TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 37

HAMILTON-BROWN SHOE COMPANY, PETITIONER,

vs.

THE WOLF BROTHERS & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 13, 1913.
CERTIORARI AND RETURN FILED MARCH 30, 1914.

(23,964)

(23,964)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

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vs.

THE WOLF BROTHERS & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a

Original.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Eighth Circuit.

No. 2811.

WOLF BROTHERS & COMPANY, Appellant,
vs.
HAMILTON-BROWN SHOE COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Filed March 12, 1908.

(a)

311

1 In the Circuit Court of the United States Eastern Division of the Eastern District of Missouri.

The Wolf Brothers & Company, Complainant,
No. 5262. vs. In Equity.
Hamilton-Brown Shoe Company, Respondent.

United States of America—ss.

The President of the United States, to Hamilton-Brown Shoe Company—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal from a decree of the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, filed in the Clerk's office of the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, wherein the Wolf Brothers & Company is appellant and you are appellee, to show cause, if any there be, why the said decree mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable David P. Dyer, Judge of said Circuit Court of the United States, this 25" day of February, in the year of our Lord one thousand nine hundred and eight.

DAVID P. DYER, Judge.

Service of the within citation acknowledged this 25th day of February, 1908.

BAKEWELL & CORNWALL,
Solicitors and of Counsel for Hamilton-Brown Shoe Company.

2 No. 5262. In the Circuit Court of the United States Eastern Div. Eastern Dist. of Missouri. The Wolf Brothers & Company, vs. Hamilton-Brown Shoe Company. Citation. Filed Feb. 25, 1908. James R. Gray, Clerk.

3 United States of America,
Eastern Division of the Eastern,
Judicial District of Missouri—ss.

In the Circuit Court of the United States for said Division of said District.

Be it Remembered, that heretofore, to-wit: on the 28th day of February A. D. 1908, there was filed in a certain cause pending in said Circuit Court wherein The Wolf Brothers & Company is Complainant and Hamilton-Brown Shoe Company is Defendant, #5262 in Equity, a Praecipe for Transcript on appeal of said cause, which said Praecipe for Transcript is in words and figures as follows, to-wit:

(Praecipe for Transcript)

In the Circuit Court of the United States Eastern Division of the Eastern District of Missouri.

The Wolf Brothers & Company, Complainant-Appellant,
No. 5262. vs.
Hamilton-Brown Shoe Company, Defendant-Appellee,

Praecipe.

To James R. Gray, Esq.,
Clerk of the above Court:

In preparing the transcript of record in the appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, in the above case, you will include the following items only.

1. Complainant's printed record, as heretofore filed and used upon final hearing in the Circuit Court;

2. Defendant's printed record, as heretofore filed and used upon the final hearing in the Circuit Court (comprising and including the pleadings, except that at page five of said record, there may be inserted in the copy of the bill of complaint, a specimen of the label incorporated in the original bill of complaint in lieu of the printed copy appearing in Defendant's record);

3. Exhibit 1 accompanying the Bill of Complaint.

4. Pages 3 and 6 (only) of Exhibit 2 accompanying the
4 Bill of Complaint.

5. Page 5 (only) of Exhibit 3 accompanying the Bill of Complaint.

6. Pages 30 and 31 (only) of Exhibit 4 accompanying the Bill of Complaint.

7. Pages 24 and 29 (only) of Exhibit 5 accompanying the Bill of Complaint.

8. Pages 11, 16, 17 and 18, only (entitled "Style 397," "Style 404," "Style 408," and "Style 407," respectively) of Exhibit 6 accompanying the Bill of Complaint.

9. The opinion of the Circuit Court;

10. The decree;

11. The petition for appeal;

12. The assignment of errors;

13. The citation and [acknowledgement] of service;

14. The order of the Circuit Court for transmitting all original Exhibits to the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

15. You will also please certify to all models, documents, exhibits of material, shoes and boxes, forming a part of the proof.

Dated February 28th, 1908.

JAMES L. HOPKINS,
Solicitor and of Counsel for Complainant.

5 In the Circuit Court of the United States Eastern Division of the Eastern District of Missouri.

The Wolf Brothers & Company, Complainant-Appellant,
No. 5262. vs.
Hamilton-Brown Shoe Company, Defendant-Appellee.

To the above named Defendant-Appellee or its Counsel—

Please take notice that we have delivered to the Clerk of the United States Circuit Court for the Eastern District of Missouri a praecipe of which the attached is a true copy.

If you desire additional parts of the record printed, please designate in writing and file with the Clerk a memorandum of such additional parts of the record as you desire certified.

JAMES L. HOPKINS,
Solicitor and of Counsel for Complainant.

State of Missouri,
City of St. Louis—ss.

Colgate Scudder of lawful age being on his oath sworn deposes and says that he served the above and foregoing praecipe and notice upon the Defendant-Appellee herein by delivering a true copy thereof to Paul Bakewell, Esq., one of its Counsel of record, at his office in the Chemical Building in the City of St. Louis aforesaid on the 28th day of February, A. D. 1908.

(Seal) COLGATE SCUDDER,

Subscribed and sworn to before me this 28th day of
6 February, A. D. 1908. My commission expires Nov. 22, 1910.

(Seal) WALTER C. STEIN,
Notary Public.

7 Which said records, pleadings and proofs are respectively and in the following order, to-wit:

1. Complainant's printed record, as filed and used upon final hearing;

2. Defendant's printed record, as filed and used upon final hearing, with specimen label inserted at page five in lieu of printed copy thereof;

3. Exhibit 1 accompanying Bill of Complaint;

4. Pages 3 and 6 of Exhibit 2 accompanying Bill of Complaint;

5. Page 5 of Exhibit 3 accompanying Bill of Complaint;

6. Pages 30 and 31 of Exhibit 4 accompanying Bill of Complaint;

7. Pages 24 and 29 of Exhibit 5 accompanying Bill of Complaint;

8. Pages 11, 16, 17, and 18 of Exhibit 6 accompanying Bill of Complaint;

9. Final Decree;

10. Petition for Appeal;

11. Assignment of Errors;

12. Bond on Appeal;

13. Order for transmission on all original exhibits.

14. Opinion of Circuit Court.

5 & 6 In the United States Circuit Court, Eastern District of Missouri, Eastern Division, Eighth Circuit.

In Equity. No. 5262.

THE WOLF BROTHERS & Co., Complainant,
vs.
HAMILTON, BROWN SHOE Co., Respondent.

Complainant's Record.

John Elias Jones and Alfred A. Eicks, Solicitors for Complainant.
James L. Hopkins, Of Counsel.

7 In the United States Circuit Court, Eastern District of Missouri, Eastern Division.

In Equity. No. 5262.

THE WOLF BROTHERS AND COMPANY, Complainant,
vs.
HAMILTON, BROWN SHOE COMPANY, Respondent.

Depositions in Behalf of the Complainant.

Examination of Witnesses, Beginning December 27th, 1906, at the office of John E. Jones, Esq., Lincoln Inn Court, No. 519 Main Street, in the City of Cincinnati, County of Hamilton, State of Ohio, before William Schuchardt, a Notary Public, in and for said County, duly commissioned and qualified, Special Examiner by agreement of Counsel, on behalf of the Complainant, under the 67th Rule of Equity, as amended, pursuant to agreement.

Present:

John E. Jones, Esq., and James L. Hopkins, Esq., on behalf of the Complainant.
Luke E. Hart, Esq., of Bakewell & Cornwall, on behalf of the Respondent.

8 ALLIE FRIEDMAN, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state your name, age, residence and occupation?
A. Allie Friedman, age 28, residence, Bedford, Ind.; occupation, shoe merchant.
Q. 2. What is the trade name under which you conduct your shoe business?
A. The Red Cross Shoe Store.

Q. 3. How long have you conducted that business at Bedford, Indiana?

A. About four months.

Q. 4. Was the business of the Red Cross Shoe Store established prior to the time you went to Bedford?

A. Yes, sir, I succeeded the Red Cross Shoe Store.

Q. 5. Prior to your acquiring the Red Cross Shoe Store, where did you reside, and in what business were you engaged?

A. I used to be at Winchester, Kentucky, in clothing and gents' furnishing.

Q. 6. Had you ever been engaged in the shoe business prior to the time you purchased the Red Cross Shoe Store at Bedford?

A. Well, not exclusively; I handled a few shoes you know, but not exclusive. Men's shoes, but not ladies'.

Q. 7. Since buying the Red Cross Shoe Store, what lines of ladies' shoes have you handled, if any?

By Mr. HART: The question is objected to, on the ground that it is wholly without relevance to the issues involved in this suit, as to what this witness may have done or what shoes he may have handled during the time which he has stated that he has been engaged in the shoe business at Bedford, Indiana.

A. Well, I handled a specialty line of American Girl
9 shoe. I handled a few off lines, you know, jobbing lines, and so forth.

Q. 8. Since you have been engaged in business at Bedford, Indiana, handling the American Girl shoes, have you had any competition between that shoe and any other line of shoes having a similar name?

(Same objection by Respondent.)

A. Yes, sir, I think I have.

Q. 9. What is the name of that competing line?

(Same objection by counsel for Respondent.)

A. I think it is the American Lady Shoe.

Q. 10. How soon after you engaged in business at Bedford did this competition come to your notice?

(Same objection by Respondent.)

A. Well, about four or five weeks.

Q. 11. Please state the circumstances under which this competition first came to your notice?

(Same objection.)

A. Well, on the first occasion I sold a pair of shoes to a man who called for the American Lady Shoe, telling that his daughter sent him after them, and after looking at the shoe he asked me if this was the shoe? So, in place of answering him, I showed him the brand on the inside, and he says, "I guess that is the shoe, wrap them up."

Q. 12. At the time of the transaction to which you have just

referred, did you have any advertising matter relating to the American Girl Shoe displayed in front of your store?

(Same objection.)

A. Yes, sir, I had the American Girl sign right out in front.

Q. 13. I have here a specimen swinging sign marked
10 "Wolf Brothers' Exhibit 10," and I will ask you if the sign to which you refer was similar to this?

(Same objection.) (And the further objection is urged that this witness is not qualified nor capable of stating what may be similar to the sign referred to by the question of counsel, and counsel states that it is a question for the Court to decide whether or not such sign may or may not be similar to this sign.)

A. One just exactly like it.

Q. 14. What was the shoe which you showed and sold to the customer to whom you have referred?

(Same objection by Respondent's counsel.)

A. Why, it was a pair of American Girl shoes.

Q. 15. After the transaction to which you have just testified, did you have any other transactions relating to the competition between the American Girl and American Lady shoes indicating any confusion between the brands in the mind of the customer?

(Same objection by Respondent.)

A. Yes, sir.

Q. 16. Please state fully the circumstances surrounding each of such transactions?

(Same objection by Respondent.)

A. About four or five weeks ago there was a lady came into my place, she says, "I have a pair of shoes on bought here and I want the buttons set over." I says, "All right." I took off the shoe and started toward the button machine, and noticed it was an American Lady shoe. I asked her, I says, "Did you get those shoes here?" She says, "Yes," she says, "I give my sister the money, and told her to buy me a pair of American Girl shoes." "Well"
11 I says, "You didn't get them." She says, "I beg your pardon, sir, I did get them here." I said, "This is an American Lady shoe you have, we sell the American Girl shoe." She says, "She didn't know the difference." Rather than to have any arguments I put the buttons on for her and showed her the difference in the shoes. After I showed her the difference in the two brands she did not look thoroughly convinced whether it was the same shoe or a different shoe, and I thought it best to tell her that Mr. Foster, my competitor, sells the American Lady shoe, and she looked satisfied. There are many minor transactions that they come in and call for the American Lady shoe and I sell them the American Girl shoe without any question.

By Mr. HART: Objection is made to so much of this answer as relates to conversations which other parties stated that they had

with different parties, this witness not being capable of testifying to such conversations to which he was not a party, and a repetition by him of such statements at best can be no more than hear-say and secondary evidence.

Cross-examination by Mr. HART:

X Q. 1. Are you interested in any way in the Complainant Company?

A. Not a bit.

X Q. 2. Are you related in any way to any persons that are interested in it?

A. No, sir.

X Q. 3. Do you appear here voluntarily to testify in this suit?

A. Yes, sir.

X Q. 4. At whose request?

A. Well, after making complaint to Wolf Brothers & Company about these two names being conflicted, they asked me if I
12 would not come to Cincinnati and testify in their suit against the Hamilton-Brown Shoe Co.

X Q. 5. Was the complaint which you state that you made to Wolf Brothers & Company made without any solicitation or request by Wolf Brothers & Company?

A. Yes, sir.

X Q. 6. Did you ever receive from Wolf Brothers & Company any communications in regard to the use of the name American Lady in connection with shoes?

A. No, sir.

X Q. 7. You received such a letter subsequent to your complaint, did you not?

A. No, sir, not as I know of.

X Q. 8. What kind of a communication did you receive from Wolf Brothers & Company in answer to your complaint?

A. Well, I received a letter from them telling me about this suit pending. I was perfectly ignorant of the fact that this suit was going on. And I have this letter that you may use (handing to examining counsel). That is what I got on my complaint. That is the best way I could explain it; I just happened to have that in my pocket.

X Q. 9. At what price do you sell the American Girl shoe?

A. Two and a half and three. Patent leathers is $3.00.

X Q. 10. When the man referred to in Question 11 of your Direct Examination asked you for an American Lady shoe, did you point out to him the fact that you were not selling him an American Lady Shoe?

A. I did not tell him anything.

X Q. 11. In your answer to Question 16, of your Direct Examination, you stated that in response to a statement by the lady
13 in question you stated, "You did not get them." Do you mean you did not get them here?

A. Yes, sir.

X Q. 12. Have you ever seen any shoes which you state are sold by a man named "Foster" under the name "American Lady"?

A. I see a windowful of them, Foster's.

X Q. 13. Have you ever seen those shoes in the manner in which they were sold by him?

A. In the manner? I do not know in what manner he sells them.

Redirect examination by Mr. HOPKINS:

R. D. Q. 1. Was your complaint to Wolf Brothers & Company to which you have referred upon your cross examination in writing?

A. Yes, sir, in the form of a letter.

R. D. Q. 2. I hand you a letter dated Bedford, Ind., 12-15-1906, and ask you if this is the complaint to which you have referred?

A. Yes, sir, that is my letter.

(Counsel for Complainant offers letter identified by the witness in evidence, and asks that same be marked "Complainant's Exhibit, Friedman letter, 12-15-1906," which is accordingly done; the letter reading as follows:

A. Friedman,
Red Cross Shoe Man,
East Side Square.

BEDFORD, IND., 12-25, 1906.

Wolf Bros. & Co.

GENTLEMEN: A woman came in my store 1 day this week demanding her money back she bought a pair of 51899 3 weeks ago and the tips of both shoes were ripped as the shoe having cut vamps, it looked very ugly her feet being exposed. of course I 14 sewed them up but as the machine will not stitch within ½ inch from edge it makes a bad job the pattents seemes to hold much better have seen some weare 3 month and they are not ripped I should think if you used 2 rows of stiches, would hold much better otherwise, had no other complants about the shoes.

Res'p. yours,

A. FRIEDMAN.

What is the difference? Any amount of customers comming in to our store are calling for the American Lady shoe Shall I tell them a lie or lose a sale? There is a party in our town handling the American Lady I wonder if he does the same when they call for your shoes?

It seems that the names conflicts and I had better let him do the advertising in the future don't you think it would be a good idea?

if you consider this of interest let me hear your opinion in the matter.

R. D. Q. 3. Upon your Cross Examination you showed counsel a letter from Wolf Brothers & Company; was that letter received by

you in response to your letter which has just been offered in evidence?

A. Yes, sir.

R. D. Q. 4. I will ask you to again produce that letter?

A. (In response witness produces said letter.)

(Counsel for Complainant offers in evidence said letter produced by the witness, and asks that same be marked as "Complainant's Exhibit, "Wolf Brothers—Friedman letter, Dec. 20, 1906," which is accordingly done.) Said letter reading as follows:

CINCINNATI, O., U. S. A., Dec. 20, 1906.

Mr. A. Friedman, Bedford, Ind.

DEAR SIR: We beg to acknowledge receipt of your valued favors and note contents. We fear we have nothing in stock that
15 will take the place of the few pairs you state you are returning but which few pairs have not as yet been brought to the writer's attention although we presume they should be here. He will certainly carefully go over them and we will endeavor to correct every existing fault.

The writer will also search through the factory and if there are any lots which are about completed from which he can take the same or similar shoes he will do so and in that event will forward same to you today or to-morrow but he is very dubious as to being able to find any, near completion.

We will also carefully look after the matter of the tips ripping and thank you for calling our attention to trouble of the kind as we are anxious to correct anything that is found wrong.

We note what you state about the "American Lady" shoe handled by your competitor and are glad that you have written us in this matter for we shall now ask you to be good enough to be present here at the taking of depositions in the matter of our suit against the Hamilton-Brown Shoe Co., and which depositions we shall begin to take here either at this office or at our attorneys' office on the 27th. of this month, which is next Thursday. We plan to take three days, viz: the 27th, 28th and 29th, as there are quite a number of witnesses.

We shall greatly appreciate it if you will be present on the 27th—next Thursday. If you cannot be here on the 27th, will you not try to arrange to be here on the 28th, and if not on the 28th, then on the 29th?

If you can be here on the 27th, we will get you off either that evening or at all events on the 28th, and, of course, all your expenses, to and from Bedford as well as while in our city will be borne by us. We trust you will advise us promptly stating you will be here and when, as we are banking on you being here and trust you will not disappoint us.

16 You will understand that this testimony is not being taken in a court but is simply in the form of depositions, our counsel and counsel for the opposing side being present, and, as stated the depositions will be taken either in our office or in the office of

our attorney. We trust you will write us promptly upon receipt of this advising when to look for you and we expectantly await your advices.

With kind regards and good wishes for a Merry Christmas, we are,

Truly yours,

THE WOLF BROS. & CO.
J. J. WOLFF, *Treasurer.*

And further deponent saith not.

(Signed) ALLIE FRIEDMAN.

Subscribed and sworn to before me this 27th day of December, 1906, A. D.

[SEAL.] WILLIAM SCHUCHART,
Notary Public.

And also, BERNARD H. HEITHAUS, produced as a witness in behalf of the Complainant, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state your name, age, residence and occupation?

A. Bernard H. Heithaus, age, 44 years; occupation, shoe merchant. Residence, Evansville, Indiana.

Q. 2. How long have you been engaged in the shoe business?

A. Since my boyhood.

Q. 3. How much of that time in Evansville?

A. About nine or ten years.

17 Q. 4. Have you handled the American Girl Shoe of Wolf Bros. & Company.

A. I have for the past two years and a half.

Q. 5. What is the name of the house with which you are connected?

A. Pocket Shoe Company.

Q. 6. What is your connection with that Company?

A. Secretary, Treasurer and General Manager.

Q. 7. Have you occupied that connection since the organization of the Pocket Shoe Company?

A. I have.

Q. 8. How long since your Company was organized?

A. About three and a half years.

Q. 9. Has your Company at any time since its organization handled the American Lady shoe of the Hamilton-Brown Shoe Co.?

A. They have not.

Q. 10. Does your connection with the business of the Pocket Shoe Company bring you into contact with its customers?

A. It certainly does.

Q. 11. In your dealings with the customers of the Pocket Shoe Company, have you ever observed any facts in regard to the competition between the American Girl shoes and any other advertised

line of shoes tending to show any confusion between the American Girl and such other line of shoes in the minds of customers?

A. I have very frequently.

Q. 12. Please state some of the circumstances which have indicated such confusion?

A. Well, I remember a customer calling for the American Lady shoe. I asked her if she was not mistaken as to the name of the shoe? She answered, saying, "I think not." I asked her how she knew it was the American Lady shoe? She answered, "I read of it through the advertisements in the daily papers"—that is our
18 local papers. I asked her, where they were for sale? She answered, saying, "The Pocket Shoe Company." I then told her this was the Pocket Shoe Company, but we did not handle the American Lady shoes, we handled the American Girl shoes. She then said, "Well, I must have got the two names confused." She says "I know this is the place where they sell them, as my friends have bought them here." I then explained to her the difference and she seemed satisfied. At another time I was answering a letter to the Wolf Brothers Shoe Company, makers of the American Girl shoes, when a woman entering the store demanded a pair of American Lady shoes. I listened to the conversation and then approached the lady myself, asking her where she heard of the American Lady shoe? She answered, by saying, "Through the daily papers, in the advertisement of the Pocket Shoe Company." I convinced the lady of the mistake by telling her it was the American Girl shoe that the Pocket Shoe Company advertised, and not the American Lady. At another time a customer, evidently in a hurry, came in demanding a pair of American Lady shoes. I also convinced her of the mistake after learning from her the sources from which she got her information; she asked me if they were not made in St. Louis, meaning the American Girl shoe. I told her by showing her the box or carton, rather, in which the American Girl shoes come packed, that they were made in Cincinnati by the firm of Wolf Brothers & Company; she was under the impression that they were made in St. Louis and stated so to me. At another time, there were two ladies seated almost side by side in the store, both holding American Girl catalogues in their hands, the one asked for the American Girl while the other demanded the American Lady, hold-
19 ing the catalogue of the American Girl shoes in her hand. I convinced her of the mistake; she stating that she had become confused in the name, not giving it any thought. I have noticed quite frequently this fall on Saturday night when the trade is generally lively, as many as I will say six or seven women sitting in a row, mostly factory girls, holding the American Girl catalogue in their hands having a certain particular style before them which they demanded to purchase, and at the same time some of them asking for the American Lady shoe, and one would correct the other, stating, "It is the American Girl shoe you want," and naturally we corrected them also. I have at various times waited on the trade and continually have to correct them and inform them as to the mistake

in the name of the shoe, the American Lady shoe, and the American Girl shoe, which the Pocket Shoe Company sells.

Cross-examination by Mr. HART:

X Q. 1. Do you recall any instances in which customers have asked for brands of shoes not handled by your Company, other than the American Lady shoe?

A. Yes, that is common.

X Q. 2. Please name such brands?

A. They call for Regal, Walk-Over, Queen Quality, Dorothy Dodds, and other brands not so well known.

X Q. 4. How frequently does this occur?

A. That is hard to say; there may be days that these demands are repeated, and there may be weeks that we have no demand for them at all.

X Q. 5. What is the retail price of the American Girl shoe?

A. Two and a half, and two in the Oxfords.

X Q. 6. If a customer were to come in and ask for a shoe which sells for two dollars and fifty cents, do you think you would be able to sell her a shoe for three dollars and fifty cents without her discovering that the shoe which you were selling her or trying to sell her was not the shoe for which she called?

A. Why, she would discover it immediately.

Redirect examination by Mr. HOPKINS:

R. D. Q. 1. Has your Company handled American Girl shoes retailing at different prices?

A. They have.

R. D. Q. 2. What is the highest retail price of the American Girl shoe you handle?

A. Three dollars.

And further deponent saith not.

(Signed) BERNARD H. HEITHAUS.

Sworn to and subscribed before me this 27th day of December, 1906.

[SEAL.] (Signed) WILLIAM SCHUCHARDT,
Notary Public and Special Master.

And also MILLARD F. THOMPSON, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?

A. Millard F. Thompson; age, over twenty-one; residence, Cincinnati, Ohio; occupation, shoe salesman.

Q. 2. In what territory and for what house do you travel?

A. Ohio, West Virginia, some of Virginia, some of Maryland, and some of Pennsylvania, for Wolf Brothers & Company, of Cincinnati, Ohio.

Q. 3. How long have you been in the employ of the Complainant?

A. Two years.

21 Q. 4. Are you acquainted with the American Lady shoe manufactured by the Hamilton-Brown Shoe Company?

A. Through their advertisements. Yes, sir.

Q. 5. Have you in your work of selling for the Complainant ascertained any circumstances indicating that any confusion exists between the American Girl shoe of your house and the American Lady shoe of the defendant?

A. I have.

Q. Please give such circumstances?

A. Well, among the many circumstances I can recall some. J. F. Hudson & Son, of Millersburg, Ohio, in selling them my line of American Girl, they said to me, upon my asking if there had been confliction between the two lines, referring to the American Girl and the American Lady, said, that there had been and that they had customers call for the American Lady shoe. Mr. J. H. Hudson, of the firm, was the one with whom my conversation was had.

By Mr. HART: Objection to this answer of the witness is made on the ground that the statements attributed to Mr. J. F. Hudson are mere repetition of hearsay statements of which the witness has not personal knowledge, and which he did not hear, and therefore such statements by the witness are mere hearsay and secondary evidence.

Q. 7. At the time of this conversation were J. F. Hudson & Son dealing in the American Girl shoes?

A. They were.

Q. 8. State if you know whether or not at that time J. F. Hudson & Son were or had been dealing in the American Lady shoe?

A. I do not know that they carry the American Lady line.

Q. 9. Have you had any other experiences in this regard in
22 your territory; if so, please state what the circumstances were?

A. Another case that I recall was of William C. Smith, of Elyria, Ohio, when after I got through selling him the American Girl line, he said that they had been having calls for that American Lady line. Another instance, a gentleman by the name of McElvay, I think, who is the buyer of the Griswold Company at Warren, Ohio, now, which at that time was W. T. Griswold, but now the firm has become the Griswold Company, he told me that he had been having calls for the American Lady shoe.

By Mr. HART: Objection is made to so much of the foregoing answer as appears to be statements made to the witness by other parties, on the ground that all of such matter is mere hearsay, and not made under oath.

Q. 10. Have either of the houses to which you have referred been dealing in the American Lady shoe?

A. I don't know.

Q. 11. Then what was the occasion of these gentlemen making these statements to you?

(Same objection by Respondent.)

A. I took it as a complaint of a competitive shoe in the market against the American Girl shoe through similarity of name.

By Mr. HART: Objection is also made on the ground that the statement of the witness is a mere conclusion or opinion.

Q. 12. Were each of the parties to whom you referred dealers in the American Girl shoes?

A. All of them are.

Q. 13. Have you had such complaints made to you in other portions of your territory?

A. I have.

23 (Same objection by counsel for Respondent.)

Q. 14. In what parts of your territory?

A. You might say all over, in all sections.

Q. 15. In your work for the Wolf Brothers & Company have you developed any new territory?

By Mr. HART: Objected to as immaterial, and wholly without relevancy.

A. Since I have been with them, yes, I have developed new territory, meaning towns where they had no accounts before.

Q. 16. Have you met with any circumstances in such new towns indicating any confusion in the minds of the dealers in shoes between the name American Girl and the name American Lady?

By Mr. HART: Objected to on the ground that the question calls for a mere conclusion and opinion of the witness.

A. I have.

Q. 17. How frequently?

A. Well, I might blanket it and simply say, almost invariably in new towns.

Q. 18. What was the nature?

A. I would go in to solicit a prospective customer for the American Girl line, and tell him what I was selling; he would say, "That line is in this town." I would then draw his attention to the name, and he would admit the possibility of his error.

Q. 19. Would such conversations occur where the American Lady shoe was already on sale by some competitive house in the same town?

A. I would judge that the American Lady shoe was being sold in the town owing to his being posted on the fact.

(Counsel for Respondent objects on same grounds.)

24 Q. 20. What effect have the sales of the American Lady shoes under these circumstances had upon your work in selling the American Girl shoes?

(Counsel for Respondent objects as before.)

A. I would not know.

Q. 21. Can you state approximately in how many cases you have had to explain to the retail shoe trade the difference between the American Lady and the American Girl shoe?

A. On a rough estimate twenty-five or thirty, possibly more.

Q. 22. Did these instances occur before, or since you testified in the opposition proceedings in the Patent Office between these parties, in January, 1906?

A. It was before, mostly, as since then I have had my established trade to take care of.

No Cross examination.

Further Deponent saith not.

(Signed) MILLARD F. THOMPSON.

Sworn to and subscribed before me, this 27th day of December, 1906.

[SEAL.] (Signed) WILLIAM SCHUCHARDT,
Notary Public and Special Examiner.

And also EDGAR A. PECK, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?

A. Edgar A. Peck; age, twenty-four; residence, 22 Somerset Flat, Avondale, Cincinnati, Ohio; occupation, traveling salesman for Wolf Brothers & Company.

25 Q. 2. What territory do you travel?

A. Louisiana, Mississippi, Tennessee and a part of Kentucky.

Q. 3. Have you in selling the American Girl shoes of Wolf Brothers & Company found any facts indicating any confusion in the minds of the retail shoe trade in your territory between the American Girl and the American Lady shoe?

By Mr. HART: Objected to on the ground that it calls for the conclusion and opinion of the witness.

A. Yes, sir.

Q. 4. Please state what you have ascertained in this regard?

A. I have found on entering merchants' stores that they always meet me with the question, "Ain't your line made by Hamilton-Brown of St. Louis?" And on several occasions I had to go through unnecessary explanations in convincing them that I had a line made by the Wolf Brothers & Company of Cincinnati. In one instance it has gone so far as to losing an account. Other merchants have said, "Are you trying to copy the name from Hamilton-Brown?" and so on.

By Mr. HART: Objection is made to that portion of the foregoing answer which relates to the supposed "losing an account," for the reason that it is a mere conclusion of the witness.

Q. 5. What were the circumstances surrounding the incident you have referred to in your last answer as relating to your loss of an account?

A. On entering this customer's store and in course of our conversation, he stated to me that he had quite a bit of trouble over the names of the two shoes; another merchant in town handling the American Lady. His customers coming into his store, namely, the store of Vernon & Kemp, of Amite City, La., on his showing
26 the American Girl shoe, he was met with the following reply: "I had a pair of those shoes, which I bought from W. B. Mason, and they did not give me satisfaction, and I do not want any more of them"—meaning he did not want any more of the American Girl shoes. When Mr. Vernon tried to explain to them the difference in the two shoes and that they were made by an entirely different firm, they would reply, "You cannot tell us that, we know they are the same."

Mr. HART: Objection to the foregoing answer is made, on the ground that it does not appear that the witness has personal knowledge of the facts stated therein, he having taken no part in, or been present at or during those conversations.

Q. 6. With whom did you have your conversation when these facts were told you?

A. With Mr. Norman Vernon, of the firm of Vernon & Kemp.

Q. 7. When and where did this conversation occur?

A. This conversation occurred in his store some time in October, 1906.

Q. 8. Prior to that time had you sold the American Girl shoe to Vernon & Kemp?

A. Yes, sir.

Q. 9. Did that firm discontinue handling the American Girl shoe from that time?

A. When I came to Amite City they had a different line.

Q. 10. Have they bought any more of the American Girl shoes from you since that time?

A. No, sir, not to my knowledge.

Cross-examination by Mr. HART:

X Q. 1. Please give the names of the other parties to whom you have referred in your direct examination aside from Vernon
27 & Kemp?

A. Well, I cannot recall any other party at the present.

X Q. 2. Are you connected with the Complainant Company, or its officers or stockholders? In any capacity other than that of an employe?

A. No, sir.

And further Deponent saith not.

(Signed) EDGAR A. PECK.

Sworn to and subscribed before me this 27th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

And also, MANUEL PECK, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?
A. Emanuel Peck, age, forty-five; residence, 22 Somerset Flat, Avondale, Cincinnati, Ohio; occupation, salesman for Wolf Brother- & Company, Cincinnati, Ohio.
Q. 2. In what territory?
A. All of Indiana, and Southern portion of Illinois.
Q. 3. How long have you been connected with the Complainant?
A. I think it has been seven or eight years.
Q. 4. In your work for the Complainant have you ascertained the existence of any confusion in the minds of the retail shoe trade between the American Girl and the American Lady shoe; if so, state what experience you have had in this regard?

By Mr. HART: Objection to this question is made on the
28 ground that it calls for a conclusion and opinion of the witness.

A. In calling upon new trade in stating the line I represent, the American Girl shoe, the question would be asked, "Is this shoe made by the Hamilton-Brown firm?" To which I would tell them, "It is not the same shoe," and would then state to them the name of the makers of the American Girl shoe.
Q. 5. In what parts of your territory has this occurred?
A. In the Southern portion of Illinois, and frequently in the Southern parts of Indiana.

Cross-examination by Mr. HART:

X Q. 1. Please give the names of the parties to whom you have referred on your direct examination?
A. At this present time I cannot recall the names of any parties.
X Q. 2. Are you connected with the Complainant company, its officers or stockholders, in any capacity other than as an employe?
A. Only as an employe.

And further deponent saith not.
(Signed) EMANUEL PECK.

Sworn to and subscribed before me this 27th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

And also, JACKSON H. DUNCAN, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation.
29 A. Jackson H. Duncan; age, fifty years; residence, 1005 Dana Avenue, Cincinnati, Ohio; occupation, paper box manufacturer.
Q. 2. Where is your place of business?
A. Eighth and Broadway, this city.
Q. 3. How long have you been engaged in the paper box business?
A. About twenty years in this city.
Q. 4. Did you have any business relations with the firm of George F. Dana & Co. of Cincinnati?
A. Yes, sir.
Q. 5. Did you manufacture any shoe cartons for them?
A. Yes, sir.
Q. 6. Have you your book of original entry which relates to such transactions?
A. Yes, sir. (Witness produces book.)
Q. 7. Please state what this book is which you have here produced?
A. Our journal. Opened January 23rd, 1896, and extending to December 29th, 1896.
Q. 8. Was this journal kept in the regular course of your business?
A. Yes, sir.
Q. 9. By whom were the entries in this book made?
A. By the book-keeper; but I cannot recall his name just now; I notice one here that my brother made, my partner.
Q. 10. From what source were the data obtained from which these entries were made?
A. Well, the bookkeeper got it from the shipping clerk making up the list for deliveries.
Q. 11. Were the items entered in this book before the goods left the house?
A. Yes, sir.

(Counsel for Complainant offers in evidence the journal
30 identified by the witness, and asks that same be marked "Complainant's Exhibit, Duncan, 1896, Journal," which is accordingly done.)
It is stipulated by and between counsel, that the Exhibit may remain in the custody of Complainant, subject to its production on notice by counsel for Respondent, at or before the final hearing of this cause.

Q. 12. Referring to page 319, of this journal, under date of July 25, 1896, I find the following entry:

"George F. Dana & Co.

525 L single 20th cent..... 8.66
1 electro engraving American Girl..... 5.00
Comp & Ptg ends White, Young & Co., gilt..... 1.50 15.16"

Please explain the reference in this entry to the electro engraving, "American Girl?"

A. That is an electro engraving of the "American Girl" gotten up by us on Dana's order for "The American Girl" top and end label, shoe cartons.

Q. Can you produce specimens of the American top and end labels to which you have referred?

A. Yes, sir.

(Counsel for Complainant offers in evidence labels referred to by the witness, and asks that the same be marked "Complainant's Exhibit Top Label," and "Complainant's Exhibit End Label," which is accordingly done.)

Q. 13. Upon printing these top and end labels, did your firm apply them to shoe cartons for Dana & Co.?

A. Yes, sir.

Q. 14. Referring to the same journal, under date of July 27th, at page 320, I find the item charged to "George F. Dana & Company," as follows:

31 "Comp & Ptg 3 M labels American Girl blue and black 6.00
Comp & Ptg 1 M labels American Girl, gilt, T & E.... 2.50"

Please explain what this entry means?

A. That is for 3,000 top and end labels American Girl, printed in blue and black, and 1,000 top and end American Girl, printed in gilt.

Q. 15. Please read into the record and explain the meaning of the subsequent entries in this book, Complainant's Exhibit, Duncan, 1896, Journal," relating to shoe cartons made by your firm and sold by it to George F. Dana & Company?

A. At page 343, August 8th, 1896, the following entry appears, as charged to George F. Dana & Company:

Comp & Ptg T. & E. American Girl blue.....2.00

That entry means 1,000 sets.

At page 402, under date of September 8, 1896, is this entry: Charge to George F. Dana & Co., viz.:

Comp & Ptg T. & E. American Girl 2.00

This means 1,000 sets of American Girl labels.

On October 7, 1896, at page 453, a charge to George F. Dana & Co.:

Comp & Ptg T. & E. American Girl, blue..... 2.00

This means 1,000 sets of American Girl labels.

At page 509, under date of November 7, 1896, I find charged to George F. Dana & Co., the following:

Comp & Ptg T. & E. 2 M American Girl..... 4.00

This means 2,000 sets American Girl labels.

The next entry is at page 579, under date of December 15, 1906, charged to Dana-Lytle Shoe Company, viz.:

Comp & Ptg 1 M T. & E. American Girl, gilt..... 2.50

32 This means 1,000 sets American Girl labels.

Q. 16. Do you know whether or not between the dates of the last two entries George F. Dana & Company had been succeeded in the manufacture of the American Girl shoes by the Dana-Lytle Shoe Company?

By Mr. HART: Objection to this question is made on the ground that it calls for a conclusion and opinion of the witness, and for the further reason that if the facts are as indicated by the question, this is not the proper method of proving such facts, since the written memoranda of such transaction would be the best and only proper evidence of such fact, and anything the witness may say in this regard must be hearsay and secondary evidence.

A. Yes, sir. According to our books they must have been successors to the Dana-Lytle Company.

Q. 17. Independent of these entries, do you know of your own recollection that George F. Dana & Company was succeeded by the Dana-Lytle Shoe Company in the manufacture of the American Girl shoes?

By Mr. HART: Same objection.

A. Yes, sir.

Q. 18. Has your firm continued to manufacture the cartons for the American Girl shoes after the Dana-Lytle Shoe Company began to manufacture those shoes?

By Mr. HART: Objection is made on the ground that the record entries of the witness or whatever Company he may have been connected with would be the only proper method of proving such facts if they exist, and anything the witness may say in answer to this question must therefore be secondary evidence. The further objection is urged that a hypothesis is contained in the question which is not warranted by the evidence in the record, since
33 it does not appear from any proper evidence in this case that this supposed Dana-Lytle Company ever manufactured American Girl shoes.

A. Yes, sir.

Q. 19. State if you know who succeeded the Dana-Lytle Shoe Company in the manufacture of the American Girl shoes?

By Mr. HART: Objected to for same reason as stated before in objecting to Question 16 above.

A. Wolf Brothers.

Q. 20. After the succession of Wolf Brothers, did you manufacture and sell to Wolf Brothers cartons for the American Girl shoes?

By Mr. HART: Objected to for the reasons as stated in objections to Questions 16 and 18 above.

A. Yes, sir.

Q. 21. What is the size of the cartons for the American Girl shoes, which you have sold to the various manufacturers of those names?

By Mr. HART: Objection is made for the reasons stated to all of the foregoing questions, and for the further reasons that if any such cartons were made they themselves would be the best evidence of their size or other characteristics, or detail, and anything the witness may say in this regard is, therefore, secondary evidence.

A. Size of the box is eleven and three-eighth-, five and three-eighths, by three and a quarter, to the best of my recollection. This is box measurement. They are ladies' single pair boxes.

Q. 22. In connection with your manufacture of the cartons for the American Girl shoes, have you had occasion to visit the places of business of George F. Dana & Company, the Dana-Lytle
34 Shoe Company, Wolf Brothers, the co-partnership, and the present, The Wolf Brothers & Company?

A. Yes, sir.

Q. 23. Have you done so with any degree of frequency since your first sales of those cartons to George F. Dana & Company in 1896 down to the present time.

A. Well, I have not been going to Wolf Brothers & Co. lately, but I have gone about once a week to the other firms.

Q. 24. From your business transactions with these various firms, do you know whether or not the American Girl shoes have been manufactured continuously by George F. Dana & Company and its successors whom I have named from 1896 down to the present time?

By Mr. HART: Objection to the question is made, on the ground that if the facts are as therein included, the records or proper memoranda of such supposed companies or persons would be the best evidence of such facts, and anything the witness may say in this regard must therefore, be secondary evidence. Further objection is made to the question, for the reason that it assumes that the persons heretofore mentioned by counsel were the successors of the alleged George F. Dana & Company, and there is no proper or competent evidence of such fact in the record in this case.

A. Yes, sir.

Q. 25. Have the American Girl shoes been so continuously manufactured during the period and by the persons named in my last questions?

By Mr. HART: Same objection.

A. Yes, sir.

No cross examination.

35 And further Deponent saith not.

(Signed) JACKSON H. DUNCAN.

Sworn to and subscribed before me this 27th day of December, 1906.

[SEAL.] (Signed) WILLIAM SCHUCHARDT,
Notary Public and Special Examiner.

And also, ROBERT E. HARRISON, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?

A. Robert E. Harrison; age, over twenty-one; residence, Cincinnati, Hamilton County, Ohio; occupation, shoe salesman for Wolf Brothers & Company.

Q. 2. What is your territory?

A. I travel South, in Texas, Oklahoma, Louisiana, Indian Territory, Texas, Arkansas, Mississippi, Alabama, Kentucky, and Tennessee.

Q. 3. How long have you been acquainted with the brand of ladies' shoes known as the American Girl?

A. Well, either along about 1895 or 1896, I could not say exactly, I first became acquainted with them.

Q. 4. What was your occupation then at that time?

A. I was a traveling salesman for M. Felix & Company, shoe manufacturers on Sycamore street, in Cincinnati, Ohio.

Q. 5. Who manufactured the American Girl shoes at that time?

A. George F. Dana & Company.

Q. 6. Have you been continuously in the shoe business since that time?

A. Yes, sir.

36 Q. 7. Can you state of your own knowledge whether or not the American Girl shoe has been manufactured continuously by George F. Dana & Company and their successors in business since that time?

By Mr. HART: The question is objected to on the ground that it calls for a conclusion and opinion of the witness; and for the further reason that it does not appear by any proper evidence in this record that the George F. Dana & Company was ever succeeded in business or that if it was, that such successor in business continued to manufacture the shoes mentioned in the question, or that it ever manufactured such shoes.

A. It has.

Q. 8. Has the manufacture of the American Girl shoes been continuous since that time?

By Mr. HART: Objection repeated.

A. It has.

Q. 9. Please state if you know who succeeded to the business of George F. Dana & Company?

By Mr. HART: The question is objected to for the reason that it calls for the conclusion and opinion of the witness, and for the further reason that if the facts are as indicated by the question this is not the proper method of proving such facts, since the written memoranda of such transaction would be the best and only proper method of proving such facts, and anything the witness may say must, therefore, be hearsay and secondary evidence.

A. George F. Dana & Company were succeeded by the Dana-Lytle Shoe Company.

Q. 10. When did you first begin to travel for the Wolf Bros. & Company, or its predecessor, Wolf Brothers & Company, the co-partnership?

37 By Mr. HART: Objection is made on the ground that it does not appear from any proper evidence in this case that the supposed co-partnership was the predecessor in any manner of the corporation mentioned in the question.

A. About 1897, I think it was, to my best knowledge.

Q. 11. Prior to that time were you in the employ of Felix Wolf & Company?

A. Yes, sir.

Q. 12. While you were in the employ of Wolf Brothers & Co., did you know of any transaction between Wolf Brothers & Company, and the Dana-Lytle Shoe Company with reference to the manufacture of the American Girl shoe; if so, please state what that transaction was.

By Mr. HART: Objection to this question is made on the ground that if any such transaction took place, the written memoranda or evidence of it would be the only proper method of proving such fact; and anything the witness may say in this regard must, therefore, be secondary evidence.

A. Wolf Brothers & Company bought out the plant of Dana-Lytle Shoe Company.

Q. 13. Did Wolf Brothers & Company continue the manufacture of American Girl shoes since that time?

By Mr. HART: Objection to this question is made on the ground that the records or other proper memoranda of the supposed Wolf Brothers & Company, if any such Company existed, will be the only proper method of proving the fact covered by the question if any such facts exist; and anything the witness may say in this regard must, therefore, be secondary evidence. Objection is also made on the ground that the question calls for a conclusion and the opinion of the witness.

A. They have.

38 Q. 14. Have you been engaged in selling the American Girl shoe since that time?

A. I have.

Q. 15. Have you sold the American Girl shoe since that time

throughout the territory which you have named in your former answer?

By Mr. HART: Last objection repeated.

A. I have.

Q. 16. How long, if at all, have you been acquainted with the American Lady shoe sold by the Hamilton-Brown Shoe Company?

A. I could not say positively; somewhere around 1900, or 1899, along there; I could not say positive just exactly.

Q. 17. During that time have you had any experiences in your dealings with your customers, or in soliciting business from others tending to indicate confusion between the brands, American Girl and American Lady, in the minds of the retail dealers in shoes or of their customers; if so, please state what the circumstances have been?

By Mr. HART: Objection to the question is made on the ground that it calls for a conclusion and the opinion of the witness.

A. Well, in making new territory and going into towns that were not properly versed with the shoe lines, did not know the lines well, I would go into a dealer's store and tell him I was selling the American Girl shoe, and in many cases he would tell me that was made by Hamilton-Brown; I would then have to tell him that the American Girl was made by Wolf Brothers & Company and that American Lady was made by Hamilton-Brown, one in Cincinnati, and one in St. Louis.

Q. 18. In what parts of your territory have you had to
39 make these explanations to the trade?

A. Well, in nearly every state I traveled through, and in new towns where they were not properly versed with the lines.

Cross Examination waived.

And further Deponent saith not.

(Signed) ROBERT E. HARRISON.

Sworn to and subscribed before me, this 27th day of December, 1906.

[SEAL.] (Signed) WILLIAM SCHUCHARDT,
Notary Public and Special Examiner.

By consent at this time these depositions not being completed, an adjournment was taken to 10:00 A. M., Friday, Dec. 28, 1906.

FRIDAY Dec. 28, 1906—10:00 o'clock a. m.

Met pursuant to adjournment at same place on above date; same parties present.

ANTHONY J. FRIES, of lawful age, being first duly cautioned and sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?

A. Anthony J. Fries; age, forty-three; residence, 2935 Cleinview

Avenue, Cincinnati, Ohio; occupation, engraver and stamp cutter.

Q. 2. How long have you been engaged in that business in the city of Cincinnati?

A. Twenty-three years.

Q. 3. Were you acquainted with the firm of George F. Dana & Company of Cincinnati?

A. Yes, sir, I was.

40 Q. 4. In what business was that firm engaged?

A. In the manufacture of shoes.

Q. 5. Do you know of any brands which they used?

A. I remember the one, the American Girl.

Q. 6. Did you have any business transactions with George F. Dana & Company in regard to their American Girl shoe brand?

A. Yes, sir, I made the die for them—stamp.

Q. 7. Is this the die to which you refer (showing)?

A. Yes, sir, that is the die.

Q. 8. State if you know who designed this die?

A. I made the design myself.

(Counsel for Complainant offers in evidence the die identified by the witness, and asks that the same be marked "Complainant's Exhibit, George F. Dana & Co. die," which is accordingly done.)

Q. 9. Have you with you your book of original entry relating to your sale of this die to George F. Dana & Company?

A. I have, and here produce it.

Q. 10. Please read into the record the entry relating to sale of this die?

A. At page 40 appears this entry, viz.: "George F. Dana & Co., 1893, July 14, To one steel stamp (here following impression of die), 3.37."

(Counsel for Complainaant offers in evidence the book identified by the witness, from which the foregoing entry is taken, and asks that the same be marked "Complainant's Exhibit, Fries Day-book," which is accordingly done. It is stipulated by and between counsel that said Exhibit may remain in the custody of Complainant subject to its production at or before the final hearing of this cause, on the request of the defendant.)

Q. 11. After you first designed and made this die for
41 George F. Dana & Company, did you make other dies of the same design for any other customer; if so, for whom?

A. I did not.

Q. 12. Did you subsequently make any die for the American Girl shoe other than the one in evidence for any one other than George F. Dana & Company?

By Mr. HART: Defendant's counsel objects to this witness stating what dies he made other than the one in evidence, and which he may think similar to this die, for the reason that such dies themselves would be the best evidence of such facts, if any such dies were ever made; and further objection is made that the question is too general in that it is not confined to any issue involved in this case, it being

immaterial who he made such dies for, unless such dies were made for the Complainant Company, or its predecessors in business, and it does not appear from the record in this case that it had any predecessors in business.

A. I made one for the Wolf Brothers, a duplicate, about four or five months ago. I misunderstood your Question No. 11. I made similar dies for the Dana-Lytle Company.

By Mr. HART: Objection to this answer is made on the ground that the records or other memoranda of the witness or the supposed companies mentioned in the answer would be the only proper method of proving such facts, and the answer of the witness is, therefore, secondary evidence.

Q. 13. Did you ever visit the place of business of George F. Dana & Company?

(Objected to by counsel for Respondent, as absolutely immaterial.)

A. Yes, sir, I did.

42 Q. 14. Did you see any of the American Girl shoes manufactured by George F. Dana & Company?

By Mr. HART: Objected to on the ground that the records or other memoranda of the supposed George F. Dana & Company would be the only proper method of proving such facts if any such facts exist, and the witness' statement in that regard must, therefore, be secondary evidence.

A. I saw the samples bearing the impression of the American Girl die which I made.

Q. 15. Subsequent to that time were you acquainted with the Dana-Lytle Shoe Company of Cincinnati?

A. Yes, sir.

Q. 16. Did you see any of the American Girl shoes made by the Dana-Lytle Shoe Company?

By Mr. HART: Objected to, on the ground that it contains a hypothesis not warranted by the evidence, since it does not appear that such supposed company ever manufactured such shoes, and if such was the case the only proper method of proving that fact would be by the records or other memoranda of such Company.

A. I do not remember any with that firm; I very seldom got into the factory.

Q. 17. Do you know whether or not the Dana-Lytle Shoe Company made the American Girl shoes?

By Mr. HART: Question objected to for the same reason as stated following the next preceding question, and for the further reason that it calls for a conclusion, and the opinion of the witness.

A. That I could not answer, because I did not know much about their business.

Cross Examination waived.

43 And further Deponent saith not.
(Signed) ANTHONY J. FRIES.

Sworn to and subscribed before me this 28th day of December, 1910.
[SEAL.] (Signed) WILLIAM SCHUCHARDT,
Notary Public and Special Examiner.

And also WILLIAM T. PINCKNEY, of lawful age, being first duly cautioned and sworn, testified as follows to-wit:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?
A. William T. Pinckney; age over twenty-one; residence, Cincinnati, Ohio; occupation, shoe salesman for The Wolf Brothers & Company, Cincinnati, O.
Q. 2. In what territory do you travel?
A. Iowa, Nebraska, Kansas, Missouri and any other territory they may specify.
Q. 3. How long have you been in the employ of The Wolf Brothers & Company?
A. I should say altogether about six years to the best of my recollection.
Q. 4. During that time in what other states have you traveled besides those you have named?
A. I represented Wolf Brothers east of the Mississippi river, and Mississippi, Alabama, Georgia, Florida, North and South Carolina, part of Kentucky and Tennessee. When I say Wolf Brothers I refer to both the former and the present concerns.
Q. 5. In the course of your travels for the Wolf Brothers & Company, and Wolf Brothers, the co-partnership, have you had
44 any experiences with the retail shoe trade indicating the existence of any confusion in the minds of the trade between the American Girl shoes and the American Lady shoe of the Hamilton-Brown Shoe Company; if so, please state what those experiences have been?

By Mr. HART: The question is objected to, for the reason that it calls for a conclusion and the opinion of the witness.

A. In making new accounts and new towns, and endeavoring to place the American Girl shoe, I have been met with the question almost invariably, "Your line is already handled here by some other dealer." On questioning the party solicited further, I find that he has confused the American Girl shoe with the American Lady shoe made by the Hamilton-Brown people of St. Louis.

Cross-examination by Mr. HART:

X Q. 1. Please mention the names of some of the parties referred to in your last answer?
A. At the present time I can recall no name, and have given but

little thought to the matter owing to the fact that it was of almost daily occurrence.

X Q. 2. Have you visited any new towns for the purpose of placing your goods therein within the past year?

A. Yes, sir.

X Q. 3. You testified in the Patent Office Interference between these parties in regard to the subject matter of this litigation, did you not?

A. I did.

X Q. 4. On that occasion you were asked a question almost identical with the first question put to you on your Cross Examination in this suit, was you not?

A. Yes, sir, I think the question was similar.

45 X Q. 5. You had reason then to believe, did you not, that such information as is called for by that question might be relevant to the issues involved in this suit?

A. I have not given much thought to the matter.

X Q. 6. Has such a question been propounded to you by retail dealers recently?

A. As I said before, it was almost a daily event, especially in making new towns, a confusion always arising between the two names, American Girl and American Lady, merchants mistaking one for the other. This has occurred at various times during my last trip completed about the 17th of this month.

X Q. 7. Please make an effort to recall the name or names of some dealer who has asked you this question at some time during the past. If this question is propounded to you frequently, and as recently as you say it has been, you ought with very little difficulty to be able to give us at least one instance in which it has occurred—especially so in view of the fact that your attention was directed to this very matter within the past year, in the Patent Office Interference.

A. In making new towns I did not make a note of the people I came in contact with, as my time and attention was absorbed in selling my product, shoes. I recall no name at this time.

X Q. 8. Please give the name of some merchant or merchants in some of the new towns visited by you recently, as stated in your last answer?

A. I do not recall any at this time.

X Q. 9. Do you know the manner or form in which American Lady shoes are placed upon the market, and sold to the retail trade?

A. I have seen their ads in several of the leading journals,

46 but as to their special method of introducing their line, of course I do not know anything about.

X Q. 10. Are not the advertisements referred to in the last answer always accompanied by the name, "Hamilton-Brown Shoe Company," in large type?

A. I could not positively say.

X Q. 11. What is your best impression in regard to it?

A. In glancing over advertising matter the head-line "American Lady" is very prominent.

X Q. 12. Please answer my question more definitely.

A. Having but little interest in any other line but my own, and in reading other advertisements of different shoes, I do not absorb the entire contents of the advertisement, and cannot recall whether or not the Hamilton-Brown appeared in large type, or small.

Further Deponent saith not.

(Signed) WM. T. PINCKNEY.

Sworn to and subscribed before me this 28th day of December, 1906.

[SEAL.] (Signed) WILLIAM SCHUCHARDT,
Notary Public and Special Examiner.

And also, ALBERT L. HAUCK, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?

A. Albert L. Hauck; age, forty-five; residence, Cincinnati, Ohio; occupation, Secretary and Treasurer of the Manss Shoe Manufacturing Company, of Cincinnati, Ohio.

47 Q. 2. How long have you been engaged in the shoe manufacturing business in Cincinnati?

A. Since 1894.

Q. 3. Have you been actively engaged in the business during all of that time?

A. No, not actively. From 1894 to 1897 I was Director of the Manss Shoe Mfg. Co., since which time I have been Secretary and Treasurer, and actively engaged.

Q. 4. During the period from 1894 down to this time have you been acquainted with the leading brands of shoes manufactured in Cincinnati?

By Mr. HART: Question objected to, as calling for a conclusion and opinion of the witness.

A. By reason of my interest I took more or less interest in the product of this city.

Q. 5. Are you acquainted with the American Girl brand of ladies' shoes, and if so how long have you been acquainted with it?

A. I am; I would say I have been acquainted with it for about ten years, I judge.

Q. 6. When you were first acquainted with that brand who was manufacturing it?

By Mr. HART: Question objected to, for same reason.

A. George F. Dana & Company.

Q. 7. State if you know by whom this brand of shoes was next manufactured?

By Mr. HART: Question objected to for same reason; objection is also made on the ground that the records or memoranda of any companies or persons that may have manufactured this supposed

shoe would be the only proper method of proving the facts attempted to be elicited by this question, if any such facts exist, and
48 therefore anything the witness may say in this regard must be secondary evidence.

A. By the Dana-Lytle Shoe Company.

Q. 8. Were you acquainted with the place of business of the Dana-Lytle Shoe Company?

A. I was.

Q. 9. Do you recollect the circumstances under which the Dana-Lytle Shoe Company went out of business; if so, please state what the circumstances were?

By Mr. HART: Objected to on the ground that it does not appear by any proper evidence in the record that the Dana-Lytle Shoe Company ever went out of business.

A. I do. The Dana-Lytle Shoe Company sold out to Wolf Brothers & Company, who had been tenants of John Manss, and I was acting agent for John Manss, and collecting rent, and in this connection had occasion to do business with Wolf Bros. & Company. In May, 1898, the building occupied by Wolf Brothers & Company and owned by John Manss, was destroyed by fire partially; Wolf Brothers & Company then went into the plant of the Dana-Lytle Company, where I had occasion to call on them in the course of business transactions. On one of these occasions I was conducted by Mr. Samuel Wolf through the plant, and told by him of the purchase of the entire plant, and also was shown the arrangement they had made for continuing the manufacture of their shoes, and also of Dana-Lytle Company's. He particularly called my attention to the good thing they had in securing the American Girl brand, and in course of the conversation said that they intended to push it for all it was worth.

By Mr. HART: Objection is made to the statement of the
49 witness that the Dana-Lytle Shoe Company sold out to Wolf Brothers & Company, on the ground that the written memoranda of such transaction if any such transaction ever took place would be the only proper method of proving that fact, and since the witness took no part in the transaction, anything he may say in this regard must of necessity be hearsay and secondary evidence. Objection is also made to the statement by this witness of statements which any other person may have made to him, on the ground that all of such statements are hearsay evidence.

Q. 10. Subsequent to that time do you know by whom the American Girl shoes have been manufactured; if so, please state by whom?

By Mr. HART: Question is objected to on the ground that it calls for a conclusion and the opinion of the witness, and for the further reason that the records or other memoranda of such supposed persons or companies wuld be the only proper method of proving the facts attempted to be elicited by this question, if any such facts exist.

A. The shoes branded American Girl shoes have been manufactured by Messrs. Wolf Brothers & Company, of this city.

Q. 11. Have the American Girl shoes as manufactured by George F. Dana & Company, Dana-Lytle Company, Wolf Brothers, a copartnership, and The Wolf Brothers & Company, been on the market continuously since you first became acquainted with the brand as you have testified?

By Mr. HART: Question is objected to, on the ground that it does not appear from any proper evidence in the record that any or all of the various persons or companies mentioned by counsel
50 have manufactured at any time the supposed shoe or shoes referred to by the question.

A. They have.

Cross-examination by Mr. HART:

X Q. 1. Are you interested in or connected with the complainant in this suit, or any party who might be interested in the complainant, directly or indirectly?

A. I am not.

(Signed) ALBERT L. HAUCK.

Sworn to and subscribed before me this 28th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

And also, SOL. HIRSCHBERG, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?

A. Sol. Hirschberg; age, thirty-two; residence, San Antonio, Texas; occupation, traveling salesman for the I. Trager Company, distillers, Cincinnati, O.

Q. 2. Have you at any time acted as traveling salesman for the Wolf Brothers & Company; and if so, in what territory?

A. Yes, sir; part of my time till a few years ago I traveled Ohio, and later years I traveled the Northwest and Michigan. I was with Wolf Brothers & Company six years.

Q. 3. During that time did you ever have any experiences with the retail shoe trade which you visited indicating that there
51 was any confusion in the minds of the trade between the American Girl and the American Lady brands; if so, please state what the experiences were?

By Mr. HART: The question is objected to on the ground that it calls for a conclusion and opinion of the witness.

A. I have had a good many instances where that thing occurred, where there was confusion that people could not tell the two shoes apart, they were so much alike.

Q. 4. In what part of the territory you have referred to did you find this confusion exist?

A. In most all the territory that I ever traveled for the firm.

Q. 5. Please name the states in which you found such confusion?

A. North and South Dakota, Minnesota and Wisconsin, Iowa, North Illinois and Michigan, and even when I traveled the State of Ohio I had instances where the confusion occurred.

By Mr. HART: Answer is objected to, for the reason that aside from the statements as to where he traveled, it is a mere conclusion and the opinion of the witness.

Cross-examination, by Mr. HART:

X Q. 1. Are you interested in any way directly or indirectly in the complainant Company, or are you connected with the Complainant or any person that may be interested in the Complainant Company?

A. I am not. I have never been interested, just traveled for the concern.

(Signed) SOL. HIRSCHBERG.

Sworn to and subscribed before me this 28th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

52 And also, SAMUEL MARCUS FECHHEIMER, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state your name, age, residence, and occupation?

A. Samuel Marcus Fechheimer; age, forty-two; residence, Cincinnati, O.; occupation, shoe manufacturer; am a member of the firm of Krohn, Fechheimer & Co., manufacturers of women's shoes.

Q. 2. How long have you been engaged in the shoe manufacturing business in Cincinnati?

A. About sixteen years.

Q. 3. Are you acquainted with the leading brands of shoes produced in Cincinnati?

A. Yes, sir.

Q. 4. Are you acquainted with the American Girl brand of the Wolf Brothers & Company?

A. Yes, sir.

Q. 5. How long have you been acquainted with that brand?

A. For about ten years.

Q. 6. Who was the manufacturer of that brand when you first became acquainted with it?

By Mr. HART: Question objected to for the reason that it calls for a conclusion and the opinion of the witness, and for the further reason that if such shoes were manufactured the records or other memoranda of such manufacture would be the only proper method of proving that fact.

A. I think it was Dana & Company.

Q. 7. State if you know by whom the brand was subsequently manufactured?

By Mr. HART: Last objection repeated.

A. My recollection is that there was some change in the
53 firm of Dana & Company, and that Wolf Brothers then bought out the firm of Dana & Company, and manufactured shoes under this brand.

Q. 8. Have you been acquainted with the American Girl brand of shoes continuously during this period?

A. Yes, sir.

Q. 9. From your knowledge of the brand can you state whether or not it is a brand of any considerable value?

By Mr. HART: Objected to as calling for a conclusion and the opinion of the witness.

A. I regard it as very valuable.

Cross-examination waived.

(Signed) S. MARCUS FECHHEIMER.

Sworn to and subscribed before me this 28th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

And also, VAL DUTTENHOFER, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?

A. Val Duttenhofer; age, forty-two; residence, Mt. Auburn, Cincinnati, O.; occupation, shoe manufacturer, President of the Val Duttenhofer Sons Company, manufacturers of ladies' shoes only.

Q. 2. How long have you been engaged in that business in Cincinnati?

A. Sixteen years.

Q. 3. How long have you been the President of your Company?

A. Since it was incorporated five years ago.

54 Q. 4. Are you acquainted with the American Girl brand of shoes?

A. I am.

Q. 5. How long have you been acquainted with it?

A. Ten or eleven years, or since it was started; I really know them since they started.

Q. 6. By whom has that brand of shoes been manufactured since you first became acquainted with it?

By Mr. HART: Question is objected to on the ground that if the shoes have been manufactured as indicated by the question, the records or memoranda of the manufacturers would be the only proper method of proving that fact.

A. George F. Dana & Company, Dana-Lytle & Company, Wolf Brothers & Company.

Q. 7. Has the shoe been on the market continuously since you first became acquainted with the brand?

A. Yes, sir.

Q. 8. Are you acquainted with the reputation and standing of the American Girl shoe brand in the trade?

By Mr. HART: Objected to as wholly immaterial, irrelevant, and attempting to elicit a conclusion and the opinion of the witness.

A. I am.

Q. 9. Have you ever had any dealings in respect to the American Girl brand yourself?

A. I have, for I tried to buy the brand once from Mr. Sam Wolf; in fact, we talked several times on that score.

By Mr. HART: All that portion of the answer following the words "I have" is objected to, for the reason that it is a voluntary statement on the part of the witness not called for by the question.

Q. 10. At the time you refer to in your last answer, did
55 you regard the American Girl brand as being of value?

By Mr. HART: The question is objected to, for the reason that it is absolutely immaterial how the witness may have regarded this supposed brand, and for the further reason that it calls for a conclusion and the opinion of the witness.

A. I did.

Q. 11. How long since has that transaction occurred?

By Mr. HART: Objected to as entirely immaterial.

A. About six months or a year after they bought Dana-Lytle out.

Q. 12. Please state if you know whether the American Girl brand has increased in value since that time?

By Mr. HART: Last objection repeated.

A. From the looks of things, and from the growth of the business, yes.

Q. 13. During the time that you have been engaged in manufacturing shoes in Cincinnati, have you been acquainted with the leading brands of shoes manufactured in Cincinnati?

A. I have.

Q. 14. During that time have you had opportunity of knowing the relative and actual values of such brands, either generally or particularly?

By Mr. HART: Last objection repeated.

A. Privately, of course, no; but publicly, from public advertisement, yes.

Q. 15. During that time have you acquired a general knowledge of the volume of business being transacted under the leading shoe brands by your principal Cincinnati competitors?

By Mr. HART: Last objection repeated.

56 A. Only by hearsay, that they were improving or going ahead, that is all I could say as to that.

Q. 16. Have you a sufficient knowledge of the volume of business done by the Wolf Brothers & Company in shoes bearing the American Girl brand to form an opinion as to the value of that brand? If so, please state your opinion as to its value?

By Mr. HART: Same objection repeated.

A. Yes, from the talk of our customers and people using the name to us. To the value I could not positively say in dollars, if that is the idea, at the present time.

Q. 17. Without asking you to express an opinion as to the exact value of the brand, as if you were appraising it, I will ask you to state if you can some amount which in your opinion the brand is certainly worth?

By Mr. HART: Last objection repeated; further objection is made that the witness has not shown himself sufficiently familiar with the brand or the amount of goods supposed to be placed on the market bearing this brand to give an intelligent answer to this question.

A. It is certainly worth five thousand dollars, or more.

Cross-examination waived.

(Signed) VAL DUTTENHOFER.

Sworn to and subscribed before me this 28th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

And also, SAMUEL B. WOLF, of lawful age, being first duly sworn, testified as follows:

57 Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?

A. Samuel B. Wolf; age, over twenty-one; residence, 2624 Stanton Avenue, Walnut Hills, Cincinnati, O.; occupation, President of the Wolf Brothers & Company, shoe manufacturers of this city, makers of ladies' shoes. I am forty-nine years old.

Q. 2. How long have you been engaged in manufacturing shoes?

A. I went into the shoe business in the spring of 1873; I was fifteen years of age in October, 1872. I have been in the shoe business continuously without interruption up to the present day; never have been in any other business one hour in my life. I became a member of the firm of Adolph Meyer & Co. in 1879, in this city, who were jobbers and manufacturers of shoes; in 1889 I went to Boston and took care of their Eastern branches there. Prior to this the firm of Adolph Meyer & Co. was bought out by Wolf & Lowman, of which I was the senior member. In 1887 I sold this plant to the Sachs Shoe Mfg. Co., who are still in business in Cincinnati; I then connected myself with the firm of Blacker, Gerstle & Co. as

salesman, and general utility man, you might say. I remained with them until 1889, when I went back with the firm of Adolph Meyer & Co. to take charge of their Eastern branch. I remained there until the fall of 1890, when I went to Nashville, Tenn., to take charge of the firm of D. Weil & Co., who were practically a branch of Adolph Meyer & Co., and remained there till 1893; in 1893 I returned to Cincinnati to again connect myself with Blacker, Gerstle & Co., and remained with them until 1897, when the firm of
58 Felix, Wolf & Co., was started; the firm of Felix, Wolf & Co. was succeeded by Wolf Brothers & Company, and they in turn were succeeded by the present corporation. Of both these firms I was a member. Felix Wolf & Co. was started in March, 1897; Wolf Brothers & Company, was started in December, 1897; the Wolf Brothers & Company, the corporation, was incorporated June 12th, 1905.

By Mr. HART: Objection is made to the statement in the foregoing answer in regard to the different persons or firms mentioned therein having succeeded any other firm or company, since the written memoranda of such transaction would be the only proper method of proving such facts; and anything the witness may say in this regard must, therefore, be secondary evidence. Objection is also made to the statement that the Wolf Brothers & Company was incorporated, for the reason that the articles of incorporation duly authenticated and verified would be the only proper method of proving such fact if any such facts exist, and the statement of the witness in this regard is mere secondary evidence.

Q. 3. Please produce the Articles of Incorporation of The Wolf Brothers & Company, and permit the same to be attached to your depositions as a part thereof.

A. I herewith produce the Articles of Incorporation of The Wolf Brothers & Company; also the certificate from the Secretary of State, Lewis C. Laylin, to the same.

(Counsel for Complainant offers in evidence the Articles of Incorporation of the Wolf Brothers & Company identified by the witness, and asks that same be marked "Complainant's Exhibit, Appendix H," which is accordingly done. It is stipulated by counsel that the same, together with the other documentary exhibits
59 about to be introduced, may be copied and the copies returned with this deposition as an Appendix thereto; the original instruments or certified copies offered by the Complainant to remain in the custody of the Complainant subject to be produced upon or before the final hearing of this cause upon notice from the defendant.)

Q. 4. How long have you been acquainted with the American Girl brand of shoes?

A. From the first public advertising of the George F. Dana Co or George F. Dana & Co.

Q. 5. Please state if you know who succeeded George F. Dana & Co. in the manufacture of the American Girl shoe?

By Mr. HART: Question objected to for the reason that if George F. Dana & Co. ever manufactured American Girl shoes and was succeeded in such manufacture, the written memoranda of such transaction would be the only proper method of proving such fact, and anything the witness may say in this regard must, therefore, be secondary evidence.

A. Dana-Lytle Shoe Company.

Q. 6. Did you at any time have any transaction or your firm of Wolf Brothers & Company, with the Dana-Lytle Shoe Company; if so, please state what that transaction was?

By Mr. HART: The question is objected to for the reason that it is too general in its nature and is not confined to anything that may be relevant to the issues in this suit, and for the further reason that the written memoranda of such transaction would be the only method of proving such fact if it existed.

A. After our fire in the spring of 1898 I purchased from the Dana-Lytle Shoe Company their entire plant, consisting of
60 machinery, lasts, dies and patterns, good-will, and their trade-mark, which was known as "The American Girl," for three thousand dollars, and afterwards and after they had delivered to me as the agent for my firm all of the above I then purchased from them all the raw material which they had on hand, and such orders as were unfilled, which we at once proceeded to produce. I hereby produce bill of sale from the Dana-Lytle Shoe Co. to my firm.

(Counsel for Complainant offers in evidence bill of sale produced by the witness, and asks that the same be marked "Complainant's Exhibit, Appendix A," which is accordingly done.)

By Mr. HART: Objection is made to the introduction in evidence of this instrument on the ground that it has not been properly authenticated.

Q. 7. Please state if you know, how long prior to this purchase made by you from the Dana-Lytle Shoe Company that Company had succeeded to the business of George F. Dana & Company?

By Mr. HART: Objection to this question is made on the ground that it does not appear from any proper evidence in the record that this supposed Dana-Lytle Company ever succeeded to the business of George F. Dana & Co. if it had any business; and for the further reason that it if ever did succeed to such business, the written memoranda of such transaction would be the only proper method of proving such fact, and the statements of the witness in that regard must, therefore, be secondary evidence. Objection is also made for the reason that the witness does not appear to have been connected with either of those supposed companies, or to have taken any part in the supposed transactions in question, and, therefore, any-
61 thing he may say in this regard can be at best no more than hearsay evidence.

A. They succeeded in November of 1896.

Q. 8. State if you know whether or not the George F. Dana of George F. Dana & Company is the same person whose signature appears upon the Bill of Sale, Appendix A, as Secretary and Treasurer of the Dana-Lytle Shoe Company?

By Mr. HART: Objection to this question is made for the reason that the witness has not shown himself capable or qualified to testify as to the signature of the party in question, nor as to the identity of the George F. Dana mentioned as being a member of the supposed firm of George F. Dana & Company.

A. He is.

Q. 9. Can you produce the Articles of Incorporation of the Dana-Lytle Shoe Company, or a certified copy thereof?

A. I can, and herewith produce a certified copy of the Articles of Incorporation of the Dana-Lytle Shoe Company.

(The instrument produced by the witness is offered in evidence by complainant and same is marked at Complainant's request "Complainant's Exhibit—Appendix G.")

By Mr. HART: Objection to the introduction of this document in evidence is made on the gronud that it has not been properly identified, and no foundation for its introduction has been laid.

Q. 10. Since your purchase of the Dana-Lytle Company assets by whom has the American Girl shoe been manufactured?

By Mr. HART: Objection is made to this question for the reason that the records or other memoranda of the Company that
62 manufactures the supposed American Girl shoe, if it is manufactured, would be the only proper method of proving the facts attempted to be elicited by this question, if any such facts exist.

A. Continuously by Wolf Brothers & Company and The Wolf Brothers & Company.

Q. 11. Can you produce the records of The Wolf Brothers & Company relating to the succession by the corporation, The Wolf Brothers & Company, to the business of the partnership, Wolf Brothers & Company?

A. I can, and do herewith produce the minute-book of the corporation showing the instrument and the purchase by the corporation.

(Counsel for Complainant offers in evidence the minute-book produced by witness, and asks that same be marked "Complainant's Exhibit, Complainant's Minute-Book," which is accordingly done; and that portion of the minutes of June 12, 1905, referred to by the witness is returned with this deposition as Appendix B.)

By Mr. HART: Objection to the introduction of this matter in evidence is made, on the ground that it is not properly identified and authenticated, and the ground has not been laid for its introduction in evidence.

Q. 12. In the course of your conduct of the business as President of the corporation, The Wolf Brothers & Company, what facts, if any, have come to your knowledge indicating confusion in the

minds of the trade between your American Girl shoes and the so-called American Lady shoe of the defendant?

A. None except such as have been given me continuously by salesmen upon their return from their different trips, as in my
63 vocation it would be hardly possible, as I have only called on such trade of mine as were old time customers, who naturally would not handle the other shoe as long as I was doing business with them, and the major portion of my time, of course I am confined in the factory.

Q. 13. Can you state approximately the number of such reports that have been made to you by your traveling salesmen, and over what period of time they have extended? If so, please do so?

By Mr. HART: Objection to the question is made on the ground that such reports would themselves be the best evidence of the statements therein contained. Objection is also made on the ground that the witness does not appear to have personal knowledge of any such facts, and a repetition by the witness of such statements can be no more than hearsay statements, not made under oath.

A. I cannot give an approximate amount; but I can simply state that each and every man upon his return home from his trip would complain to me of the interference occasioned by the sale or offer to sell of the American Lady shoe over his respective territory. It would be impossible for me to tell just how many complaints they made, but it is absolutely certain that it has been a regular occurrence since the American Lady shoe has been on the market.

Q. 14. Please state the present value of the trade-mark American Girl as applied to shoes by the Complainant?

By Mr. HART: The question is objected to for the reason that it calls for a conclusion and the opinion of the witness.

A. It is worth over five thousand dollars.

64 Cross-examination by Mr. HART:

X Q. 1. How much stock of the Complainant Company do you own?

A. About twelve hundred shares.

X Q. 2. What is the value of those shares?

A. Over a hundred dollars a share.

X Q. 3. Are you familiar with the manner in which the American Lady shoe is placed upon the market? I refer now to the single pair cartons in which such shoes are sold?

A. Yes, sir.

X Q. 4. Is not the name "Hamilton-Brown Shoe Company" placed upon such cartons in a prominent manner?

A. Well, not with any idea of bringing out the name of "Hamilton-Brown," but simply with the idea of showing "The American Lady."

X Q. 5. Does not the name "Hamilton-Brown Shoe Company" extend across the entire front end of the top of the carton in which such shoes are marketed, in large black type; also at the top of the

upper surface of the cover of the carton on a black background in large white type?

A. If you will produce a carton it will be a very easy matter for us to decide this.

X Q. 6. Did you not hold a carton in which the American Lady shoes are marketed in your hand just before answering the last question?

A. I did, and found Hamilton-Brown's name on the lid of this carton in the same position that any other jobber would naturally place his name to advertise himself. The main portion of this carton that was to attract the attention of the consumer plainly showed the name, "American Lady."

X Q. 7. Was not the name "Hamilton-Brown Shoe Company" printed upon this carton in the manner indicated by X Q. 5?

65 A. I think it was; but the name on top could absolutely not be seen by the consumer until after they had purchased the shoe, as the retailer keeps them stacked on top of each other in his shelves, and it would only be seen after the goods had been delivered, as the shoes are taken out of the box to be tried on and sometimes are delivered in the box, and sometimes delivered without being put in any box in some cases where shoes of this description were sold, in all probability giving the lady to understand that she was buying the American Girl, the probabilities are that the shoe was not delivered in a box but wrapped in a piece of paper and handed to her in that manner.

By Mr. HART: Objection to the foregoing answer is made on the ground that it is a volunteered argumentative statement by the witness not called for by or responsive to the question.

X Q. 8. Do you not know that the name "Hamilton-Brown Shoe Company" is printed upon the carton which you have just held in your hand in the manner indicated by my former questions?

A. My former answer will answer your question.

X Q. 9. I am not asking you whether or not your former answer answers this question. I am asking you to give me a direct answer to my last question?

A. Hamilton-Brown & Company's name unquestionably appears upon the box that I just held in my hand, but as I stated before, all goods are not delivered in boxes to the consumer.

By Mr. HART: Last objection repeated, as applicable to the latter part of the foregoing answer.

X Q. 10. Does not the name "Hamilton-Brown Shoe Com-

66 pany" extend across the entire front end of the carton which you have just held in your hand, in large black type, the background being white; also, at the top of the upper surface of the cover of the carton on a black background in large white type, the name in white type occupying two lines?

A. It does not. The name of Hamilton-Brown in black type is on the lid, and not on the carton; and as I said before, a lid can be lost or shoes delivered without being delivered in carton.

By Mr. HART: Objection is made to the latter part of the answer, for the reasons stated above.

X Q. 11. As modified by your answer, does not the name "Hamilton-Brown Shoe Company" appear upon this carton in the manner indicated by my question No. 10 above?

A. Please ask me the question over again.

X Q. 12. Does not the name "Hamilton-Brown Shoe Company" extend across the entire front end of the lid of the carton which you have just held in your hand, in large black type, such portion of the lid coming down over the front end of the body of the carton and when in position forming a part of the front end of the complete carton; also, does not the name "Hamilton-Brown Shoe Company" appear at the top of the upper surface of the lid of the carton in large white type on a black background and occupying two lines?

A. It does.

X Q. 13. Does not the mark of the "Hamilton-Brown Shoe Company," which is a circular belt, the ends of which are buckled together, such belt being printed in black upon a white background, and the portion within the belt being printed in red, appear upon the front end of this carton?

A. In handling the carton, which I did very quickly, I noticed some kind of a mark under the name of "American Lady,"
67 or design, but I could not state just what that design was, nor do I know whether there is a name there or not.

X Q. 14. When did you first learn that the Hamilton-Brown Shoe Company was using the name "American Lady" in connection with shoes?

A. I believe my brother called my attention to it, and showed me their "ad" about the time that they started making the American Lady shoe, which I think was about 1900, if I am not mistaken.

X Q. 15. What is the retail price of the American Girl shoe?

A. American Girl shoe retails at two, two and a half, three dollars, and some have been sold at much higher price, as we have been making some for foreign trade with the words American Girl, but unbranded as to price, and no price on the carton.

(Signed) SAMUEL B. WOLF.

Sworn to and subscribed before me this 28th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

And also, THOMAS F. MCGRANE, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?

A. Thomas F. McGrane; age, forty-seven; residence, 712 Barr street, Cincinnati, O.; occupation, shoe cutter.

Q. 2. Were you ever in the employ of George F. Dana
68 & Company?

A. No, sir; I was with them as nominal partner.

Q. 3. What service, if any, did you render for the firm of George F. Dana & Company?

A. I was manufacturer for the firm.

Q. 4. What did that firm manufacture?

Mr. HART: Objection to the question is made on the ground that the records or other memoranda of the supposed firm would be the only proper method of proving the fact attempted to be elicited by this question, and anything that the witness may say in this regard must be secondary evidence.

A. Women's shoes.

Q. 5. Under what brands, if any?

By Mr. HART: Same objection.

A. The American Girl.

Q. 6. Were you a partner in George F. Dana & Company when that firm began to use the mark "The American Girl" upon shoes?

By Mr. HART: Same objection.

A. Yes, sir.

Q. 7. Did that firm continue to use the mark "The American Girl" upon shoes as long as you remained with the firm?

By Mr. HART: Same objection.

A. Yes, sir.

Q. 8. Are you the T. F. McGrane named as an incorporator of the Dana-Lytle Shoe Company in the Articles of Incorporation of that Company, which articles are in evidence in this case?

A. Yes, sir.

Q. 9. Was the George F. Dana who is named in these
69 Articles of Incorporation the George F. Dana of George F. Dana & Company?

A. Yes, sir.

Q. 10. How long did the firm of George F. Dana & Company continue to manufacture the American Girl shoes, and who if any one succeeded that firm in the manufacture of shoes bearing the mark "The American Girl"?

By Mr. HART: Same objection. Objection is also made to the question on the ground that if the supposed George F. Dana was succeeded as indicated by this question, the written memoranda of that transaction would be the only proper method of proving that fact.

A. George F. Dana & Company continued to manufacture the shoe under the brand "The American Girl" as long as they continued in business and until they were succeeded by the Dana-Lytle Shoe Company; and they in turn were succeeded by the Wolf Brothers & Company.

By Mr. HART: Objection is made to the latter part of the foregoing answer, on the ground that it is a volunteered statement on the part of the witness not called for by nor responsive to the question propounded by counsel.

Q. 11. What services did you perform for the Dana-Lytle Shoe Company, if any?

A. I was the manufacturer. I had charge of manufacturing of the goods.

Q. 12. Did you have charge of the manufacture of the shoes made by the Dana-Lytle Shoe Company?

A. Yes, sir.

Q. 13. Under what brands were those shoes made, if any?

By Mr. HART: Objection to this question is made on the ground that the record or other memoranda of the supposed Com-
70 pany would be the only proper method of proving the facts attempted to be elicited by this question, and anything the witness might say in this regard must therefore be secondary evidence.

A. The American Girl.

Q. 14. How long did the Dana-Lytle Shoe Company continue to manufacture and sell the American Girl shoe?

By Mr. HART: Same objection.

A. Until they were succeeded by the Wolf Brothers & Company, of Cincinnati, Ohio.

By Mr. HART: Objection is made to the statement by the witness that the supposed Dana-Lytle Shoe Company was succeeded by the supposed Wolf Brothers & Company, on the ground that such statement is volunteered and not responsive to the question propounded by counsel, and for the further reason that if any such transaction took place the written memorandum of that transaction would be the only proper method of proving such fact.

Q. 15. After the Dana-Lytle Shoe Company sold out to Wolf Brothers & Company, did you have any further connection yourself with the manufacture of the American Girl shoes? And if so, for how long?

By Mr. HART: Objection appearing following Q. 13 is here repeated.

A. Why, I was in the employ of the Wolf Brothers for two weeks, who made the shoe while I was with them, the American Girl.

Q. 16. From the time when George F. Dana & Company began the manufacture of the American Girl shoes, up till the time when you left the employ of Wolf Brothers & Company, had the American Girl shoes been manufactured continuously?

71 By Mr. HART: Last objection repeated.

A. Yes, sir.

Cross-examination waived.

(Signed) THOMAS F. McGRANE.

Sworn to and subscribed before me this 28th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

And also, ALBERT W. HIGHLANDS, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. State your name, age, residence and occupation?

A. Albert W. Highlands; age, forty-one; residence, Mt. Auburn, Cincinnati, Ohio; occupation, publisher.

Q. 2. Are you connected with the Boot and Shoe Recorder?

A. I am.

Q. 3. In what manner and how long have you been so connected with it?

A. I have charge of the Ohio and Southern Department. I have been connected with the Boot and Shoe Recorder since 1894, both in the news and advertising departments.

Q. 4. Has your connection with that publication brought you in contact with the boot and shoe trade during that period?

A. It has.

Q. 5. During your acquaintance with the boot and shoe trade have you become acquainted with the American Girl shoe; and if so, how long have you been acquainted with the shoe made under that mark?

A. I have, since April, 1896.

72 Q. 6. Since you have first been acquainted with the American Girl shoe, by whom has that shoe been manufactured?

By Mr. HART: Objection to this question is made on the ground that the record or other memoranda of such supposed manufacturers would be the only proper method of proving the facts attempted to be elicited by this question, if any such facts exist, and anything the witness may say in this regard must therefore be secondary evidence; objection is also made on the ground that the witness does not appear to have personal knowledge of such facts, if they exist, and therefore any statements he might make in this regard would be hearsay evidence.

A. By the George F. Dana Company, Dana-Lytle Shoe Company, Wolf Brothers & Company, and The Wolf Brothers & Company.

Q. 7. What is the nature and extent of your personal acquaintance with the shoe manufacturing trade?

A. I have been calling on the shoe manufacturers and jobbers of Cincinnati since 1894, and of Ohio since 1900, in the capacity of a representative of the Boot and Shoe Recorder in this territory for the purpose of soliciting advertising, subscriptions, and compiling reading matter pertaining to the shoe trade and kindred interests.

Q. 8. Did you become acquainted in this manner with George F. Dana & Company and the Dana-Lytle Shoe Company?

A. I did.

Q. 9. Did you visit the place of business of each of those concerns?

A. I did.

Q. 10. Did you do any business with either or both of those concerns in reference to the American Girl shoes?

A. I compiled reading notices pertaining to the American

73 Girl shoe, and also assisted in the preparation of some of the advertising copy.

Q. 11. Since the American Girl shoe has been manufactured by Wolf Brothers & Company, have you done similar business with Wolf Brothers & Company, and The Wolf Brothers & Company?

A. I have.

Q. 12. I hand you a page numbered 164, from the Boot and Shoe Recorder, of June 27, 1900, and will ask you if you recognize that page as being part of one of the regular issues of the Boot and Shoe Recorder?

A. I do.

(Counsel for Complainant offers in evidence the sheet identified by the witness, and asks that same be marked "Complainant's Exhibit Advt. of June 27, 1900," which is accordingly done.)

Q. 13. With reference to the advertisement of the American Girl shoe appearing upon the page of the Boot and Shoe Recorder just offered in evidence, I will ask you if you are familiar with the catch phrase, "A Shoe as Good as its Name," contained in this advertisement?

A. I am.

Q. 14. How long have you been familiar with that catch phrase?

A. I cannot state that exactly. According to the best of my knowledge and belief, it has been used in connection with the name "American Girl" since soon after the trademark was put out. The files of the Recorder would determine it more exactly.

By Mr. HART: The answer of the witness is objected to as being mere opinion.

Q. 15. Since you first became acquainted with it, has this catch phrase been associated to your knowledge with any shoe other than the American Girl shoe?

74 By Mr. HART: The question is objected to, as calling for a conclusion, and as immaterial whether or not the witness has, or has not, such information as is attempted to be elicited by this question.

A. None that I know of.

Q. 16. Have you in your capacity as manager of the Southern Department of the Boot and Shoe Recorder recognized that phrase as being the property of the owners of the American Girl brand?

By Mr. HART: Question objected to as calling for a conclusion of the witness, and for the further reason that it is absolutely immaterial who the witness recognizes or has recognized as the owner of such alleged phrase or brand, or whether he does recognize or has ever recognized anybody, firm or corporation as the owner thereof.

A. I have.

Q. 17. Are you familiar with the American Lady brand as used by the Hamilton-Brown Shoe Company?

A. Only in so far as their advertisements in the various trade journals and magazines is concerned.

Q. 18. In the course of your business relations with the shoe manufacturing trade have you learned of any facts indicating that

any confusion between the brands "American Girl" and "American Lady" exists in the minds of the trade, or consumers of shoes; if so, please state what the facts are?

By Mr. HART: The question is objected to on the grond that it calls for a conclusion and the opinion of the witness.

A. Shoe manufacturers have from time to time spoken of the American Girl shoe and the American Lady shoe, commenting on the fact that it seemed that the use of the American Lady by
75 Hamilton-Brown was working a hardship on Wolf Brothers & Company; and that if they were in Wolf Brothers Co. position they would certainly endeavor to put a stop to it.

By Mr. HART: The answer of the witness is objected to as repetition of mere hearsay statements, and expressions of opinion.

Cross-examination by Mr. HART:

X Q. 1. Do you compose the advertisements of the complainant?

A. Advertisements are prepared by me subject to their approval and O. K.

X Q. 2. You receive a commission—a fee—for doing this, do you not?

A. I work on a guarantee and commission from the publishers.

X Q. 3. You receive a commission, then, for the advertising matter of the Wolf Brothers & Company in the Boot and Shoe Recorder, do you?

A. I receive a certain commission on all advertising above the guarantee, which would necessarily cover the business of the Wolf Brothers & Company the same as any other advertiser in my territory.

X Q. 4. You are therefore interested in securing their advertising, are you?

A. To the same extent that I would be in securing the business of any other shoe manufacturer.

X Q. 5. Do you also receive a fee or compensation of some sort from The Wolf Brothers & Company for preparing their advertisements?

A. I do not.

X Q. 6. Does the Hamilton-Brown Shoe Company use advertising space in the Boot and Shoe Recorder?

A. They have been using space in the Boot and Shoe Recorder.

X Q. 7. Have they ceased to do so?

76 A. Up to the last two or three issues they have not.

X Q. 8. You receive no commission for the advertising space used by Hamilton-Brown Shoe Company, do you?

A. They are not in my territory. Therefore I do not receive a commission on their business.

X Q. 9. Did you communicate the remarks which you have stated on your direct examination were made to you in regard to the use of the name "American Lady" by Hamilton-Brown Shoe Company to Complainant?

A. We have frequently discussed the confusion of the names, but I cannot remember the language.

X Q. 10. About when did you first talk of this matter with any member of the Complainant Company.

A. From time to time I have remarked that some of the other manufacturers had spoken of the similarity of the names.

At this point, the cross-examination of this witness not being completed, by consent an adjournment was taken until 11:00 a. m. Saturday, December 29th, 1906.

SATURDAY, Dec. 29, 1906. 11:00 o'clock a. m.

Met pursuant to adjournment; same parties present.

Thereupon, ALBERT W. HIGHLANDS.

Cross-examination resumed by Mr. HART:

X Q. 11. Please answer my last question more definitely?

A. I could not make any definite statement on that.

77 X Q. 12. How long ago do you think it was?

A. I could not state that.

X Q. 13. Was it as much as five years?

A. I could not say; I don't know.

X Q. 14. When did this matter first come to your attention?

A. I could not say.

X Q. 15. Do you think the use of the name "American Lady" by Hamilton-Brown Shoe Company came to your attention about the time they commenced advertising American Lady shoes in the Boot and Shoe Recorder?

A. I judge so.

X Q. 16. Do you think that you spoke to the Wolf Brothers & Company in regard to it shortly after the use of the name American Lady by Hamilton-Brown Shoe Company first came to your attention?

A. That I could not say.

X Q. 17. Please give us some idea in regard to the time when you first talked with the Complainant Company in regard to this matter?

A. I could not give you anything definite. It might have been five years; it might not have been more than three.

X Q. 18. Did you talk with any member of the Complainant Company in regard to the advisability of instituting this litigation?

A. I don't recall.

X Q. 19. You have stated that the Hamilton-Brown Shoe Company advertise the American Lady shoe in the Boot and Shoe Recorder. Are not such "ads" always accompanied by the name "Hamilton-Brown Shoe Company" in bold type?

A. I could not say; I have not studied them that closely.

X Q. 20. If they had not been, you would not have known that it was the Hamilton-Brown Shoe Company's "ad," would

78 you?

A. It would not be necessary to print the name in bold-faced type in order for me to see it.

X Q. 21. However, the name always accompanied such advertisements, did it not?

A. As far as I remember, it did.

X Q. 22. Were not such advertisements also accompanied by the Hamilton-Brown mark, which consists of a belt, the ends of which are buckled together, and upon which is stamped the name, "Hamilton-Brown Shoe Company," and the part enclosed by such belt being printed in red?

A. They were not, according to the best of my recollection.

X Q. 23. Does not such mark usually accompany such advertisements?

A. I do not think they always do, no, sir.

(Signed) A. W. HIGHLANDS.

Sworn to and subscribed before me this 29th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

And also, MILTON ADLER, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state your name, age, residence and occupation?

A. Milton Adler; age, thirty-seven past; residence, 717 South Crescent Avenue, Avondale, Cincinnati, Ohio; occupation, Vice-President Julian & Kokenge Company, manufacturers of ladies' shoes, this city.

79 Q.—. How long have you been engaged in the manufacture of ladies' shoes in Cincinnati?

A. Since May 1896.

Q. 3. How long have you been acquainted, if at all, with the American Girl brand of Wolf Brothers & Company?

A. Since the taking of the name by them, and previous to that by the former owners.

By Mr. HART: Question is objected to on the ground that it contains volunteered matter, and not responsive to the question; and for the further reason that it contains secondary evidence.

Q. 4. Are you acquainted with the phrase, "A Shoe as Good as Its Name"?

A. I am.

Q. 5. How long have you been acquainted with it?

A. At least six or seven years.

Q. 6. By whom has it been used during that time?

By Mr. HART: Question is objected to on the ground that it calls for secondary evidence.

A. The Wolf Brothers Company, and their predecessors.

Q. 7. In what manner has that phrase been used during that time?

By Mr. HART: Same objection.

A. In connection with all advertisements that have come before my notice. I refer to advertisements of the American Girl shoe.

Q. 8. Does your house employ trade-marks, or catch phrases, or both, in connection with the sale of its ladies' shoes?

By Mr. HART: Objected to as wholly immaterial and without relevancy in this suit.

A. We use both trade-marks and catch phrases.

80 Q. 9. Please explain to the Court the function which is performed by a catch phrase in the advertising and sale of merchandise in your line?

By Mr. HART: Same objection. Objection is also made on the ground that the witness has not shown himself qualified to or capable of giving an intelligent or accurate answer to this question.

A. It gives added value. We have decided and have used the term "Makers of Shoes for Young Women," believing that by the use of this phrase there will be an established connection between it and our firm name, which will be and is of very considerable value to us. This phrase will eventually appear on all our advertisements, stationery and other printed matter which we may use in connection with our business.

Q. 10. Who, if any one, have you recognized as being the owner of the catch phrase, "A Shoe as Good as its Name," as applied to shoes?

By Mr. HART: Objected to on the ground that it is immaterial who this witness may regard as the owner of such alleged catch phrase; and for the further reason that it calls for a conclusion of the witness.

A. The Wolf Brothers & Company and their predecessors.

Q. 11. From your knowledge and experience in the shoe trade and your observation of the manner and extent in which the catch phrase, "A Shoe as Good as its Name," has been used by The Wolf Brothers & Company, and its predecessor, Wolf Brothers & Company, can you state whether or not that catch phrase is of value; and if so, please state fully your views as to its value?

By Mr. HART: Last objection repeated.

81 A. Basing upon my experience in the shoe trade, as to the value of catch phrases to us and others, I should state that it certainly would exceed, taking into consideration the number of years it has been used, twenty-five thousand dollars.

Q. 12. Based upon the same sources of knowledge, please state what you regard as the value of the trade-mark "American Girl" as applied to shoes by The Wolf Brothers & Company and its predecessor?

By Mr. HART: Same objection.

A. I should say fifty thousand dollars.

Cross-examination by Mr. HART:

X Q. 1. Are you interested in any way in the Complainant Company?

A. No, sir, I am not.

X Q. 2. Is any person interested in that Company interested in the concern with which you are connected?

A. No, sir; we are competitors.

X Q. 3. Are you related to any person that is connected with the Complainant Company?

A. No, sir.

X Q. 4. Have you ever had occasion to examine the books of the Complainant Company?

A. I have not.

X Q. 5. And in this way gain a knowledge of the extent of their sales of the supposed American Girl shoe, or the extent to which they may have advertised this supposed shoe, or used the supposed catch phrase, "A Shoe as Good as its Name"?

A. I have not.

X Q. 6. You do not know, then, the extent of such sales, or advertising do you?

A. I have known of very considerable advertising done by the Wolf Brothers & Company by observation of literature issued by them to the trade and publications by them in trade journals
82 and other mediums usually employed. I know that the phrase has been used by them very extensively.

(Signed) MILTON ADLER.

Sworn to and subscribed before me this 29th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

And also, EDGAR BETTMANN, of lawful age, being duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state your name, age, residence and occupation?

A. Edgar Bettmann; age, forty; residence, Cincinnati, O.; occupation, shoe manufacturer, men's shoes. Am a member of the firm of Helmers, Bettmann & Company.

Q. 2. How long have you been engaged in the shoe manufacturing business in Cincinnati?

A. Seventeen years.

Q. 3. Are you acquainted with the American Girl brand of ladies' shoe?

A. Yes, sir, I am acquainted with it.

Q. 4. How long have you been acquainted with it; and by whom has it been used during that time?

By Mr. HART: Question objected to on the ground that it calls for secondary evidence in that the records or other memoranda

of such persons as may have used the supposed brand would be the best evidence of such fact, if it exists.

A. Oh, ever since its use, about eight or ten years. I
83 first knew it being used by Dana & Company, who were the predecessors of the Dana-Lytle Company; it was next used by the Dana-Lytle Company, Wolf Brothers Company and then by The Wolf Brothers & Company.

Q. 5. Are you acquainted with the catch phrase, "A Shoe as Good as Its Name?"

A. Yes, sir.

Q. 6. How long have you been acquainted with it, and by whom has it been used?

By Mr. HART: Last objection repeated.

A. Been acquainted with it several years. It has been used by Wolf Brothers & Company, and The Wolf Brothers & Company.

Q. 7. Has your firm any shoe trademark of its own?

By Mr. HART: Objected to as wholly immaterial.

A. We have a named shoe called "The Eclipse."

Q. 8. Are you acquainted generally with the use of trade-marks and catch phrases in the shoe trade of the United States?

By Mr. HART: Same objection.

A. Yes, in a general way.

Q. 9. How have you derived your knowledge of such marks and phrases?

By Mr. HART: Same objection.

A. Observation, conversation, and attention to the subject.

Q. 10. From your knowledge and observation of the use of the brand American Girl by The Wolf Brothers & Company and its predecessor please state what you regard as the value of that brand?

By Mr. HART: The question is objected to on the ground that it is wholly immaterial what the witness may regard as the value
84 of this supposed brand, especially so since he does not appear to have any knowledge whatever of the extent to which this supposed mark has been used, and for the further reason that it calls for a conclusion and the opinion of the witness.

A. The value of a brand is dependent largely on the ability to make the product at a profit; the value of the brand consequently would have to be measured by the profit of the business. As an outsider I cannot tell what that is.

Q. 11. What do you regard as the standing of the American Girl brand among the shoe manufacturers' brands of Cincinnati?

By Mr. HART: Same objection. And further objection is made that the value or standing of brands in Cincinnati is not to be taken as a basis or criterion in this case.

A. I know of no brand that is as well known or as extensively

advertised as the American Girl among any branded shoes made here in Cincinnati.

Q. 12. Are you acquainted with the manufacturing plant of Wolf Brothers & Company?

By Mr. HART: Objected to as wholly immaterial.

A. Yes, sir.

Q. 13. From your own knowledge of the brand American Girl, and of the business in which it is used, can you state what you regard as a conservative minimum value of that brand as used in that business?

By Mr. HART: The question is objected to on the ground that it is wholly immaterial what this witness might regard such supposed brand to be worth; and for the further reason that the question calls for a conclusion and the opinion of the witness; also
85 that the witness does not appear to be capable of giving an intelligent answer to this question, and he has already stated that he has not a knowledge of such facts as would enable him to give an intelligent answer to the question.

A. The minimum value of any established trade-mark—well, about five thousand dollars.

Q. 14. By the expression "any well established trade-mark," do you refer to marks used in the shoe manufacturing trade?

A. No, sir .

Q. 15. What do you mean by the expression?

By Mr. HART: Same objection.

A. Any trade-mark that has been many years before the public and well advertised, that is producing a reasonable profit for the maker of the goods to which that trade-mark is applied.

Q. 16. Based upon your experience and knowledge of the shoe trade please state what you regard as the conservative minimum value of the catch phrase, "A Shoe as Good as Its Name," as used by the Wolf Brothers & Company?

By Mr. HART: Last objection repeated.

A. Well, that is a matter of opinion only. But our firm would pay twenty-five hundred dollars right now for an effective striking catch phrase to be used in connection with our brand. I would certainly consider the phrase as used by the Wolf Brothers & Company worth more.

No cross examination.

(Signed) EDGAR BETTMANN.

86 Sworn to and subscribed before me this 29th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

And also, VICTOR M. ABRAHAM, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state your name, age, residence and occupation?

A. Victor M. Abraham; age, fifty-two; residence, Haddon Hall, Cincinnati, Ohio; occupation, insurance agent.

Q. 2. Have you ever been connected with the shoe trade; if so where and when?

A. For a number of years I was employed by and was subsequently a member of the firm of Adolph Meyer & Company, Cincinnati and Boston. From about 1879 to 1889 I was at Cincinnati, and subsequently until 1891 in Boston. After that time I have been in the insurance business.

Q. 3. What experience, if any, have you had in advertising?

A. For many years I advertised largely for my firm in various mediums, cataloging, and the like.

Q. 4. Were you acquainted with the Dana-Lytle Shoe Company of Cincinnati?

A. I was.

Q. 5. Do you recollect any brand of shoes manufactured by that concern?

By Mr. HART: The question is objected to, on the ground that it calls for secondary evidence, since the books, records or other
87 memoranda of such supposed company would be the best evidence of the facts attempted to be elicited by this question, if any such facts exist.

A. I do; the American Girl.

Q. 6. Do you know who subsequently manufactured that brand of shoes?

By Mr. HART: Same objection.

A. Wolf Brothers & Company.

Q. 7. Do you know of any catch phrase that has been used in the advertising of the American Girl shoe; if so please state what it is?

By Mr. HART: Same objection; objection is also made upon the ground that the witness has not shown himself qualified to answer this question.

A. I do. "A Shoe as Good as Its Name."

Q. 8. Under what circumstances did you become acquainted with this catch phrase?

By Mr. HART: Objected to as wholly immaterial.

A. I originated it, to use in connection with their advertising. I refer to Wolf Brothers & Company.

Q. 9. Had that catch phrase even been used before that time by any person in connection with the advertising of shoes, to your knowledge?

By Mr. HART: Last objection repeated.

A. Never.

Q. 10. Since you severed your connection with the shoe trade have you had any experience in advertising? If so, what has that experience been?

By Mr. HART: Objected to as wholly immaterial.

A. I have had considerable in connection with the American Credit-Indemnity Company, and in my own personal business, and I have done considerably in the way of advertising for Wolf Brothers & Company.

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Q. 11. Has your experience in advertising for yourself and others been such as to familiarize you with the value of advertised trade-marks and catch phrases?

By Mr. HART: Question objected to, as wholly immaterial, and as calling for a conclusion and the opinion of the witness.

A. It has.

Q. 12. Are you familiar with the character and extent of the business done by The Wolf Brothers & Company in American Girl shoes?

By Mr. HART: Objection to this question is made on the ground that it is wholly immaterial, calls for a conclusion and opinion of the witness, and tends to the introduction of secondary evidence, since the books or other memoranda of The Wolf Brothers & Company would be the only proper evidence of the facts attempted to be elicited by this question.

A. I am.

Q. 13. Are you familiar with the extent to which the Wolf Brothers & Company have advertised the American Girl shoe, and the catch phrase, "A Shoe as Good as Its Name," and the character of the medium employed by them in that advertising?

By Mr. HART: Last objection repeated.

A. I am up to the last few months.

Q. 14. Please state to the Court your opinion as to the value of the trade-mark "American Girl," as applied to shoes by the Complainant?

By Mr. HART: Objection to this question is made, upon the ground that it is utterly immaterial what the witness may conceive to be the value of this supposed trade-mark; and for the further reason that it calls for a conclusion and the opinion of the witness; also that the witness has not shown himself qualified or competent to give an intelligent answer to this question.

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A. It is a difficult matter to place any definite value. It is certainly in my opinion not less than twenty-five thousand, and probably many times that amount.

Q. 15. Please state to the Court your opinion as to the value of the catch phrase "A Shoe as Good as Its Name," as used by the Wolf Brothers & Company in connection with the American Girl shoes?

By Mr. HART: Last objection repeated.

A. I should say it would be difficult to separate the value of the trade-mark and the phrase. Phrases of this character are used to identify the trade-mark, and in my opinion become practically inseparable. I should say that the phrase is about twenty-five per cent of the value of the combined items. My former estimate was based upon the combined value.

No cross examination.

(Signed) VICTOR M. ABRAHAM.

Sworn to and subscribed before me this 29th day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

And also, JAMES J. WOLF, of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state your name, age, residence and occupation?

90 A. James J. Wolf; residence, Avondale, Cincinnati, Ohio; age, thirty-eight. I manufacture ladies' shoes.

Q. 2. How long and where have you been engaged in the manufacture of shoes?

A. I have been engaged in the manufacture of shoes in the city of Cincinnati since March, 1897.

Q. 3. Prior to that time in what business were you engaged, and where?

A. Prior to that time I was engaged in the shoe business at Boston, Mass., both as jobber and manufacturer, from the fall of 1888 to the spring of 1897. Prior to going to Boston I was engaged in the shoe business in Cincinnati from 1886.

Q. 4. Are you connected with the Wolf Brothers & Company, and if so, in what capacity?

A. I am Treasurer and Vice-President of The Wolf Brothers & Company; and have been since the organization of the company, June 12, 1905.

Q. 5. Is the Wolf Brothers & Company a corporation; and if so, under the laws of what State?

By Mr. HART: The question is objected to as calling for secondary evidence.

A. The Wolf Brothers & Company is a corporation, organized under the laws of the State of Ohio.

Q. 6. Prior to the incorporation of your company, what was the style of the concern with which you were connected?

A. Prior to the organization of our stock company we were a partnership under the name of Wolf Brothers & Company.

Q. 7. In what business was that partnership engaged; where, and how long?

91 By Mr. HART: Question objected to on same grounds.

A. That partnership was engaged in business from December, 1897, up to June 12, 1905, and from March, 1897, to December, 1897, the firm name was Felix, Wolf & Company; and I was a partner in the firm of Felix, Wolf & Company. Both the partnerships of Felix, Wolf & Company and Wolf Brothers & Company were engaged in the manufacture of ladies' shoes in Cincinnati.

By Mr. HART: Answer is objected to on the ground that it contains volunteer matter not called for or responsive to the question; and for the further reason that the records or other memoranda of the supposed firms or companies would be the best evidence of such facts if any such facts exist.

Q. 8. Has the shoe manufacturing business to which you have referred been conducted continuously by the two co-partnerships, and the corporation to which you have referred, from March, 1897, to the present time in the city of Cincinnati?

By Mr. HART: Question objected to, as calling for secondary evidence in that the records or other memoranda of such supposed concerns would be the best evidence of such facts if any such facts exist.

A. It has.

Q. 9. Where is the factory of the Wolf Brothers & Company located in the city of Cincinnati?

A. On the north side of Seventh street west of Central avenue.

Q. 10. How long has it been located there?

A. Since November 1st, 1902.

Q. 11. Was the present factory acquired by the corporation, the Wolf Brothers & Company, upon its incorporation, from Wolf
92 Brothers & Company, the co-partnership?

By Mr. HART: Objected to on the ground of calling for secondary evidence.

A. It was.

Q. 12. Prior to November 1st, 1902, where was the factory of Wolf Brothers & Company, the co-partnership, located?

A. On Sycamore street between Seventh and Eighth, in the city of Cincinnati.

Q. 13. How long was the factory in that location?

A. The firm of Felix, Wolf & Company were located in the factory between Seventh and Eighth on Sycamore street from the inception of the partnership in March, 1897, and the firm of Wolf Brothers & Company, who, in December, 1897, succeeded Felix, Wolf & Company, remained in the same location until May, 1898, at which time the factory was partially destroyed by fire, forcing them to seek other quarters. Two or three days following our fire we bought the plant of the Dana-Lytle Shoe Company. It was lo-

cated at Ninth and Sycamore streets, Cincinnati, Ohio, and continued making ladies' shoes at that factory, Ninth and Sycamore, until July, 1898, at which time we again moved to our old location, on Sycamore between Seventh and Eighth, the factory having been rebuilt.

By Mr. HART: The answer is objected to on the ground that it is volunteered argumentative matter not called for by or responsive to the question, and for the further reason that it contains secondary evidence of which the written memoranda books or records relating thereto would be the best evidence.

93 Q. 14. Does the date upon the bill of sale from the Dana-Lytle Shoe Company (Appendix A) correctly indicate the date when Wolf Brothers & Company, the partnership, purchased this factory and brand from the Dana-Lytle Company?

A. The date, May 11th, the date upon which we purchased same, is very fresh in my mind without reference to the bill of sale itself, we having burned out on May 8th, Friday, and bought the plant and trade-mark from them the Monday following, May 11th.

Q. 15. Are you acquainted with the trade publication known as the "Boot and Shoe Recorder"? If so, please state its character and the position it occupies as a trade journal?

A. I am acquainted with the Boot and Shoe Recorder, which is a trade journal issued weekly in the interests of the boot and shoe trade. It ranks high; in fact, first among publications of its class.

Q. 16. I will hand you a copy of that publication bearing date December 30, 1896, and ask you to state if you know whether or not this is an issue of that publication which was made upon the date indicated upon the title-page?

By Mr. HART: Objection to this question is made upon the ground that the witness has not shown himself competent or qualified to answer the question.

A. It is.

(Counsel for Complainant offers in evidence the publication identified above by the witness, with particular reference to the advertisement on page 50 thereof, and asks that same be marked "Wolf Brothers' Exhibit Boot and Shoe Recorder, Dec. 30, 1896," which is accordingly done.)

By Mr. HART: Objection to the introduction in evidence
94 of this exhibit is made, on the ground that it has not been properly authenticated, and is not proved to be a regular issue of the journal of which it appears to be a copy.

Q. 17. Please state, if you know, whether the Dana-Lytle Shoe Company was preceded in its shoe manufacturing business by any other concern and if so, by whom?

By Mr. HART: The question is objected to on the ground that if such concern was preceded in business, or that if it succeeded to the business of any other concern, the written memoranda of such trans-

actions would be the best evidence of that fact; also that the witness does not appear to have been connected with either of such supposed concerns, and he therefore could not have personal knowledge of any such transaction if it took place; and anything he may say in this regard must therefore be hearsay evidence.

A. Yes, by George F. Dana & Company.

Q. 18. At the time of the purchase by your firm of the business of the Dana-Lytle Shoe Company, in what territory had the Dana-Lytle Shoe Company established its trade in the American Girl shoe?

By Mr. HART: Objected to on the ground that it calls for secondary evidence; the records or other memoranda of the Dana-Lytle Shoe Company being the best evidence of such facts, if any such facts existed.

A. I know they had an established trade in Pennsylvania and contiguous territory; while they also sold goods throughout the United States in general; I have occasion to know particularly as regards the Pennsylvania territory by reason of the fact
95 that one of our salesmen, Louis Brown, made a trip through the Pennsylvania field in the interest of Wolf Brothers & Company, having started upon such trip a few days after the purchase of the Dana-Lytle Co. by Wolf Brothers & Company, the Dana-Lytle Shoe Company having furnished a list of customers in that territory.

By Mr. HART: Objection is made to the statement of the witness of what lists may have been furnished him by any other person, since such lists would themselves be the best evidence of such facts.

Q. 19. Since your former partnership, Wolf Brothers & Company, engaged in the manufacture of shoes under the American Girl brand, in what territory have the shoes so branded been sold by the partnership and its successors, the present complainant?

By Mr. HART: Objected to on the ground that the records or other memoranda of such supposed concerns would be the best evidence of such facts if they existed; and for the further reason that it does not appear from any proper evidence in this record that either of such supposed concerns was engaged in the manufacture of shoes under this brand, or that one of them succeeded the other, in such manufacture.

A. Throughout the United States in general, with the possible exception of Nevada and Arizona, and I am not quite sure but that we have one or two customers in either or both of those States, through Canada, Mexico, and European countries, Great Britain, Belgium, France, and we now have an order on file from Amsterdam, Holland, and I am under the impression that we have one or more accounts in South Africa. Our shoes are sold very strongly in Belfast, Ireland.

96 Q. 20. In what manner has the mark, The American Girl, been applied to the shoes thus sold?

By Mr. HART: The question is objected to for the reason that if such supposed mark was ever applied to shoes in any manner such shoes with the mark so applied would be the best evidence of the facts attempted to be elicited by this question; and anything the witness may say in this regard must therefore be secondary evidence.

A. The brand, The American Girl, has been branded on the sole; this name also appears on the top facings of the shoe in the nature of a woven facing, the words "The American Girl" having been woven in the facing; while in the instance of low shoes the name has appeared as well not only on the sole but on what is known as the sock lining, wherever possible to put it on. This brand, The American Girl, has also appeared on the single pair shoe cartons in which the shoes are packed, and the wooden cases in which these cartons in turn are packed have also printed on them the brand, The American Girl. These wooden boxes being delivered by our box-maker printed for us. These wooden boxes vary in size, holding from twelve to sixty pairs each.

By Mr. HART: The latter part of the answer is objected to on the ground that it is volunteer- and not responsive to the question.

Q. 21. Will you produce and permit to be returned with your deposition a specimen pair of the shoes sold by you under the American Girl brand?

A. I can and do hereby produce same.

By Mr. HART: Objection is made to this witness stating what he may conceive to be a specimen pair of their shoes, on the ground that it is for the Court to determine from an inspection of
97 all shoes which may be made by the witness what is or is not a specimen pair showing this supposed mark.

(The shoes produced by witness are offered in evidence by Complainant, and the notary requested to mark the same "Complainant's Exhibit American Girl Shoes," which is accordingly done.)

Q. 22. Will you please produce specimens of the various applications of the mark, "The American Girl," as used by you upon the shoes themselves, and the pasteboard boxes or cartons in which they are packed for shipment and sale, and as used upon the wood cases in which the cartons are packed for shipment?

A. I do herewith produce same.

(Counsel for Complainant offers in evidence the specimens produced by witness, and asks that same be marked "Wolf Brothers Exhibit, American Girl imprint;" which is accordingly done.)

Q. 23. At the time of the purchase by Wolf Brothers & Company of the assets of the Dana-Lytle Shoe Company, was there any interruption in the manufacture or sale of the American Girl shoe?

By Mr. HART: Question is objected to on the ground that the records or other memoranda of such supposed company would be the best evidence of such fact, if any such fact exists.

A. There was not; in fact, when Wolf Brothers & Company

bought out the Dana-Lytle Shoe Company, the Dana-Lytle Shoe Company had shoes in process of manufacture under the brand of the American Girl, and while these were making we were cutting and starting work upon others so that by the time that the
98 ones in process were about completed, the ones which we had started were nearing completion.

By Mr. HART: Answer is also objected to, on the ground that it is volunteered and not responsive to the question.

Q. 24. Was there any interruption in the manufacture or sale of the American Girl shoes by Wolf Brothers & Company from that time until the time when the assets of Wolf Brothers & Company were acquired by the Complainant?

By Mr. HART: The objection following the last preceding question is here repeated.

A. Positively none.

Q. 25. Have the manufacture or sale of the American Girl shoes been interrupted at any time since then?

By Mr. HART: Same objection repeated.

A. They have not.

Q. 26. Please state the total amount of sales of shoes under the American Girl brand by the Complainant and its predecessor, Wolf Brothers & Company, the co-partnership?

By Mr. HART: The question is objected to on the ground that the records or other proper memoranda of such supposed companies would be the best evidence of such facts, if any such facts exist; and anything the witness may say in this regard must therefore be secondary evidence.

A. Approximately two and a quarter million dollars.

Q. 27. To what extent has the American Girl brand of shoes been advertised, if at all, by the Complainant and its predecessor, Wolf Brothers & Company?

By Mr. HART: Last objection repeated. Also, if such supposed brand was ever advertised such advertisements would them-
99 selves be the best evidence of such fact.

A. Through catalogs, which we have sent to the consumer, for the benefit of the dealer; through poster signs, and smaller fence signs; through a magazine known as the American Girl; through a magazine, "Our Girl," published by us at large expense and sent to the dealer gratuitously; by means of various advertising devices, both of outdoor and indoor display; and by a force of competent, high-priced salesmen. Also, through the trade journals, among which are the Boot and Shoe Recorder, the Shoe and Leather World, and at times other of the trade journals; the American Girl shoe has also been widely advertised through the medium of the daily and weekly papers throughout the country, partly at an expense to ourselves, and partly at the expense of the dealers in the American Girl shoes.

Q. 28. As an incident of that advertising, have you had occasion to employ a catch phrase; if so, what phrase, and how long have you employed it?

By Mr. HART: Last objection repeated.

A. We have employed a catch phrase, "A Shoe as Good as its Name," and which catch phrase has appeared in all our ads where space permitted, since either late in 1899, or the early spring of 1900.

Q. 29. I call your attention to two volumes of newspaper "ad" clippings which have been filed in this cause as "Complainant's Exhibit Specimen Advertisements," and ask you by whom these volumes were compiled?

By Mr. HART: The question is objected to as wholly immaterial.

100 A. They were compiled under my personal supervision, and in a large part by myself.

Q. 30. Of what do the contents of these two volumes consist?

By Mr. HART: The question is objected to, on the ground that the volumes in question are themselves the best evidence of such facts, and for the further reason that the witness does not appear to know anything about the origin of the contents of said volumes, or their authenticity.

A. They consist of "ads" of our customers; that is to say, "ads" of the American Girl shoes, which "ads" were gotten out by our customers, and copies as in these two books sent to us. These are for the larger part newspaper "ads," while in a smaller part they are circular "ads" in the shape of catalogs and posters or folders; while a few items in the books are clippings from magazines.

Q. 31. Under what circumstances did you secure the various specimens of advertising done by your customers which appear in these volumes?

By Mr. HART: Objected to as wholly immaterial.

A. They were sent to us by our customers.

Q. 32. For what purpose?

By Mr. HART: Objected to on the ground that it is wholly immaterial, for the reason that the witness does not appear to be capable of stating what the purpose of the supposed customers may have been in sending such matter to them, and for the further reason that it calls for a conclusion and opinion of the witness.

A. For the purpose of showing to us what they were expending in advertising the American Girl shoe, and the value they
101 placed upon the line, in advertising it; and by "it" I mean the American Girl shoe. In some instances these ads were sent to us in order to show us that they had expended the advertising allowance we had agreed to give them; while in other instances they were sent to show what had been expended by them personally.

Q. 33. Please state, if you can, the approximate total amount which has been expended by Wolf Brothers & Company, the part-

nership, and by the Complainant, in advertising the American Girl shoes?

By Mr. HART: Question objected to, on the ground that it calls for secondary evidence, in that the records or other proper memoranda of such supposed companies would be the best evidence of such facts, if any such facts ever existed.

A. Sixty thousand dollars.

(Counsel for Complainant offers in evidence the two volumes of clippings identified by the witness, and asks that the same be marked "Complainant's Exhibit Specimen Advertisements, Vol. 1," and "Complainant's Exhibit, Specimen Advertisements, Vol. 2," respectively, which is accordingly done.)

By Mr. HART: Objection to the introduction of those two volumes in evidence is made on the ground that they have not been properly identified or authenticated.

Q. 34. Please produce specimens of the periodical publications entitled, "Our Girl," and "The American Girl," to which you have referred?

A. I here produce specimens of each.

(Counsel for Complainant offers in evidence the specimen numbers introduced by witness, and asks that same be marked "Wolf
102 Brothers' Exhibit, 'Our Girl,'" and "Wolf Brothers' Exhibit, 'The American Girl,'" respectively, which is accordingly done.)

Q. 35. Please produce specimens of some of the other form of advertising not included in the exhibits thus far offered, in which you have advertised the American Girl shoe, particularly in connection with the phrase, "A Shoe as Good as Its Name"?

A. I here produce such specimens.

(The specimens produced by the witness are offered in evidence by Complainant and marked "Complaint's Exhibits, Miscellaneous Advertisements.")

Q. 36. When did you first learn of the use by the defendant of the mark "American Lady" in application to shoes?

A. Through an "ad" in the Shoe and Leather Gazette, issue of January 5th, 1901.

By Mr. HART: Objection to this witness stating what was contained in any issue of the periodical in question is made on the ground that copies of such periodical properly authenticated would be the best evidence as to their contents.

Q. 37. Can you produce a copy of the defendant's advertisement which you then saw; if so, please do so.

A. I can, and here produce same.

(Counsel for Complainant offers the advertisement produced by the witness in evidence, and asks that same be marked "Wolf Brothers' Exhibit, Hamilton-Brown Advertisement of January 5, 1901," which is accordingly done.)

By Mr. HART: Objection to the introduction in evidence of this exhibit is made, on the ground that it is not properly authenticated; the exhibit appears to be but a fragment or portion of the
103 whole; and for the further reason that this does not appear to have been taken from a regular edition of the periodical in question.

Q. 38. Is this the identical advertisement which you saw at that time? I refer to the Exhibit that you have just produced and offered?

By Mr. HART: Objected to as wholly immaterial.

A. Positively, yes, sir.

Q. 39. Upon seeing this advertisement what steps, if any, did you take to advise the defendant of your rights in the premises?

A. Upon seeing this advertisement on January 7th, 1901, I wrote the Hamilton-Brown Shoe Company a letter of which I produce a copy.

By Mr. HART: Objection to this witness stating the nature or contents of the letter supposed to have been written by him to Hamilton-Brown Shoe Company is made, on the ground that such letter would of itself be the best evidence of such fact, and any statement of the witness in that regard must therefore be secondary evidence.

(Counsel for Complainant offers in evidence copy of letter of January 7th, 1901, produced by the witness, and asks that the same be marked, "Complainant's Exhibit, Appendix D," which is accordingly done.)

By Mr. HART: Objection to the introduction in evidence of this instrument is made on the ground that it is manifestly but a copy of a supposed original, and it is therefore secondary evidence, and no foundation has been laid for the introduction of secondary evidence.

Q. 40. What response, if any, did you receive from the defendant?

A. January 9th, 1901, we received a letter from the Hamil-
104 ton-Brown Shoe Company in reply to ours of January 7th, 1901, but which letter bears no date, and which letter I here produce.

(Letter produced by the witness is offered in evidence by Complainant, with the request that same be marked "Complainant's Exhibit, Appendix E," and which is accordingly done.)

By Mr. HART: Objection to the introduction in evidence of this exhibit is made on the ground that it has not been properly authenticated, and appears to be but a fragmentary portion of the correspondence, the remainder of which has not been produced or accounted for.

Q. 41. What response, if any, did you make to the letter just offered in evidence as Appendix D?

A. I wrote the defendant under date of January 9th, 1901, a copy of which letter I herewith produce, and to which letter we have received no reply.

(The copy of the letter produced by the witness is offered in evidence by Complainant, with the request that same be marked "Complainant's Exhibit, Appendix F," which is accordingly done.)

By Mr. HART: The objection appearing following Complainant's Exhibit "Appendix D," is here repeated as applicable to the introduction in evidence of this exhbit.

Counsel for Complianant now gives notice to the defendant to produce upon final hearing the originals of the letters addressed to the defendant by Wolf Brothers & Company, under date of January 7, 1901, and January 9, 1901, whereof copies have today been offered in evidence by Complainant, as "Complainant's Exhibit Appendix D," and "Complainant's Exhibit, Appendix F," respectively.

By Mr. HART: Objection to this notice is made on the
105 ground that it is not made at a proper time, or in a proper manner or form; and for the further reason that if any such letters existed the time set for their production is not proper.

Q. 42. What in your opinion is the value of the trade-mark American Girl as applied to shoes by Complainant?

By Mr. HART: Objection to this question is made upon the ground that it calls for a conclusion and opinion of the witness, and for the further reason that the witness has not shown himself to be in possession of facts which will enable or qualify him to give an intelligent answer to this question.

A. The tradé-mark American Girl has been a big dividend paying proposition, and its value is certainly in excess of ten thousand dollars.

By Mr. HART: The answer is objected to, as containing volunteered matter not responsive to the question.

Q. 43. Of what value has the catch phrase, "A Shoe as Good as Its Name," been to Complainant in its business?

By Mr. HART: The objection appearing following Q. 42 is here repeated.

A. Value of over ten thousand dollars.

Q. 44. What is the present value of that catch phrase to Complainant?

By Mr. HART: Same objection.

A. Over five thousand dollars.

Q. 45. Has there been any change in the value of the trade-mark American Girl and the catch phrase, "A Shoe as Good as Its Name," since the time of the filing of this suit?

106 By Mr. HART: Same objection. Objection is also made on the ground that such matter is absolutely immaterial and without relevance to this suit.

A. There has been.

Q. 46. What were the value of the catch phrase and trade-mark at the time of the filing of this suit?

By Mr. HART: The objection appearing following Q. 42 is here repeated.

A. The trade-mark, "American Girl," and the catch phrase, "A

Shoe as Good as Its Name," each had a value of over ten thousand dollars.

Q. 47. At the time of the filing of this suit what was the value of the good-will of the Complainant?

By Mr. HART: Same objection.

A. Over ten thousand dollars.

Q. 48. From the time when Wolf Brothers & Company, the co-partnership, succeeded to the business of the Dana-Lytle Shoe Company, please state whether or not the right of ownership of Wolf Brothers & Company, and the Complainant, as its successor, had been generally acquiesced in by the shoe trade of the United States?

By Mr. HART: Same objection.

A. It has been.

Q. 49. Please state whether or not the use and possession of that trade-mark by the Complainant and the partnership, its predecessor, have been quiet, peaceable and undisturbed, except for the acts of defendant?

By Mr. HART: Same objection.

A. They have been.

Q. 50. Since the first adoption by the co-partnership, the predecessor of the Complainant, of the catch phrase, "A Shoe as
107 Good as Its Name," what steps, if any, have been taken by the defendant to avail itself of the benefits of the phrase as used by you in advertising?

By Mr. HART: Same objection.

A. In their advertisements of American Lady shoe, they have used the phrase, "The shoe deserves its name."

By Mr. HART: The answer of the witness is objected to on the ground that if such statement was made in connection with an advertisement by the defendant, such advertisement properly authenticated would be the best evidence of such fact.

Q. 51. Can you and will you produce an advertisement of the defendant containing the language to which you refer?

A. I can and do herewith produce a copy of the Shoe and Leather Gazette, issue of October 22nd, 1903. The Shoe and Leather Gazette is a trade publication published at St. Louis, Mo. Said issue contains an advertisement of American Lady shoe, and the expression referred to in my former answer appears in that "ad."

(Complainant offers in evidence the publication referred to by witness, and asks that the same be marked "Complainant's Exhibit, Gazette, Oct. 22, 1903," which is accordingly done.)

By Mr. HART: Objection to the introduction in evidence of this exhibit is made on the ground that it is not properly authenticated, and does not appear to be a regular issue of the periodical in question.

By the WITNESS: I also produce one of the defendant's catalogs of the American Lady shoe, containing the phrase, "With the Char-

acter of the Woman," and several other specimens of defendant's advertisements containing the same phrase. The defendant's catalog is entitled "Shoelight," received by us from one of our cus-
108 tomers March 26, 1906. The specimen advertisements are The Ladies' Home Journal, for April, 1906; the advertisement occurring at page 59; and The Delineator, issue of April, 1906, at page 715.

(Complainant offers in evidence the three items produced by the witness, and asks that the same be marked as follows: The Defendant's Catalog, "Complainant's Exhibit No. 7." Ladies' Home Journal, as "Complainant's Exhibit No. 8;" The Delineator, as "Complainant's Exhibit No. 9.")

By Mr. HART: Objection to the introduction in evidence of this supposed catalog—"Shoelight"—Exhibit No. 7, is made on the ground that it does not appear by any competent evidence to be the product of the defendant, and any information the witness may have in regard to its origin or authorship is based upon hearsay statements by others. Objection to the introduction in evidence of "Complainant's Exhibit No. 8," and "Complainant's Exhibit No. 9," is made on the ground that they are not properly authenticated and do not appear to be regular issues of the periodicals in question, and no person capable of testifying to such fact, if it be a fact, has been called for that purpose.

By consent further taking of this deposition adjourned until 10:00 a. m., Monday, Dec. 31, 1906.

MONDAY, December 31, 1906. 10:00 o'clock a. m.

Met pursuant to adjournment; counsel present as before.

James J. Wolf.

Direct examination resumed by Mr. HOPKINS:

Q. 52. Since the organization of the Complainant's corpo-
109 ration has there been any change in the amount of its capital stock?

By Mr. HART: Question objected to on the ground that the records or other memoranda of such company would be the best evidence of such fact, and the statement of the witness in this regard must therefore be secondary evidence.

A. There has not been any change.

Q. 53. Prior to the institution of this suit, did the complainant have an established trade for its shoes vended under the American Girl brand in the State of Missouri; and if so, in what part of the State of Missouri?

By Mr. HART: Last objection repeated.

A. It did have, and through the State in general.

Q. 54. I now call your attention to the Exhibits Nos. 2, 3, 4, 5

and 6 accompanying the Bill of Complaint, and will ask you to describe, if you can, each of such exhibits.

By Mr. HART: Question objected to, on the ground that such exhibits are of themselves the best evidence of any facts or statements the witness may make in answer to this question.

A. Exhibit No. 2 is a catalog got out by Wolf Brothers & Company descriptive of the American Girl shoe, with illustrations of same, Spring of 1901. This catalog was published in the spring of 1901. Exhibit No. 3 is a catalog illustrating and describing the American Girl shoe, issued by Wolf Brothers & Company, Fall of 1904. Exhibit No. 4 is a catalog describing and illustrating the American Girl shoes, issued by Wolf Brothers & Company, Spring of 1905. Exhibit No. 5 is a catalog describing and illustrating the American Girl shoe, issued by The Wolf Brothers & Company,
110 Fall of 1905. Exhibit No. 6 is a catalog got out by Hamilton-Brown Shoe Company, illustrating and describing American Lady shoes, issued in the fall of 1905.

By Mr. HART: Objection to the answer is also made, on the ground that the records or other memoranda of Complainant Company would be the best evidence of the facts stated in this answer, if any such facts exist; the statement of the witness is therefore secondary evidence. Objection is also made to the statement that Exhibit No. 6 was gotten out by Hamilton-Brown Shoe Company, on the ground that the records of the defendant company would be the best evidence of such fact, if it be a fact; and for the further reason that the witness does not appear to have personal knowledge of such fact or qualified to give an accurate statement in this regard.

Q. 55. Referring to the cover page design of Complainant's Exhibit No. 3, being a representation of Uncle Sam and a lady in full dress dancing a minuet, I will ask you to state whether Wolf Brothers & Company were the first to employ this design, or a design of similar character in the advertising of shoes?

By Mr. HART: Question objected to, on the ground that the witness does not appear to have a knowledge of such facts as will enable him to give an accurate or intelligent answer to this question.

A. They were.

Q. 56. After the publication of this catalog, Complainant's Exhibit No. 3, what steps, if any, were taken by the defendant to appropriate this, or a similar design for the advertisement of its so-called American Lady Shoe?

111 By Mr. HART: Last objection repeated; objection is also made on the ground that the question calls for a conclusion and opinion of the witness.

A. The defendant issued a catalog in which are illustrations of the American Lady shoe, and on the front cover of which catalog is a color illustration of George Washington dancing a minuet with Martha Washington. I here produce a copy of the catalog I have referred to.

By Mr. HART: Objection to the answer of witness is made for the same reason stated following the answer to Q. 54.

(Complainant offers in evidence the catalog produced by the witness, and asks that the same be marked as "Complainant's Exhibit No. 10," which is accordingly done.)

By Mr. HART: Objection to the introduction of this Exhibit in evidence is made on the ground that its authenticity, origin, date of issue, or authorship has not been proved by any competent or credible evidence.

Q. 57. Referring to the catalog of Wolf Brothers & Company, Complainant's Exhibit No. 2, please point out to the Court the place in the said catalog where the styles 407 and 408 of the American Girl shoe are illustrated?

A. These two styles 407 and 408 appear on page 6, of the Exhibit you refer to.

Q. 58. Prior to the issuance of this catalog, Complainant's Exhibit No. 2, had you used these same numbers, 407 and 408, in connection with the vending of the American Girl shoes; and if so, how and for what purpose did you use said numbers?

By Mr. HART: Question objected to, on the ground that the record or other memoranda of defendant company are the
112 best evidence of any such facts, if any such facts exist.

A. Yes. We had used these numbers for the purpose of designating certain styles of the American Girl shoe.

Q. 59. How long prior to the issuance of this catalog, Complainant's Exhibit No. 2, had you so used the numbers 407 and 408?

By Mr. HART: Same objection.

A. To the best of my recollection, at least a year. And in all likelihood, somewhat longer than that.

Q. 60. Was your adoption of these numbers for the purpose you have described made arbitrarily?

By Mr. HART: Question objected to, as calling for a conclusion and opinion of the witness.

A. Yes, sir.

Q. 61. At the time when you adopted these numbers for the described purpose, were the numbers 407 and 408 being used, or had they been used at any time, by any other person, or firm, or corporation, in application to shoes to your knowledge?

By Mr. HART: Question objected to, as calling for a conclusion; and for the further reason that witness does not appear to have sufficient knowledge of such facts to give an accurate and intelligent answer in regard to whether or not such numbers had been used in this manner, or at the time in question.

A. They were not so being used.

Q. 62. In Complainant's Exhibit No. 3 did Wolf Brothers & Company make a like use of the numeral 407; and if so, at what page of this Exhibit?

By Mr. HART: Question objected to, on the ground that
113 the Exhibit is of itself the best evidence of such facts, if any such facts exist.

A. They did, on page 5, of the Exhibit you refer to.

Q. 63. Referring to Complainant's Exhibit No. 4, and with particular reference to the numeral 403, as used at page 31 of that Exhibit, and 404 as used at page 30 of that Exhibit, please state to the Court for what purpose these numerals were employed by Wolf Brothers & Company, and how long they had been employed for that purpose prior to the issuance of the catalog of which Exhibit No. 4 is a specimen?

By Mr. HART: The question is objected to, on the ground that it calls for secondary evidence, in that the records or other memoranda of such supposed company would be the best evidence of such facts, if any such facts exist.

A. They were used for the purpose of designating certain styles of the American Girl shoe; and these two numbers have been used since the early part of 1900, and to the best of my knowledge earlier than that by Wolf Brothers & Company.

Q. 64. At the time of the inception of the use of these numerals 403 and 404, by Wolf Brothers & Company, for the purpose you have described, were those numerals being used or had they been used by any other person, firm or corporation to your knowledge in application to shoes?

By Mr. HART: The objection appearing following Q. 61 is here repeated.

A. They were not being used, nor had they been used, for that purpose.

Q. 65. Are the same numerals used for the same pur-
114 pose in Complainant's Exhibit No. 5, at pages 24 and 29, respectively?

A. Yes, sir.

Q. 66. Please state to the Court in what manner the catalogs of Wolf Brothers & Company illustrated by Complainant's Exhibits Nos. 2, 3, 4 and 5, were circulated, the class of merchants or others among whom they were circulated, and the approximate number of each of said catalogs so distributed?

By Mr. HART: Question objected to on the ground that it calls for secondary evidence, in that the records or other memoranda of Complainant would be the best evidence of such facts, if any such facts exist.

A. They were circulated among the retail shoe trade, dealers in shoes throughout the United States in general, and more or less abroad, and were also sent at the instance of the customers of Wolf Brothers & Company and The Wolf Brothers & Company directly to consumers. These were sent all of them, through the United States mails to consumers, lists of which had been furnished by the customers, whose names appeared on the back covers of catalog

Of the catalog represented by Exhibit No. 2 the issue was to the best of my recollection, 10,000; of catalog Exhibit No. 3, the issue to the best of my knowledge and remembrance was 75,000; of catalog as represented by Exhibit No. 4, the issue was 100,000; and of the catalogs as represented by Exhibit No. 5, to the best of my knowledge the issue was 75,000. To the best of my recollection the catalog as represented by Exhibit No. 2 was not sent directly to consumers by Wolf Brothers & Company, but the other catalogs as per Exhibits Nos. 3, 4 and 5, were so sent as per the earlier part of my answer.

115 By Mr. HART: Objection to the statement by the witness as to what list or lists was furnished them is also made on the ground that such list or lists would be the best evidence of such facts, if any such facts exist.

Q. 67. Since your establishing of your use of the numerals 403, 404, 407 and 408, in application to your American Girl shoes, how has the Defendant conducted itself in regard to the use of those numbers upon its so-called American Lady shoe?

By Mr. HART: The question is objected to, upon the ground that it calls for a conclusion and the opinion of the witness and for the further reason that the witness does not appear to have a knowledge of such facts as will enable him to give an intelligent and accurate answer to this question; and for the further reason that the records or other memoranda of defendant company would be the best evidence of such facts if any such facts exist.

A. They have used the same numbers to designate styles of American Lady shoes, as shown in Exhibit No. 10, at pages 75, 76 and 77; and as shown in Exhibit No. 6, at the several pages which are not numbered, but which are the 7th, 16th, 17th, and 18th.

Q. 68. Did Wolf Brothers & Company prior to the complainant's incorporation have an established trade in the State of Illinois in the American Girl shoes; and if so, when did they first begin to establish that trade?

By Mr. HART: Question objected to on the ground that it calls for secondary evidence, in that the records or other memoranda of such supposed companies would be the best evidence of such facts if any such facts exist, and the statement of the witness in this regard would therefore be secondary evidence.

116 A. They did have, and they first began to establish that trade in the fall of 1899, or spring of 1900.

Q. 69. In their efforts to establish that trade did Wolf Brothers & Company employ any traveling salesman in the State of Illinois; and if so, what was his name?

By Mr. HART: Same objection; objection is also made on the ground that the contract between the complainant company and such salesman would be the best evidence of such fact.

A. They did; his name was and still is, Julius L. Selig.

Q. 70. What was the result of his efforts in that territory in the sale of the American Girl shoe?

By Mr. HART: Last objection repeated.

A. He succeeded in placing the line with a large number of reliable merchants; and by line I mean the American Girl shoe. He sold approximately fifty thousand dollars a year.

Q. 71. After the said Selig had established this trade, what if anything was done by the defendant to the end of diverting that trade from your house to itself?

By Mr. HART: Question is objected to on the ground that it calls for the conclusion and opinion of the witness.

A. The defendant engaged the services of the said Selig to travel the same territory he had traveled for Wolf Brothers & Company, or a part thereof.

By Mr. HART: The answer of the witness is objected to on the ground that if the defendant engaged the services of said Selig as indicated by this answer, the records of the defendant company, and the contract between defendant and Selig would be the best evidence of said fact, and anything the witness may say in
117 this regard must therefore be secondary evidence and no foundation has been laid for the introduction of secondary evidence; objection is also made on the ground that it does not appear that the complainant has or ever had a monopoly upon or a right to a monopoly upon the services of persons skilled in this line of work, or that defendant trespassed in any way upon the rights of the complain-nt in employing such persons.

Q. 72. State if you know whether said Selig engaged in the sale in that territory of the defendant's so-called American Lady shoe?

By Mr. HART: The objection appearing following the last preceding answer is here repeated.

A. He did.

Q. 73. Please state what in your opinion is the value of the complainant's right to be exempt from unfair competition in trade?

By Mr. HART: Objected to on the ground that it calls for the conclusion and opinion of the witness; and for the further reason that the witness has not shown himself to be in possession of such facts as would enable him to give an intelligent or accurate answer to this question.

A. More than one hundred thousand dollars.

(Counsel for complainant offers in evidence a printed uncertified Patent Office copy of the Certificates of Trademark Registration No. 36514, issued to Gale Shoe Mfg. Co., June 4, 1901; and asks that same be marked as "Complainant's Exhibit No. 11," which is accordingly done.)

(It is stipulated by counsel that printed uncertified Patent Office copies of trademark registrations may be introduced in evidence with the same force and effect as if the same were duly
118 certified: subject to correction if error is found therein.)

(Counsel for Complainant offers in evidence a certified

copy of the Assignment from Gale Shoe Mfg. Co. to Wolf Brothers & Company of the mark American Girl as registered in Certificate No. 36514 recorded August 1, 1903, liber W67, page 338, of Transfers of Patents, a copy being returned herewith, as "Appendix C;" the original being marked "Complainant's Exhibit 12.")

By Mr. HART: The introduction of this document in evidence is objected to on the ground that it is wholly irrelevant and immaterial, and for the further reason that it is not properly authenticated or identified with any issues in or any party to this suit.

(Counsel for Complainant offers in evidence a printed uncertified Patent Office copy of the Certificate of Trademark Registration No. 56100, issued August 21, 1906, to The Wolf Brothers & Company, and asks that the same be marked as "Complainant's Exhibit No. 13," which is accordingly done.)

(Counsel for Complainant offers in evidence the Certificate of Trademark Registration numbered 1365, issued by the Secretary of the Commonwealth of Massachusetts, June 27, 1901, to Wolf Brothers & Company; and asks that the same be marked as "Complainant's Exhibit No. 14," which is accordingly done.)

(Counsel for Complainant offers in evidence the Certificate of Trademark Registration, numbered 1366, issued by the Secretary of the Commonwealth of Massachusetts, June 27, 1901, to Wolf Brothers & Company; and asks that the same be marked as "Complainant's Exhibit No. 15"; which is accordingly done.)

119 (Counsel for Complainant offers in evidence the Notice of Opposition of The Wolf Brothers & Company in Opposition No. 39, in the United States Patent Office, said Opposition being entitled, "The Wolf Brothers & Company against Hamilton-Brown Shoe Company," and requests that the same be marked "Complainant's Exhibit, Appendix I"; also, the Answer of Hamilton-Brown Shoe Company in the same case, and requests that the same be marked "Complainant's Exhibit, Appendix J"; both exhibits being marked by the notary, as requested.)

By Mr. HART: Objection is made to the introduction in evidence of these two documents on the ground that such documents are wholly immaterial and irrelevant to any issue involved in this suit: that they are wholly without probative force in this suit and can serve no purpose other than to unnecessarily congest the record and divert the attention of the Court from the real issues in this suit.

(Counsel for Complainant offers in evidence a copy of the record of The Wolf Brothers & Company in the case of the Wolf Brothers & Company, Opponent, against Hamilton-Brown Shoe Company, Applicant, in the U. S. Patent Office, Opposition No. 39, and asks that the same be marked "Complainant's Exhibit, Appendix K," which is accordingly done.)

By Mr. HART: Last objection repeated, and counsel protests against this manner of unnecessarily congesting the record, which has already exceeded any reasonable volume or length for the amount of testimony taken: and the attention of the Court is called to the

fact that this is mere surplusage, and its introduction is wholly without right or authority of law.

(Counsel for Complainant offers in evidence a printed
120 uncertified Patent Office copy of the Certificate of Trade-mark Registration No. 43640, issued Nov. 8, 1904, to Hamilton-Brown Shoe Company; and asks that same be marked "Complainant's Exhibit No. 16," which is accordingly done.)

Q. 74. Has any incident recently come to your attention illustrating the confusion existing in the minds of the trade between the terms "American Lady" and "American Girl"; if so, please state what the incident was?

By Mr. HART: The question is objected to as calling for a conclusion and the opinion of the witness, and the repetition of questions formerly propounded to this witness during his direct examination in this suit.

A. There has. Under date of November 22nd, of this year I received the following communication from Sol Stein, of Columbia City, Indiana:

Stein's Bee Hive, Columbia City, Ind.

COLUMBIA CITY, IND., 11-22.

Wolf Bros., Cincinnati, Ohio.

GENTLEMEN: One of our clerks wore a pair of Am. Lady shoes and they did not give satisfactory wear. Mr. Peck saw them and took the number of them down and told me to replace them with a new pair for which you will please credit my a/c.

Yours respectfully,

SOL. STEIN."

Under date of Nov. 24, 1906, I answered him as follows:

(Letter-head of Wolf Bros. & Co.)

CINCINNATI, O., U. S. A., Nov. 24, 1906.

Mr. Sol. Stein, Columbia City, Ind.

DEAR SIR: We are in receipt of your favor of the 22nd inst., and in reply beg to state that we are not making "Ameri-
121 can Lady" shoes, hence we ask your further advices in the matter and trust to hear from you promptly. With kind regards, we are,

Truly Yours,

THE WOLF BROS. & CO.
J. J. WOLF, *Treasurer.*"

Mr. Stein returned my letter to me, with the endorsement at the bottom, as follows: I made an error, it is the "American Girl." S. Stein."

(Counsel for Complainant offers in evidence the post-card from Stein identified by the witness, and asks that same be marked, "Complainant's Exhibit No. 17," which is accordingly done; and

offers the letter of Wolf Bros. & Co., produced by witness, and asks that same be marked as "Complainant's Exhibit No. 18," which is accordingly done.)

By Mr. HART: Objection to the introduction of evidence of the said two documents is made on the ground that they are a mere fragmentary portion of correspondence and for the further reason that the postal-card in question is not properly authenticated, and the statements contained therein are mere hearsay statements not made under oath.

Cross-examination by Mr. HART:

X Q. 1. Are you familiar with the advertising methods of the various prominent shoe manufacturers of the United States?

A. Why, in reading magazines and any other matter that comes to my attention I look at any shoe ads that appear. I have also seen catalogs issued by various manufacturers; also, newspaper ads and posters.

X Q. 2. Do you know it to be a fact that for a number of years the Hamilton-Brown Shoe Company has advertised extensively the name "American Lady" as applied to shoes?

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A. I have seen quite a number of ads of the Hamilton-Brown Shoe Company of America Lady shoes.

X Q. 3. Have you seen such ads almost without interruption since the time which you state that you first saw such an ad in the Boot and Shoe Recorder on January 5th, 1901?

A. I have not stated that I saw an ad of Hamilton-Brown in Boot and Shoe Recorder of January 5th, 1901; and to the best of my recollection Hamilton-Brown were not advertising in the Boot and Shoe Recorder in that year.

X Q. 4. Possibly I am mistaken, and your statement related to the Shoe and Leather Gazette instead of the Boot and Shoe Recorder; please answer the question as applied to the Shoe and Leather Gazette?

A. We do not subscribe to the Shoe and Leather Gazette, and I do not read it regularly, but such copies as I have gone through have usually contained some form of ad of Hamilton-Brown, and I have also seen ads of Hamilton-Brown in magazines since I first saw the one in the Shoe and Leather Gazette referred to.

X Q. 5. Have you not known ever since you saw the advertisement referred to that during all the time since then Hamilton-Brown Shoe Company has been employing practically every device known to the advertising art in advertising the American Lady shoe?

A. To the best of my recollection it is only within the past two years or possibly three that they have employed the magazines; that is to say, the monthly magazines, as a medium. By magazines I refer to magazines of general circulation, not trade journals.

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X Q. 6. You did know, however, that during all of that time Hamilton-Brown Shoe Company was advertising the American Lady Shoe quite extensively, did you not?

A. I knew it principally through the inroads they were making

into our trade. I can only repeat my former answer, that I have seen their ads from time to time during that period.

X Q. 7. Did you ever take any steps for the purpose of testing the right of Hamilton-Brown Shoe Company to use the words "American Lady" in connection with shoes prior to the institution of this suit?

A. Aside from the letters I wrote them which are in evidence as exhibits in this case, and our opposition proceedings against them in the Patent Office, we have taken no steps until the commencement of this present suit.

X Q. 8. When was the Opposition proceedings to which you have referred instituted?

A. July 15th, 1905.

X Q. 9. Did you not know prior to that time that on November 8th, 1904, Hamilton-Brown Shoe Company had registered the name "American Lady" as a trade-mark for shoes in the United States Patent Office?

A. I did not.

X Q. 10. When did you first learn of this?

A. My attention was called to it by Mr. Jones a few days prior to our filing Opposition proceedings.

X Q. 11. Please give the lowest and highest prices at which you sell boots or high shoes, and low cut shoes, to the dealers, and also state the highest and lowest prices charged by the dealers to
124 the consumers. Answer this question according to the prices of such shoes at the time of the institution of this suit?

A. Our prices on low cuts to dealer ranged from a dollar and a half to two dollars, with some few styles as high as two fifteen; while our price of boots or high cut shoes as they are also called, ranged from a dollar eighty-five up to either two fifteen or two and a quarter. Some of these shoes were sold by the dealer at a price to suit himself, as no price appears on the goods; while on some of the Oxfords the price in some instances was branded two dollars and others two fifty, and in others three dollars. This also applies to boot- or high cut shoes as regards no price being stamped, while others are branded two fifty, and others three dollars; while I am not quite sure but that we may have branded more or less three and a half or four dollars where our trade has requested; and particularly so as regards Canadian trade, where they have requested the price branded at all.

X Q. 12. What percentage of your shoes sold under the name "American Girl" do you estimate as being sold to the consumer at a price in excess of two dollars and fifty cents?

A. That is a pretty hard question to answer off-hand, but I should say ten per cent or more.

X Q. 13. When did you first consider the advisability of instituting a suit for the purpose of testing the right of Hamilton-Brown Shoe Company to use the name "American Lady" in connection with shoes?

A. When our counsel advised us that the time to do so was ripe.

X Q. 14. When did your counsel so advise you?

A. At the time this suit was instituted.

X Q. 15. Did you not consider the advisability of instituting such a suit prior to the time that you did institute this suit?

125 A. Well, I do not know what my thoughts may have been, but I never sought counsel in the matter until shortly before.

X Q. 16. Was you not under the impression prior to the time that you sought counsel as you have stated, that your right might be infringed upon by the use of the name "American Lady" in connection with shoes by Hamilton-Brown Shoe Company?

A. My letter to Hamilton-Brown of January 7th, 1901, is the best answer to that question.

X Q. 17. Did you not think of this matter in any manner or in any way, or have any impression in regard to it, between the time that you state that you wrote that letter to Hamilton-Brown Shoe Company on January 7th, 1901, and the time that you state that you consulted counsel just prior to the institution of this litigation?

A. Yes, I have thought of it from time to time, but their aggression kept growing so steadily worse, and the loss of our trade in American Girl on account of American Lady became so clearly manifest, that I felt something must be done about it, to stop the defendant in the use of the name, "American Lady."

X Q. 18. Then you were under the impression during all of the time between January, 1901, and the time that this suit was instituted, January 29th, 1906, that your rights were being infringed upon in the manner complained of, but you did not take any steps for the purpose of testing the right of Hamilton-Brown Shoe Company to use the name "American Lady" in connection with shoes except in the manner in which you have stated, to-wit, by writing them the letter which you state you did write on January 7th,

126 1901, and the Opposition which you made in the U. S. Patent Office, which was filed July 15th, 1905, to the Registration by Hamilton-Brown Shoe Company of the name "American Lady" as a trade-mark for shoes. Is that a fact?

A. I felt that my letter of January 7th, 1901, was sufficient notice to them that they were infringing our mark, "American Girl," and as soon as their application for registration of the name, "American Lady" was made under the new trade-mark law, which as I understand it, went into effect on April 1st, 1905, I felt under the advice of counsel that we should oppose the registration to determine what the courts thought of the matter.

X Q. 19. Do you know the kind of carton—single pair cartons—in which Hamilton-Brown Shoe Company placed the shoe "American Lady" upon the market?

A. I have never seen but one carton of the Hamilton-Brown Shoe Company in which the American Lady shoe is packed, and which carton I now hold in my hand, the name American Lady appearing on the front of the carton, the name Hamilton-Brown Shoe Company appearing on the lid strip of this carton, a picture of a girl appearing on the cover of this carton, on the top thereof, the words "American Lady" also appearing on the top of this carton; also the words, "Hamilton-Brown Shoe Company;" while the shoes contained therein have "American Lady" stamped on the sole, no price

appearing, however, either on shoe or carton, and these shoes were sold to my concern for one dollar and fifteen cents for this pair, we having bought same from a jobber, who said he paid ninety-five cents for them. This is the only pair of American Lady shoes I have ever seen, and the only carton.

127 By Mr. HART: Objection to the answer is made on the ground that it contains a mass of volunteered argumentative matter; that it is not responsive to the question; that it contains statements based upon hearsay statements of others.

X Q. 20. Does not the name "Hamilton-Brown Shoe Co.'s" extend across the entire front end of the lid of the carton which you have just held in your hand, in large black type on a white background, such portion of the lid coming down on the front end of the body of the carton, and when in position forming a part of the front end of the complete carton; also, does not the name "Hamilton-Brown Shoe Co.'s" appear at the top of the upper surface of the lid of the carton in large white type on a black background, and occupying two lines?

A. What I called the "cover strip" is the front of the Cover, and is known in the trade as the cover slip; and of course the cover slip comes down over part of the body of the carton. The lettering that you have stated appears thereon, and on the cover of the box as you have stated.

X Q. 21. Does not the mark of Hamilton-Brown Shoe Company, which is a circular belt, the ends of which are buckled together and upon which is printed in white type the name "Hamilton-Brown Shoe Company" and the portion within the belt being printed in red appear upon the front end of this carton?

A. Yes, sir.

X Q. 22. What has been the condition of your business as relates to the manufacture and sale of American Girl shoe from the year 1900 up to the 29th of January, 1906, the date when this suit was instituted? I mean by this, has the sales increased, or diminished from one year to the next, and if so, to what extent?

128 A. Our sales in the year 1900 showed a big increase over the year 1899, while the year 1901 showed a decrease over the year preceding. Since 1901 our gain each year has been perhaps ten per cent over the year preceding, but we have made such gain at a largely increased expense, for since 1901 we have had to maintain a much larger selling force, and have been forced to advertise vigorously and in general to prosecute our business with much more vigor, owing to the competition of American Lady and the inroads it was making and has been making in our established trade.

X Q. 23. Is it not a fact that competition has been greater in all lines of business since that time—since the year 1901?

A. When we had the field to ourselves in 1900 we made a large increase in the sale of American Girl shoe over the year previous, and I have every reason to believe that had it not been for the competition of American Lady shoe that that large increase would have been maintained each succeeding year?

By Mr. HART: Answer is objected to as volunteer, argumentative, not called for by or responsive to the question and as being a mere conclusion and expression of opinion.

X Q. 24. Same question.

A. I have no knowledge of other lines of business, but competition in the shoe line has not been any severer since 1901 than before that date, while to the best of my knowledge there have been more shoe concerns leave the field since 1901 than there have been new ones enter. So summing it all up, I should say that competition has not been greater.

X Q. 25. Has not your profits on your business kept pace with its growth?

A. Our gross profits, yes; but not our net profits, no.

129 X Q. 26. You have produced here and there has been introduced in evidence copies of what are supposed to be or to have been magazines or papers known as Our Girl and The American Girl; please state when such papers were first placed upon the market, and how many issues of them were sent out?

A. Wolf Brothers & Company first placed Our Girl magazine upon the market either in the early part of 1901, or the latter part of 1900; in fact, I now find it was the 1st of February, 1901, that we first placed Our Girl magazine on the market. When the American Girl magazine to which you refer was first placed upon the market I do not know; but the issue of the American Girl magazine March, 1900, which appears as an Exhibit in this suit, indicates that it is the 1st Number of the 2nd Volume of that magazine. To the best of my recollection Wolf Brothers & Company issued Our Girl magazine for six or seven months, one issue a month, and we then discontinued it. The American Girl magazine to the best of my knowledge is still on the market and being issued monthly.

X Q. 27. The magazine known as "The American Girl" was not published by your Company then, was it?

A. It was not; we were simply an advertiser in it.

X Q. 38. Did any correspondence pass between you and Mr. Sol. Stein prior to the receipt by you of the postal card which has been offered in evidence, Exhibit No. 17?

A. No.

X Q. 29. To whom are the American Girl shoes sold, jobbers, dealers, or directly to consumers?

A. Retail dealers.

X Q. 30. Was not the advertisement of the American Lady shoe to which you have referred during the course of your testi-

130 mony always accompanied by the name "Hamilton-Brown Shoe Company"?

A. Perhaps so, although I took no note of it.

X Q. 31. Were they not also accompanied by the belt brand heretofore referred to?

A. On some of them I have noticed it; on others I do not think it appeared.

(Counsel for complainant offers in evidence a pair of American

Lady shoes produced by the witness in response to XQ. 19, and asks that the same be marked as "Complainant's Exhibit No. 19," which is accordingly done.)

(Signed) JAMES J. WOLF.

Sworn to and subscribed before me this 31st day of December, 1906.

(Signed) WILLIAM SCHUCHARDT,
[SEAL.] *Notary Public and Special Examiner.*

131 In the Circuit Court of the United States, Eastern *District* of the Eastern District of Missouri.

In Equity. No. 5262.

THE WOLF BROTHERS AND COMPANY, Complainant,
vs.
HAMILTON-BROWN SHOE COMPANY, Respondent.

Testimony for Complainant Taken in Pursuance of the Attached Stipulation at the Law Offices of Hopkins & Eicks, 400-404 Tobin Building, St. Louis, Missouri, Beginning Wednesday, January 23rd, 1907, at 2 o'clock P. M., before S. Barclay Denison, Notary Public, Acting Special Examiner by Consent.

Appearances:

James L. Hopkins, Esq., on behalf of Complainant;
Luke E. Hart, Esq., of Bakewell & Cornwell, on behalf of the Respondent.

VICTORIA B. RYAN, witness produced on behalf of the Complainant, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state your name, residence and occupation?

A. Victoria B. Ryan, 3318 Vista Ave., St. Louis, Mo., none at present, married and living with my husband at that address.

Q. 2. In October, 1906, were you in the employ of the Thiel Detective Service Company, and if so in what capacity?

132 A. I was, as a detective, and had been occasionally for two years before that.

Q. 3. I hand you a carton containing a pair of shoes, and will ask you if you recognize the carton and its contents, and if so, state the circumstances under which you first saw them?

A. Yes, sir, those are a pair of shoes I purchased Aug. 11th, 1906, from the Banks Store, Oran, Missouri.

By Mr. HART: Objection to the answer of the witness is made on the ground that it is irrelevant and immaterial to the issues involved in this suit what the witness may have done or what shoes she may have purchased at the time in question.

Q. 4. What was the occasion of your being in Oran, Missouri, at that time?

By Mr. HART: Same objection.

A. I was sent out to the different shoe dealers where the "American Lady" was sold, and asked for the "American Girl" shoes.

Q. 5. By whom were you sent out?

A. By Mr. Hopkins.

Q. 6. Please state what took place at the Banks Store at the time mentioned?

Mr. HART: Same objection.

A. I went in and asked for the "American Girl" shoes and the man sent a young lady clerk to me, his daughter, Miss Banks, and I told her again I wanted "American Girl" shoes. She handed me a pair of "American Lady" shoes, this pair here (indicating). I asked her if this was "The Girl" shoe, she said "Yes." I said I see the American Lady stamped on it." She said "That is all right, it is the same thing, it is made by the same people, the
133 Hamilton, Brown Co., St. Louis." She said there was not any such a thing as the "American Girl" shoes made by other firms, it was made by the Hamilton, Brown, the Lady and the Girl was the same shoe, the one shoe. So I purchased the shoe for $2.75, in this box.

Counsel for Complainant offers the carton and its contained pair of shoes in evidence, and asks the same to be marked "Complainant's Exhibit No. 101," which is accordingly done.

Q. 7. Did you mark the shoes and carton for identification at the time?

A. Yes, sir; I did. On the sole of the shoe and on the box also, with my initials, Mrs. D. W. R.

Q. 8. Did anyone accompany you at the time of your purchase of Complainant's Exhibit No. 101?

—. No, sir.

Q. 9. I hand you another carton and its contents, and ask you to state under what circumstances they first came into your possession?

A. I went into the Boston Shoe Store, 59 Broadway, Peru, Indiana, and asked the man for the American Girl shoes. He said, "Yes, I have those shoes," and he took down two pair of the American Lady shoes. I asked him which is the Girl shoe. He said "They are both the American Girl" shoes. Miss Florene E. Ives also examined these shoes and noticed the American Lady stamped on them, and asked the man if it was the same as the American Girl shoe. He said "Yes, it is the same thing, made by the same people." Miss Ives was with me as a witness to the transaction between me and the shoe dealers. There was a lady setting at the desk and I took her to be the man's wife, she also said it was the American Girl shoe, it was the same as the Girl shoe. So I purchased the shoe for $3.50, and got the receipt for same. I got the shoes in this
134 box marked, "Mrs. D. W. R." and "Miss F. E. I.," August 25th, 1906.

Mr. HART: The objection appearing following the answer to Q. 3 of the testimony of this witness is here repeated.

Counsel for Complainant offers the carton and its contained pair of shoes in evidence and asks that the same be marked "Complainant's Exhibit No. 102," which is accordingly done.

Counsel for Complainant offers in evidence the receipt produced by the witness, and asks that the same be marked "Complainant's Exhibit No. 103," which is accordingly done; the receipt reading: "Sold by 2—1 shoes $3.50."

By Mr. HART: Objection to the introduction in evidence of the articles referred to by counsel for Complainant is made for the reasons stated following the answer to Q. 3, of the examination of this witness.

Q. 10. When speaking to the salesmen from whom you purchased the Exhibits, Complainant's Exhibit No. 101 and Complainant's Exhibit No. 102, in what tone of voice did you ask for the "American Girl" shoe?

By Mr. HART: Same objection.

A. Distinctly for the "American Girl" shoe.

Q. 11. I hand you another carton and its contents and ask you to state when and where you first saw them? And what you did at that time and place?

A. August 27th, 1906, I went into Smiths Brothers Clothing and Shoe Store at Norris City, Illinois. I asked for the American Girl shoe. Miss Florene E. Ives was with me. I asked for the American Girl shoe. He said "Yes, I have them." He handed us a pair of American Lady shoes. I told him that the shoe was stamped
135 "American Lady" and asked him if it was the same thing. He said, "Yes, it was the same thing made by the same firm," and I purchased the shoe for $3.00, and got a receipt for same. I identify this by the mark, "Mrs. D. W. R." and "Miss F. E. I.," "August 27th, 1906." These are the shoes I bought at that time, the box they were packed in and the receipt given me by the clerk.

Mr. HART: Same objection.

Counsel for Complainant offers the carton and its contained pair of shoes in evidence and asks that the same be marked "Complainant's Exhibit No. 104," which is accordingly done.

Counsel for Complainant offers in evidence the receipt produced by the witness, and asks that the same be marked "Complainant's Exhibit No. 105," which is accordingly done.

By Mr. HART: Objection to the introduction in evidence of the articles referred to by counsel for Complainant is made for the reasons stated following the answer to Q. 3, of the examination of this witness.

The receipt reads as follows:

$3.00. NORRIS CITY, ILL., Aug. 27, 1906.

Received of Miss Rine, Three Dollars 00-100 in full for one pair of American Lady Shoes.

SMITH BROS."

No. —.

Q. 12. I hand you another carton and its contents and ask you to state when and where you first saw them, and what you did at that time and place?

A. On August 31st, 1906, I went to the New York Store, D. W. Taylor, Proprietor, Litchfield, Illinois, I asked the man for
136 the American Girl shoe. He showed me the American Lady and said that he didn't know very much about the American Girl shoe, but he knew it was made in St. Louis by the Hamilton-Brown Shoe Company. He said the only difference in the two shoes was the price, the American Girl $2.50 and the American Lady $3.00. Mrs. E. J. Swink was with me. I purchased the shoe for $3.00, which I identify by the mark in the shoe and the box, on the sole of the shoe, "Mrs. D. W. R." and "Mrs. E. J. S., August 31st, 1906." The carton is also marked with the same initials.

By Mr. HART: Objection appearing following the answer to Q. 3 of the testimony of this witness is here repeated.

Counsel for the Complainant offers the carton and its contained pair of shoes in evidence, and asks that the same be marked "Complainant's Exhibit No. 106," which is accordingly done.

Q. 13. Did you get any receipt at the time of your purchase of Complainant's Exhibit No. 106?

A. Yes, sir; I did, and I here produce it.

The receipt reads as follows:

The New York Store,

D. W. Taylor,

Dry Goods, Millinery, Clothing, Carpets, Hats and Shoes.

LITCHFIELD, ILL., 8-31-1906.

Sold by 5—
1 shoes $3.00.

is offered in evidence by counsel for Complainant, who requests that the same be marked "Complainant's Exhibit No. 107," which is accordingly done.

By Mr. HART: Objection to the introduction in evidence
137 of the shoes, carton and receipt, just referred to by counsel for Complainant, for the reasons stated following the answer to Q. 3 of the examination of this witness.

Q. 14. I will ask you as to the four pairs of shoes and the cartons containing them, being Exhibits numbered 101, 102, 104 and 106,

whether all of those shoes and cartons are marked with the name "American Lady"?

A. Yes, sir.

Q. 15. I hand you a carton marked "American Lady" and containing a pair of shoes, and ask you to state when and where you first saw them, and what you did in regard to them?

A. At Springfield, Ill., September 1st, 1906, at John P. Corey, I asked the clerk there for the "American Girl" shoe. He showed me a pair of shoes marked "American Lady," and he said "I just have a few pair of these left." I asked him what kind of shoe was that. He said it was the same as the American Girl, each one sells for $2.50, made by Hamilton-Brown Shoe Co., St. Louis, Mo. He said "Some call them the American Lady and some the American Girl." I purchased a pair for $2.50. Mrs. E. J. Swink was with me. I identify the shoes by the mark in the inside "Mrs. D. W. R. and Mrs. E. J. S., September 1st, 1906," and the same marks on the carton.

By Mr. HART: Objection to the answer of the witness is made for the same reason as following the answer to Q. 3 of the examination of this witness.

Counsel for Complainant offers the carton and its contained pair of shoes in evidence and asks that the same be marked "Complainant's Exhibit No. 108," which is accordingly done.

138 By Mr. HART: Objection is made to the introduction in evidence of this Exhibit, for the same reason stated following the answer to Q. 3 of the examination of this witness.

Q. 16. I hand you a carton containing a pair of shoes and ask you to state the circumstances under which you first saw them?

A. At Clinton, Ill., September 4th, 1906, in the Bargain Shoe Store. I told the lady I wanted a pair of American Girl shoes. She said "All right," and she brought me this pair. I noticed the American Lady mark on it and spoke to her about it. She said that didn't make any difference, that they were both the same, that and the American Girl. She said the shoe sold for $2.50, but I could have it for $2.25, so I purchased the shoes from her for $2.25. Mrs. E. J. Swink was with me. I identify the shoes by the mark on the sole of the shoes "Mrs. D. W. R., Mrs. E. J. S.," "September 4th, 1906." There is also the same mark on the box.

By Mr. HART: Objection to the answer of the witness is made for the reasons stated following the answer to Q. 3 of the examination of this witness.

Counsel for Complainant offers the carton and its contained pair of shoes in evidence and asks that the same be marked "Complainant's Exhibit No. 109," which is accordingly done.

By Mr. HART: Objection to the introduction in evidence of the shoes and carton just referred to by counsel for the Complainant is made for the reasons stated following the answer to Q. 3 of the examination of this witness.

Q. 17. How are the shoes and carton "Complainant's Exhibit No. 109" marked?

A. The shoes are marked "American Lady," the carton, "The Boston."

139 Q. 18. I hand you a carton marked "American Lady" and containing a pair of shoes, and ask you to state when you first saw them and where, and what you did in regard to them?

A. I purchased them at Greencastle, Indiana, September 17th, 1906, at the Enterprise Dry Goods and Shoe Store. I asked the Clerk for the American Girl shoe. He showed us, Mrs. E. J. Swink and me, the American Lady shoe. Mrs. E. J. Swink spoke up and said "the shoe I wanted has the American Girl stamped on the sole of the shoe." He says "It is the same thing, anyway, the Girl sells for $2.50 and the Lady sells for $3.50." He said it was the same thing only they stamped one the American Girl and one the American Lady, but that they were both made by Hamilton, Brown Shoe Co., St. Louis, Mo. Mrs. Swink told him if he was sure they were both made by the same company she would get a pair for herself. He said, "Yes, I am sure. I know they are made by the Hamilton, Brown Shoe Co." Mrs. Swink tried on a pair and purchased them for $3.50. I gave him the money. I paid for them myself and got a receipt for same. I identify these shoes by the mark on the sole, "Mrs. D. W. R., Mrs. E. J. S., September 17th, 1906," and the carton by the same marks. This is the receipt I got for the purchase. The name of the salesman was Mr. Sears.

By Mr. HART: Objection to the answer of the witness is made for the reasons following the answer to Q. 3 of the examination of this witness.

Counsel for Complainant offers the carton and its contained pair of shoes in evidence, and asks that the same be marked "Complainant's Exhibit No. 110," which is accordingly done.

140 By Mr. HART: Objection to the introduction in evidence of the shoes and carton just referred to by Complainant's counsel is made for the reasons stated following the answer to Q. 3 of the examination of this witness.

Counsel for Complainant offers in evidence the receipt produced by the witness, and asks that the same be marked "Complainant's Exhibit No. 111," which is accordingly done. The receipt reads as follows:

SEPT. 6.

Enterprise
K
Shoes 3.50
H. GOLDBERG.

By Mr. HART: Objection to the introduction in evidence of this receipt is made for the reasons stated following the answer to Q. 3 of the examination of this witness.

Direct examination closed.

Cross-examination by Mr. HART:

X Q. 1. Mrs. Ryan, when you purchased the shoes that have been offered in evidence here, you knew, did you not, that such shoes were manufactured by Hamilton-Brown Shoe Company of St. Louis?

A. Yes, sir.

X Q. 2. Miss Ives and Mrs Swink also knew that those shoes were made by the Hamilton Brown Shoe Company of St. Louis?

A. I think they did.

X Q. 3. Did any of the persons whom you have stated you purchased those shoes from, tell you that the shoes shown you were made by The Wolf Brothers & Company, of Cincinnati, Ohio?

A. No, sir; didn't tell me the American Lady was made in Cincinnati.

X Q. 4. In each case the shoes shown you, and sold under
141 the name "American Lady," were branded with the name Hamilton Brown Shoe Company, were they not?

A. Yes, sir.

X Q. 5. You were in the employ, directly or indirectly, of the Wolf Brothers & Company in making the purchases referred to in your direct examination, were you not?

A. Indirectly.

Cross-examination closed.

VICTORIA B. RYAN.

Subscribed and sworn to before me this 23rd day of January, 1907.

[SEAL.] S. BARCLAY DENISON,
Special Examiner.

Miss FLORINE E. IVES, witness produced on behalf of the Complainant, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state, your name and residence?

A. Florine E. Ives, 4129 Cleveland Avenue, St. Louis, Mo.

Q. 2. Are you the daughter of Mr. George E. Ives?

A. Yes, sir.

Q. 3. What is his occupation?

A. Manager of Thiels Detective Agency.

Q. 4. In the month of August, 1906, did you visit the place of business of the Boston Store, at Peru, Indiana?

By Mr. HART: The question is objected to for the reason that it is immaterial and irrelevant to the issues involved in this case as to what this witness may have done at the time in question, or as to what *what* may have come to her attention at that time.

142 A. Yes, sir.

Q. 5. What was the occasion of your going there?

A. I was to go with Mrs. Ryan and hear the conversation between Mrs. Ryan and the shoe dealers.

Q. 6. At whose request did you go?

A. My father's.

Q. 7. I hand you a carton containing a pair of shoes, which has been offered in evidence as Complainant's Exhibit No. 102, and ask you to state if you recognize them, and if so, when and where you first saw them, and under what circumstances?

Mr. HART: Same objection.

A. I recognize them, yes, sir; and we bought them in Peru, Indiana, on August 25th, 1905. The Boston Store was the name of the Store, and Mrs. Ryan asked for the American Girl shoe, the gentleman brought down two pair of shoes. She asked which is the American Girl? The gentleman said "both are American Girl shoes." Then I spoke up and said they had American Lady labels and he said "It is just the same as the American Girl, and some people call it American Lady, others American Girl, because it is made by the same firm."

Q. 8. Did the salesman state who it was made both the American Girl and the American Lady shoe?

A. No, sir.

Q. 9. Did you mark the shoes and carton?

A. Yes, sir.

Q. 10. Where and in what way did you mark them?

A. Marked them back at the hotel with ink. I marked my initials "F. E. I."

Q. 11. I hand you the carton and shoes, Complainant's Exhibit No. 104, and asked you to state if you were present when they
143 were purchased, and if so, who else was present and what occurred?

Mr. HART: Same objection.

A. I went with Mrs. Ryan to get some shoes. She asked for the American Girl shoe, this was at Norris City, Illinois, at Smith Brothers Store, they handed her the American Lady. Mrs. Ryan said "This is not the American *Lady?*" The gentleman said "It is the same shoe as the American Girl, made by the same firm." She bought the shoes and paid $3.00 for them. She got a receipt for same. I recognize this receipt, (referring to Complainant's Exhibit No. 105), as the receipt she received.

Q. 12. Did you mark the shoes and carton "Complainant's Exhibit No. 104?"

A. Yes, sir.

Q. 13. And if so when and in what manner?

Mr. HART: Same objection.

A. I marked it "F. E. I." on the inside of the lining of the shoe in the hotel room. Also marked with initials on end of carton "F. E. I."

Direct examination closed.

Cross-examination by Mr. HART:

X Q. 1. You knew that the shoes shown you and purchased by Mrs. Ryan, as stated on your direct examination, were manufac-

tured by Hamilton Brown Shoe Company of St. Louis, did you not?

A. Yes, sir.

X Q. 2. You were in the employ, directly or indirectly, of The Wolf Brothers & Company when you accompanied Mrs. Ryan upon this trip, were you not?

144 A. Yes, sir.

Cross-examination closed.

FLORINE E. IVES.

Subscribed and sworn to before me this 23rd day of January, 1907.

[SEAL.] S. BARCLAY DENISON,
Special Examiner.

Adjourned to January 24th, 1907 at 10 A. M.

Thursday, January 24, 1907, met pursuant to adjournment, parties present as before.

ELLA J. SWINK, witness produced on behalf of Complainant, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state your name and residence?

A. Ella J. Swink, 3425 Caroline Street, St. Louis, Mo.

Q. 2. I hand you a carton and pair of shoes, Complainant's Exhibit No. 106, and ask you to state if you recognize them, and if so under what circumstances you first saw them?

A. I saw them at the New York store on State Street, Litchfield, Ill., August 30th, 1906. Mrs. Ryan asked for the "American Girl" shoes, the clerk brought us a pair of shoes with the "American Lady" stamped on them, and told us they were the same as the "American Girl." He knew that the American Girl was made by the Hamilton-Brown Shoe Company, St. Louis, Missouri. We bought a pair of shoes for $3.00. This is the shoe (indicating shoes handed her by attorney). The clerk's name was Homer Tanner, Clerk No. 5. This was the box I got them in.

145 By HART: The answer of the witness is objected to for the reason that it is immaterial and irrelevant to the issues involved in this suit as to what this witness may have done or as to what facts may have come to her attention at the time in question.

Q. 3. Are the initials "E. J. S." which appear on the shoe and carton, Exhibit 106, your own?

A. Yes, sir.

Q. 4. What was the occasion of your being in Litchfield at that time?

By Mr. HART: Same objection.

A. Why, we went at the request of the Thiel's Detective Agency. I went as a witness with Mrs. Ryan.

Q. 5. Were you in the employ of the Thiel's Detective Service Company at that time?

A. Not exactly. Why, I was employed for this occasion.

Q. 6. I hand you the carton and pair of shoes Defendant's Exhibit 108, and ask you to state when and where you first saw them?

By Mr. HART: Same objection.

A. At Springfield, Ill., September 1st, 1906, at John T. Geory's & Company, Boston Shoe Store, 104—5th South Square. Mrs. Ryan asked for the "American Girl" shoe, the clerk said what size do you wear and she said 3. He went in the back part of the store and brought a pair of shoes stamped the "American Lady" shoe, and said they were the same as the American Girl and made by the same Company, the Hamilton-Brown Company. Both sold for $2.50. She bought a pair of shoes. The clerk's name was Plummer. No. 6. This is the pair of shoes and the box in which they were packed.

Q. 7. I hand yo uthe carton and pair of shoes, Complainan's Exhibit No. 109, and ask you to state when and where you
146 first saw them and what occurred at that time?

By Mr. HART. Same objection.

A. I first saw this pair of shoes at the Bargain Shoe Store, 204 East Washington Street, Clinton, Ill., September 4, 1906. Mrs. Ryan asked for the "American Girl" shoe, the lady said yes, we have it, what size do you wear?" Mrs. Ryan said "Three." She brought a pair of shoes stamped "American Lady" and said this is what you want. Mrs. Ryan said the shoe I wear is stamped the "American Girl." The lady said "Well it is the same thing made by the same Company, Hamilton-Brown Company, St. Louis," Mrs. Ryan bought this pair at $2.25 in this carton or box.

Q. 8. I hand you the carton and shoes Complainant's Exhibit No. 110, and ask you to state if you recognize them and if so when and where you first saw them and what occurred?

By Mr. HART: Same objection.

A. I saw them at Greencastle, Indiana, September 17th, 1906. Mrs. Ryan asked for the "American Girl shoe," the clerk said yes he had them, what size do you wear?" She said "Three." He looked but couldn't find the No. 3. I said I would take a pair if they had one to fit me. They said they didn't have only $3.00. We said we would look at the shoe and we told him the shoe we wore had the "American Girl" stamped on it, and asked him the price of the shoe. He said $3.50. We told him we only paid $2.50 for the "American Girl" shoe. He said "Oh yes, that is the "American Girl" shoe. It is just a different brand made by the same Company, the Hamilton-Brown Shoe Company. The American Lady
147 always sold for $3.50, and the American Girl $2.50. That was the only difference, and then said if you are sure they are the same shoe and made by the same Company I will take a pair. I then bought this pair of shoes for $3.50 in this carton.

Q. 9. Is the mark "Mrs. E. J. S. on each of the last three Exhibits you have referred to your identification mark?

A. Yes, sir.

Q. 10. Is the Mrs. Ryan you have referred to the same Mrs. Ryan who is present here and has testified in this case?

A. Yes, sir.

Direct examination closed.

Cross-examination by Mr. HART:

X Q. 1. When the shoes referred to on your Direct Examination were purchased as you have stated you knew, did you not, that such shoes were not the product of the Wolf Brothers & Co. of Cincinnati, Ohio?

A. I did.

X Q. 2. Did you not know that those shoes were the product of Hamilton-Brown Shoe Company of St. Louis?

A. I did when I saw the stamp on the shoe.

X Q. 3. When you went into the store where those shoes were purchased you went there for the purpose of buying American Lady shoes, did you not?

A. Not unless they represented them to be the same as the American Girl, made by the same firm.

X Q. 4. If they had not stated that those shoes were the same as the American Girl shoe, would you have bought them?

A. No, sir.

X Q. 5. How many places did you and Mrs. Ryan visit on this trip?

A. Nine in Illinois, I think, and about fourteen in Indiana.

148 X Q. 6. Did you go into the stores in those different places and ask for American Girl shoes?

A. Yes, sir.

X Q. 7. Did all of those stores which you visited in this trip handle the American Lady shoe?

A. No, sir, not all of them.

X Q. 8. How many did handle the American Lady shoe?

A. I think there was only one,—two probably that did handle them besides where we bought them.

X Q. 9. Did the clerks in those stores offer you the American Lady shoe when you called for the American Girl shoe?

A. No, sir, only those I have made a report of.

X Q. 10. What statements were made by the clerks in those stores when you asked for the American Girl shoe?

A. Why they said they didn't have the American Girl but that they had the American Lady. One store they had never heard of the American Girl.

X Q. 11. Please give the names and locations of the stores visited by you on this trip and the dates when you visited them.

A. Store—117 Collinsville Ave., E. St. Louis, Ill. Aug. 29, 1906.
315 Missouri Ave., E. St. Louis, Ill., August 29, 1906.
J. H. Sanner, Edwardsville, Ill. August 29, 1906.
K. Larch, Edwardsville, Ill. August 29, 1906.
The New York Store, Litchfield, Ill. August 30, 1906.
Fogarty's Shoe Store, Springfield, Ill. August 31, 1906.

W. Klaholt Shoe Store, Springfield, Ill. September 1, 1906.
Boston Shoe Store, Springfield, Ill. September 1, 1906.
Roger & Clark's Shoe Store, Decatur, Ill. September 3, 1906.
Bargain Shoe Store, Clinton, Ill. September 4, 1906.
149 John P. Goory & Co. Springfield, Ill. September 1, 1906.
My Store, Bloomington, Ill. September 6, 1906.
Schatz Shoe Co. Danville Ill. September 6, 1906.
Progress Shoe Co. Danville, Ill. September 7, 1906.
Northwest Box Shoe Co. Lafayette, Ind. September 7, 1906.
Walter Maivon Shoe Store, Logansport, Ind. September 8, 1906.
Otto Shoe & Clothing Co. Logansport, Ind. September 10, 1906.
Harry N. Ward Shoe Store Logansport, Ind. September 10, 1906.
Simmon & Beckman Wabash, Ind. September 10, 1906.
Kinko Bazaar, Marion, Ind. September 11, 1906.
Boston Shoe Store, Marion, Ind. September 11, 1906.
Neil Thomas, Kokomo, Ind. September 12, 1906.
Victor E. Vail Shoe Store, Kokomo, Ind. September 12, 1906.
Shortles Dept. Store, Tipton, Ind. September 12, 1906.
Fedely & Son, Anderson, Ind. September 13, 1906.
122 Lebanon St., Lebanon, Ind. September 14, 1906.
Charles Morgan Shoe Store Lebanon, Ind. September 14, 1906.
Van Camp Shoe Store, Crawfordsville, Ind. Sept. 14, 1906.
111 S. 7th St. Terre Haute, Ind. September 15, 1906.
Truth Shoe Store Terre Haute, Ind. September 15, 1906.
Wilson & Bach, Clinton, Ind. September 15, 1906.
Scott & Martin, Clothing & Shoes, Clinton, Ind. Sept. 15, 1906.
Allen Bros. Greencastle, Ind., September 17, 1906.
Enterprise, The Only Dept. Store, Greencastle, Ind., September 17, 1906.
C. A. Kelley's Shoe Store, Greencastle, Ind., September 17, '06.
150 Wicke's Bee Hive, Bloomington, Ind., September 18, 1906.
Breenden & Co. Bloomington, Ind. September 18, 1906.

At Taylorville, Ill., I visited all the shoe stores in the town but could not find either the American Girl or the American Lady shoe. At Lafayette, Ind., they didn't have either shoe. At Delphi, Ind., only two shoe stores but no American Lady or American Girl shoes.

X Q. 12. Which of the stores referred to in your last answer and which were not referred to in your direct examination kept the American Lady shoe for sale?

A. I know there was one at Clinton, Ind. In several of the stores we saw the American Lady sign but they didn't say anything about it.

X Q. 13. Can you give the names of the stores where you saw the American Lady signs, referred to in your last answer?

A. Yes, sir, one place was Fletemeyer's Shoe Store at Five Points, Indiana. I think the next place was at Edwardsville, Ill., where they didn't say anything about it. Another was at Logansport, Ind. He didn't say anything about it and we asked him what the sign was, and he said that is what you want but we haven't got it.

X Q. 14. At any of the places referred to by you either in your

direct or cross-examination were you offered any shoe other than the American Lady in response to your inquiries for the American Girl shoe?

A. When they did not have either they tried to sell us other shoes.

X Q. 15. What were the names of the shoes which they tried to sell you?

A. Different names, Queen Quality was one I remember. Some places they would tell us to buy an eastern shoe, I do not remember the name.

X Q. 16. You have stated that at one of the places where
151 you called for the American Girl shoe and the American Lady shoe was kept for sale that they did not know of the American Girl shoe. Do you know that at the places where you purchased the shoes referred to on your direct examination that the dealers from whom you purchased those shoes knew of the American Girl shoe?

A. We did not know by their answer. They would say that the American Lady was the same as the American Girl shoe, made by the same firm.

Cross-examination closed.

ELLA J. SWINK.

Subs-ribed and sworn to before me this 24th day of January, 1907.

S. BARCLAY DENISON,
[SEAL.] *Special Examiner.*

BEATRICE GEARY, witness produced, on behalf of Complainant, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state your name and residence?

A. Beatrice Geary, 1131 St. Ange Avenue, St. Louis, Mo.

Q. 2. I hand you a carton and a pair of shoes contained in the carton, the carton and the shoes being marked with the words "American Lady" and ask you to state when and where you first saw them and what the circumstances were?

A. I first saw them on October 16, 1906, at Battle Creek, Michigan, on October 16th, 1906. They were bought from the Sterling Cash Store on Main near Jefferson. Miss Mable Newstadt and I called at this store and asked for a pair of American Girl
152 shoes. The clerk brought a pair of American Lady shoes. The young lady asked if they were the American Girl shoe. The clerk said they were. She asked the price and he said $3.00. She said she hadn't been in the habit of paying but $2.50. Then she asked if he was sure that they were the American Girl shoes and he said it was, made by Hamilton-Brown Shoe Company of St. Louis. He then said that the American Girl and the American Lady were one and the same. I asked this clerk to give me his name that I would call in the morning and get a pair for myself. He said he would write his name on the wrapper of the box, and it was "Gal-

lagher," and the check inside of the box bears "No. 8." This is the pair of shoes that I purchased and this is the carton. I marked the carton and the shoes with my initials "J. W. G."

By Mr. HART: The answer of the witness is objected — for the reason that it is immaterial and irrelevant to the issues involved in this suit as to what this witness may have done or as to what facts may have come to her attention at the time in question.

Cou-sel for complainant offers in evidence the carton and pair of shoes identified by the witness and ask- that same be marked Complainant's Exhibit No. 112, which is accordingly done.

Objected to by defendant for the reasons stated following the last preceding answer of this witness.

Q. 3. Is this the receipt referred to in your last answer?

(Handing witness rec-ipt memorandum.)

A. Yes, sir.

Q. 4. Counsel for complainant offers the receipt identified by the witness in evidence and asks that same be marked Complain-
153 ant's Exhibit No. 113, which is accordingly done; receipt reads as follows:

"The Poulesen Co. Department Store.

6 and 8 Main Street, East.

BATTLE CREEK, ——, 190–.

Shoes,—$3.00.
Clerk No. 8.
38."

Objected to by defendant for reasons stated following the answer to Q. 2.

Q. 3. On the occasion in question were you acting under the instructions the Thiel Detective Service Company?

A. I was.

Direct examination closed.

Cross-examination by Mr. HART:

X Q. 1. You knew when you purchased the shoes referred to on your direct examination that they were not the product of The Wolf Brothers & Co. of Cincinnati, Ohio?

A. Yes, sir.

X Q. 2. You knew that they were the product of the Hamilton-Brown Shoe Company of St. Louis, did you not?

A. I did.

X Q. 3. You went into the store in question for the purpose of buying a pair of American Lady shoes, did you not?

A. No, sir, I went into purchase what is called the American Girl shoe.

X Q. 4. Notwithstanding the fact that you called for the American

Girl shoe, you went into the store for the purpose of purchasing a pair of American Lady shoes, did you not?

A. I went in to purchase the American Girl shoe, the shoe I called for.

X Q. 5. Did you not know that the American Girl shoe was not handled at that store?

A. I did not.

154 X Q. 6. Was you in need of a pair of shoes at that time?

A. Yes, I could have worn a new pair nicely.

X Q. 7. If you went into the store for the purpose of purchasing a pair of American Girl shoes why did you take a pair of the American Lady shoes when you knew as you have stated that they were not the same shoe?

A. It was represented to me as the same shoe.

X Q. 8. Did the Thiel Detective Service Company employ you to go out and buy American Girl shoes?

A. I was told to buy the American—I was sent out to investigate the American Lady shoe that was sold under the other name.

Same question repeated.

A. They sent me out to buy the American Lady shoe under the misrepresentation of it being the American Girl shoe.

X Q. 9. They did not however send you out to buy American Girl shoes?

A. Not if they were misrepresented to me they didn't.

X Q. 10. And when you went into the store referred to in your direct examination you did not go in there for the purpose of buying American Girl shoes, did you?

A. That is the shoe I called for, the American Girl shoe.

Same question repeated.

A. I went in to buy the American Girl shoe, called the American Girl shoe.

X Q. 11. Do you not know that the Thiel Detective Service Company was employed by The Wolf Brothers & Company, Cincinnati, Ohio, and that they sent you out as you have stated for the purpose of performing the service for which it was employed?

A. I suppose they were.

X Q. 12. You know then that The Wolf Brothers & Com-

155 pany did not employ the Thiel Detective Service Company to purchase American Girl shoes, do you not?

A. I know they didn't.

Same question.

A. I don't know anything about The Wolf Brothers, what they did, they didn't talk to me.

X Q. 13. If the clerk had shown you American Girl shoes would you have bought them?

A. If he had shown me the American Girl shoes and they had not been misrepresented and they had fitted, I would have bought them.

X Q. 14. And your purpose in going into that store was to buy American Girl shoes and not American Lady shoes?

A. I called for the American Girl shoe. The American Lady was brought, tried on and fitted, bought and paid for, under the

representation that it was made by the same people that the American Girl was made by.

X Q. 15. Was your home in St. Louis at that time?

A. It was.

X Q. 16. And you went from St. Louis to Battle Creek, Michigan, for the purpose of purchasing those shoes, did you?

A. I did not go direct to Battle Creek from St. Louis.

X Q. 17. You went from St. Louis to Battle Creek for that purpose, did you not?

A. Yes, sir.

X Q. 18. Did you visit any other shoe stores on that trip for this purpose?

A. Yes, sir.

X Q. 19. Please give the names of such shoe stores and locations and the dates.

A. Fetter's Shoe Store, Adrian, Mich., October 15, 1906
Robert Charles, Adrian, Mich., October 15, 1906
Benedict's Adrian, Mich., October 15, 1906
Wesley & Thompson, Adrian, Mich., October 15, 1906
Hayes, Adrian, Mich., October 15, 1906
156 George A. Schmitts, Hillsdale, Mich., Oct. 15, 1906
Ed A. Ruckman, Hillsdale, Mich., Oct. 15, 1906
Manheimer's, Hillsdale, Mich., Octob. 15, 1906
L. H. Field Dept. Store, Jackson, Mich., Oct. 16, 1906
Irwins, Jackson, Mich., Oct. 16, 1906
Palmer Shoe Store, Jackson, Mich., Oct. 16, 1906
W. H. Heenan, Jackson, Mich., Oct. 16, 1906
L. C. Powley, Jackson, Mich., Oct. 16, 1906
Glasgow Bros., Jackson, Mich., Oct. 16, 1906
R. C. Conner, Jackson, Mich., Oct. 16, 1906
B. A. Kelleher, Marshall, Mich., Oct. 16, 1906
S. E. Cronin, Marshall, Mich., Oct. 16, 1906
Grace Bros., Marshall, Mich., Oct. 16, 1906
Dudley's Shoe Store, Battle Creek, Mich., Oct. 16, 1906
Sterling's Cash Store—
Battle Creek, Mich., October 16, 1906
M. C. Beebe, " " " "
Harbech's, " " " "
Foster & Gordon, " " " "
Webber Bros., Kalamazoo, Mich., "
The Bell, " "
Chase Shoe Store, " "
The Bryant Shoe Store, " "
Gilmore Bros., " "
Appledoorn's Shoe Store, " "
J. F. Muffley, " "
Smith's Dept. Store, Cassopolis, Mich., October 17, 1906
J. B. Stem, " "
A. B. Rudd's, " "
Walker Bros., Racine, Wis., October 18, 1906
Irme Johnson's, " "

	A. Arthur Kimball,	" "
157	Fren Kambach,	" "
	H. Pregger,	Burlington, Wis., October 18, 1906
	J. N. Christien,	" "
	Mrs. Miller,	Burlington, Wis., October 18, 1906
	C. P. Hanson,	Elkhorn, Wis., October 19, 1906
	A. Graff,	" "
	W. B. Coombe,	" "
	The Elkhorn Dry Goods Co.,	" "
	Brown Bros.,	Janesville, Wis., October 19, 1906
	Amos Rehberg,	" "
	Golden Eagle Shoe Store,	" "
	King & Cowles,	" "
	D. G. Luby & Co,	" "
	Smith Shoe Store,	Broadhead, Wis., October 19, 1906
	Stair Bros.,	" "
	Terry & Amerpohl,	" "
	The Beehive Cash Store,	" "
	Treat's Shoe Store,	Monroe, Wis., October 20, 1906
	Adam Schmitt,	" "
	Clark & Timmons,	" "
	Snyder & Zilner,	" "
	Schmidt, Wachlin & Pfeifer,	Freeport, Ill., October 20, 1906
	Winslow's,	" "
	George H. Tandy,	" "
	Robert Luecke,	" "
	E. W. Cozy,	" "
	Golden Rule,	Freeport, Ill., October 20, 1906
	Simon Ortmeir,	" "
	F. W. Weaver,	" "
	C. A. McNamara,	" "
	C. A. Shulz,	" "
158	Geo. A. Brown,	Savanna, Ill., October 20, 1906
	Clarence Thill,	" "
	W. A. Bristol,	" "
	G. W. Holland,	" "

Adjourned until 2 p. m., Thursday, January 24, 1906.

After adjournment, 2 p. m.

X Q. 20. What was your object in visiting those stores?

A. To buy a pair of shoes.

X Q. 21. What kind of shoes did you call for in entering those stores?

A. American Girl shoes.

X Q. 22. Did any of the stores mentioned handle the American Girl shoe?

A. At one time they did. We didn't see any of them.

X Q. 23. Did any of them handle the American Lady shoes?

A. Yes, sir.

X Q. 24. Please state which of the stores mentioned handled the American Lady shoe?

A. At Adrian. Mich., Albig's Dept. Store, Sterling Cash Store, Battle Creek, Mich., Robert Luecke, Freeport, Illinois.

X Q. 25. Were you offered any shoe other than the American Lady in response to your inquiry for the American Girl shoe at any of the places mentioned?

A. The different dealers offered us their different brands that they carried.

X Q. 26. Please mention the brands referred to.

A. Dorothy Dodd, Queen Quality, Foster and I think the Boardman. I don't remember of any others.

X Q. 27. Did you go into each of those stores to buy American Girl shoes?

A. I went into each and all of these stores and called for the American Girl shoe.

159 X Q. 28. Did you expect to purchase American Girl shoe if *I* was offered them?

A. I probably would if they had fitted and had not been misrepresented to me.

X Q. 29. Did you expect to purchase those shoes in each instances when you called for them?

A. If it had not been misrepresented to me I would have bought it, yes, sir.

X Q. 30. Did you go there for the purpose of purchasing American Girl shoes?

A. My direct call when I went into these stores was for the American Girl shoe.

X Q. 31. My question does not relate to what you called for; my question is did you go into those stores for the purpose of purchasing American Girl shoes?

A. Well, I will have to tell you the same thing again.

X Q. 32. You refuse to give me a direct answer to this question.

A. I don't refuse to answer any direct question that is asked me?

The attention of the Court is called to the fact that the witness refuses to give a direct answer to this question; that it is manifestly proper and defendant is entitled to an answer. And counsel now states that unless the witness answers the question propounded to her a motion will at the proper time be made to strike the entire deposition of this witness from the record and complainant's counsel is now requested to direct the witness to answer this question.

X Q. 33. Last question (X Q. 30) repeated.

A. My purpose was to buy any other shoe that was offered to me when I called for American Girl shoe.

X Q. 34. Was that your purpose in going into the store where you stated on direct examination that you purchased the pair of American Lady shoes offered in evidence?

A. Yes, sir.

160 X Q. 35. Did not the American Lady shoes shown you at the places where they were handled bear the name and address Hamilton-Brown Shoe Company, St. Louis?

A. They did.

Cross-examination closed.

Redirect examination, by Mr. HOPKINS:

R. D. Q. 1. Upon your cross-examination you have stated that upon October 20th, 1906, you visited the shoe store of Robert Luecke, at Freeport, Illinois. Please state what took place on that occasion.

Objection is made to the question for the reasons stated following the answer to Q. 2.

A. We called for the American Girl shoe and the American Lady was brought. The clerk was asked if that was the American Girl shoe. He looked at it and said "No," and that he had misunderstood us after showing us several different pairs.

R. D. Q. 2. After you entered the store and asked for the American Girl shoe was anything said to you by the clerk before he brought you the American Lady shoe, if so what?

Same objection, and objection is also made to the repetition by the witness of statements made to her by others on the ground that such statements are mere hearsay.

A. The clerk said they handled the American Girl shoe.

Redirect examination closed.

BEATRICE GEARY.

Subscribed and sworn to before me this 24th day of January, 1907.

[SEAL.] S. BARCLAY DENISON.

161 MABEL NEUSTADT, witness produced on behalf of the complainant, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Please state your name and residence.

A. Mabel Neustadt, 1320 Euclid Avenue, St. Louis, Missouri.

Q. 2. Are you acquainted with Mrs. Geary, who has just testified?

A. I am.

Q. 3. Do you recollect the purchase of the shoes Exhibit No. 112 at Battle Creek, Michigan?

A. I do.

The question is objected to for the reason that it is immaterial and irrelevant to the issues involved in the suit as to what this witness may have done or as to what facts may have come to her attention at the time in question.

Q. 4. Please state what occurred.

Same objection.

A. On the 16th of October Mrs. J. W. Geary and myself were in Battle Creek, Michigan. We went into the Sterling Cash Store which is located on Main Street near Jefferson. Mrs. Geary asked the clerk who came to wait on us to show her a pair of American Girl shoes for this young lady, referring to me. He did not hesitate but brought out a pair of American Lady shoes. After looking at these

I remarked that I did not want these but a pair of American Girl shoes. He said that the American Girl shoes and the American Lady shoes were the same thing and that they were manufactured by Hamilton-Brown Shoe Company which is located in St. Louis, and at this time he went forward in the store to bring back different sizes and different styles of the shoe, and while he was gone
162 I remarked to Mrs. Geary that this was just what we wanted, and I thought that we were going to find a pair of shoes here. She said that you are mistaken that we did not want a pair of American Lady shoes, and I remarked that if I took this pair of shoes she would not pay for them. Well about this time I became very much excited and said that if she did not pay for them I would because I was positive that the instructions were to purchase American Lady shoes if it were represented as the American Girl shoe, and that if she did not pay for them I would, and asked her what she was going to do about it. About this time the clerk came back with the different styles of shoes and again I asked him if the American Girl shoe and the American Lady were the same thing, and he said "Oh, yes". Then I asked him the price of the shoe and he said $3.00. The pair showed me didn't fit and he went back to get another pair and when he was out of hearing I said to Mrs. Geary, "Will you pay for them if I take them?" She said yes, but that she would not sign the report and I said we will talk about that later on. So when the clerk came back again I selected a pair of shoes and Mrs. Geary paid for them, the amount was $3.00. Mrs. Geary said that she would probably return in the morning and purchase a pair of the same kind of shoes for herself and asked the clerk if he would give his card, and he said that he would write his name and number on the outside of the cover and took the shoes away and had them wrapped up and returned them wrapped and wrote his name, which was "Gallagher," No. 8, and we went out of the store. These are the shoes I bought and the box they were in.

Q. 5. Do you recollect visiting the store of Robert Luecke
163 at Freeport, Illinois, if so please state what occurred there.

Same objection.

A. On the 20th of October, 1906, Mrs. Geary and I went into the Robert Luecke store, which is 82 Galena Street, and there a young boy came forward to wait on us. Mrs. Geary asked for a pair of American Girl shoes and he brought down several pair of American Lady shoes. After looking at several pairs and different styles I asked if this was the American Girl shoe and the young man hesitated and said "I beg your pardon, but I misunderstood you" and said "the shoes I have been showing you are the 'American Lady' shoes, and the 'American Girl' and the 'American Lady' are entirely two different shoes" and said "I misunderstood you." We said—we looked at several pairs of other shoes too, but did not purchase any but left the store.

Q. 6. When Mrs. Geary asked the clerk for the American Girl shoe, did he make any response to her before showing her the American Lady shoe, if so what?

Same objection.

A. I do not remember that he made any remark other than asking the size, but just brought a pair of the American Lady shoes.

Direct examination closed.

Cross-examination by Mr. HART:

X Q. 1. You knew when Mrs. Geary purchased the pair of shoes shown you on your Direct Examination that those shoes were not the product of The Wolf Brothers & Company of Cincinnati, Ohio, did you not?

A. I did not.

164 X Q. 2. You knew that they were the product of Hamilton-Brown Shoe Company of St. Louis, did you not?

A. Yes, sir, I did.

X Q. 3. You accompanied Mrs. Gary on this trip at the direction of the Thiel Detective Service Company, in whose employ you were for that purpose. Is not that a fact?

A. Yes, I did.

X Q. 4. The shoes shown you under the name of "American Lady" bore the name and address "Hamilton-Brown Shoe Company, St. Louis," did they not?

A. I noticed the name stamped on the sole of the shoe, but did not see the address.

X Q. 5. In no instance were the shoes represented to you as being the product of Wolf Brothers & Company of Cincinnati, Ohio, were they. I refer to American Lady shoes?

A. They certainly were represented to be same shoe as the American Girl shoe. For the clerk said that the American Girl shoe and the American Lady were the same thing and were manufactured by Hamilton-Brown Shoe Company, St. Louis.

Cross examination closed.

MABEL NEUSTADT.

Subscribed and sworn to before me this 24th day of January, 1907.

[SEAL.] S. BARCLAY DENISON.

It is stipulated by and between counsel that the shoes and cartons included in Complainant's Exhibits Nos. 101 to 112, inclusive, may remain in the custody of Complainant, subject to their production at or before the final hearing of this cause upon request by the respondent.

In respect to the carbon copies of letters of January 7,
165 1901, addressed to Hamilton-Brown Shoe Company by The Wolf Brothers & Company, and the letter of January 9, 1901, addressed to Hamilton-Brown Shoe Company by the Wolf Brothers & Company, defendant's counsel withdraws his objection to the said letters on the ground that they are merely carbon copies, and consents that the said carbon copies of letters may stand in

this record with the same force and effect and subject to the same objections that he would have applied to the original letters had the original letters been reproduced.

St. Louis, Mo., January 24th, 1907.

Complainant's counsel here states that complainant has closed its prima facie proofs.

STATE OF MISSOURI,
City of St. Louis, ss:

I, S. Barclay Denison, a notary public in and for said City and State, and Special Examiner herein by agreement of counsel, hereby certify that the above witnesses, Victoria B. Ryan, Florine E. Ives, Ella J. Swink, Beatrice Geary and Mabel Neustadt were by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that their depositions were reduced to typewriing by myself in the presence of the said witnesses respectively, and subscribed by them in my presence and in the presence of such of the parties and counsel as attended; that said depositions were taken pursuant to the annexed stipulation or agreement at the Law Offices of Hopkins & Eicks, 404 Tobin Building, in the City of St. Louis, State of Missouri, beginning on the 23rd day of January, 1907, and continuing from day to day as set forth; that the parties were represented at the taking of said depositions by their respective
166 counsel as set forth; that the several exhibits recited were offered in evidence and marked as specially noted in the foregoing depositions; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

I further certify that the fees for the taking and transcribing of these depositions were paid by the complainant, amounting to $43.00 and are proper charges therefor.

In testimony whereof I have hereunto set my hand and official seal this 24th day of January, 1907.

S. BARCLAY DENISON,
Notary Public and Specail Examiner.

Five witness fees at $1.50 paid by Complainant, $7.50.

167 In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri.

In Equity. No. 5262.

THE WOLF BROTHERS & COMPANY, Complainant,
vs.
HAMILTON-BROWN SHOE COMPANY, Respondent.

Examination of Witnesses, beginning October 9th, 1907, beginning at 2 o'clock in the afternoon, at the office of John E. Jones, Esq., Lincoln Inn Court, No. 519 Main street, in the City of Cincinnati, County of Hamilton, State of Ohio, before William Schuchardt, a Notary Public in and for said County, duly commissioned and qualified, Special Examiner by agreement of Counsel, on behalf of the Complainant, under the 67th Rule of Equity, as amended, pursuant to agreement.

Present:

John E. Jones, Esq., and James L. Hopkins, Esq., on behalf of the Complainant.

Luke E. Hart, Esq., of Bakewell & Cornwall on behalf of the Respondent.

JOHN F. HUDSON, a witness produced on behalf of the complainant, being first duly sworn, testifies as follows:

Q. 1. Are you the same John F. Hudson, who testified on behalf of the defendant at page 107 of defendant's record?

A. I am.

Q. 2. I hand you a letter written on the letter head of Wolf Bros. & Co. and reading as follows:

168 CINCINNATI, O., U. S. A., May 28, 1906.

Messrs. J. F. Hudson & Son, Millersburg, Ohio:

GENTLEMEN: Our Mr. Thompson has advised us that Mr. Hudson told him that you had several calls for "American Lady" shoe.

We will highly appreciate it if you will be good enough to advise whether or not when you had such calls you sold "The American Girl" shoe.

Please bear in mind that we are entering no objection to your having done so, but are desirous to receive this information and the same may be very valuable to us and to you at the same time for the protection of "The American Girl," hence we trust you will favor us by letting us hear from you in detail.

We await your good news and we are, with kind regards,

Truly Yours,

THE WOLF BROS. & CO.,
J. J. WOLF, *Treasurer.*

J. J. W.—M.

Upon the margin of this letter the following appears:

"GENTS: We have had two calls. Sold in one Case the other a failure. Yours & C.,

JNO. F. HUDSON & SON.

Do you recognize this letter; if so, state by whom the endorsement upon the margin was written if you know?

By Mr. HART: Objection to this question is made on the grounds that it does not call for any matter tending to rebut any proofs offered on behalf of the defendant and that any answer the witness may make in answer to this question would not be proper in rebuttal and would not rebut or tend to rebut any proofs offered on behalf of the defendant.

It is stipulated by counsel that this objection may be considered as made and reserved against every question put to and answer made by this witness.

169 By Mr. HART: Objection is also made on the ground that the facts attempted to be elicited by this question were not called to the attention of the witness on Cross-Examination when he testified on behalf of the defendant, and therefore it is not competent for complainant to go into any such matters in this manner or by way of rebuttal testimony.

A. I recognize the letter and the endorsement was written by myself.

Counsel for plaintiff offers in evidence the letter identified by the witness and asked that the same be marked "Complainant's Exhibit No. 114," which is accordingly done.

By Mr. HART: Objection to the introduction in evidence of this paper is made for the reason stated following the answer to Question 2 put to this witness and for the further reason that the paper contains apparent statements of the complainant its agents and of the witness not made under oath.

Q. 3. After having examined this letter, do you desire to make any explanation concerning your testimony given on behalf of the defendant regarding the testimony of Mr. M. F. Thompson about his conversation with you, which was inquired about in Question 13, defendant's printed record 108, in your former testimony? If so, please make such explanation?

By Mr. HART: Objection following Question 2 is repeated.

A. Mr. Thompson, when at our place when he is through selling goods asks me if I had any calls for "American Lady" shoe, my reply was, that "I had." I remembered a case short time before of that inquiry being made. I did not regard this inquiry for
170 "American Lady" shoes as conflicting or causing confusion between the "American Girl" or "American Lady" shoe.

Q. 4. Can you fix the date of that conversation? If so, please state when it occurred?

A. I can not, it was during the year of 1906.

Q. 5. Did it occur before or after the time when you received the letter, "Complainant's Exhibit No. 114"?

Same objection.

A. Before.

Direct examination closed.

Cross-examination by Mr. HART without waiving objections:

X Q. 1. Do you have calls for any shoes other than the "American Lady" shoe which you do not handle?

A. I have.

X Q. 2. Please mention the names of one or two such brands?

A. I have calls for Dorothy Dodd, Sorosis and others.

X Q. 3. Was the call for "American Lady" shoe which you have referred to on your direct examination similar to the calls for Dorothy Dodd, Sorosis and such other brands of shoes as are not handled by you?

Objected to by Mr. Hopkins, as incompetent, and calling for a volunteer statement by this witness of what was in the mind of the parties making the inquiries, concerning which this witness can have no knowledge whatever?

A. It was.

Q. 4. Was there anything about the manner in which this call for the "American Lady" shoe was made that indicated that
171 she wanted any other shoe than the "American Lady?"

A. I think that she wanted the shoe called for from the fact that she had formerly been a resident of St. Louis, Mo.

Cross examination closed.

(Signed) JOHN F. HUDSON.

Subscribed and sworn to before me this 10th day of October, 1907.

(Signed) WILLIAM SCHUCHARDT,

[NOTARIAL SEAL.] *Notary Public.*

SAMUEL B. WOLF, being called on behalf of the complainant testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. You are the president of the complainant, and have heretofore testified in its behalf?

A. I am and have so testified.

Q. 2. Please state what experience you have had with the shoe trade in the Southern States with reference to the persons who buy women's shoes from the retail dealer, and who use such shoes, which tends to acquaint you with the ability of such persons, or of any proportion of such persons to read and write, if you have had such experience?

By Mr. HART: Objection to this question is made on the ground that it does not call for any matter tending to rebut any proofs offered on behalf of the defendant and that any answer the witness may make in answer to this question would not be proper in rebuttal and would not rebut or tend to rebut any proofs offered on behalf of the defendant.

It is stipulated by counsel that this objection may be con-
172 sidered as made and reserved against every question put to and answer made by this witness.

A. I have traveled in the Southern country for a good many years, well, nearly thirty years, off and on, and still continue to make short trips South, in fact am to leave here Saturday night for the South. The majority of our shoes are sold to either the poorer class of white people or the negroes in my territory. The amount of money a negro will spend for shoes depends entirely upon the amount that he or she has at the time of purchasing. Although our goods are plainly branded with the price on the bottom, there are instances that have come to my knowledge where the dealer has charged more money for the shoe than the price stamped on the sole; of course, in this instance that I speak of the negro woman in question was illiterate. I remember an instance in Atlanta where a negro asking for a pair of the "American Girl" shoe was shown the shoe with the plain top facing, as we only place the woven top facing bearing our trade mark on one shoe, when she promptly refused to look at the shoe, saying to the clerk, "This is not the shoe I want. I want the shoe with the head of the woman on the top," she, of course, meant the top facing; the clerk then brought her the other shoe, showing the head, etc., and she promptly sat down and was fitted and made the purchase. This was in the store of Messrs. Byck Bros. & Co., of Atlanta, in either 1900 or 1901. I am not positive as to the year. I remember another instance when I was traveling for Blacker, Gerstle & Co., who were formerly in business in this city, when I sold some of our goods to a concern, named W. J. Davis & Co., of Charlotte, N. C. The shoes that I sold them, that that inci-
173 dent refers to, was a shoe that retailed at two dollars, the brand on the front of the box were large letters, printed in red with the words "B. G. & Co." We decided that we would change the color of this label to a blue; we did so, and sent this special lot of shoes to this concern, they put them on sale and a short time afterwards wrote us that they could not convince their negro trade, to whom this shoe had been selling, that it was the same shoe that they were calling for, and demanded of us to send them new labels printed in red, with which to relabel the boxes. This incident, if I am not mistaken, happened in 1893. I remember the date of this incident, as the letter was forwarded to me making that complaint when I was in Chicago at the World's Fair.

Objection to the foregoing answer is made on the ground that it contains a mass of volunteered argumentative matter wholly unresponsive to the question, and for the further reason that it contains a statement of matters in regard to which the witness does not appear

to have had personal knowledge and which are based entirely upon hearsay statements of others.

Q. 3. Please state what proportion of the complainant's trade in the "American Girl" shoe is had with the Southern States?

A. The large proportion of our business is done with the Southern States, I mean, by the Southern States, those states south of the Ohio River.

Q. 4. Are you a married man?

A. I am.

Q. 5. I hand you an envelope bearing the return card

After 5 days, return to
A. May & Sons,
Grand Rapids, Mich.

This envelope is post-marked upon its face

174 Grand Rapids, Mich.
Dec. 28
12.30 P. M.
1905.

It is post-marked upon its back

Cincinnati, O.
Dec. 29
10—A. M.
1905.

and

Cincinnati, Ohio
Station N.
Dec. 29 1.30 P. M. '05.

The envelope is addressed to

Mrs. Sam B. Wolf,
Cincinnati,
Ohio.

c/o American Lady Shoe Co.

Do you recognize this envelope, if so, please state where it was delivered?

Objected to as wholly immaterial.

A. The "fools and idiots" in the post-office here in Cincinnati handed it to the post-man, who delivered it to our place of business, the factory of The Wolf Bros. & Co., makers of the "American Girl" shoe.

Counsel for complainant offers in evidence the envelope identified by the witness and asks that the same be marked "Complainant's Exhibit No. 115," which is accordingly done.

Objection to the introduction in evidence of this envelope is made

for the reason stated following Question 2 and for the further reason that the party who appears to be responsible for the markings on this envelope has not been produced as a witness to testify in regard to the markings thereon or his good or bad faith in making such markings, or as to the inducements which may have led him
175 to mark this envelope as it is marked at present and for the reason that the origin or authenticity of this envelope and the markings thereon are not accounted for by any sworn or other testimony in the case, and so far as appears in the testimony of this witness, he knows nothing whatever except that.

Q. 6. Please state if you know who the writer of the letter originally contained in the "Complainant's Exhibit No. 115" was, and if that writer is now living?

A. The letter was written by Mr. A. May, who was President of the Chamber of Commerce at Grand Rapids and who is now deceased.

Q. 7. I hand you another envelope, post-marked on its face

Cincinnati, O.
Jan. 17,
12—M.
1906.

and addressed

Mr. Samuel Wolf,
c/o "American Lady,"
Cincinnati, Ohio.

Please state if you can identify this envelope, and if so, whether it was delivered to you in the regular course of the mail and at the time indicated by the post-mark?

A. In looking at this envelope I note that I have made an endorsement on same, reading, "Received 4 P. M., at 416 W. 7th, 1/17/06, and now remember that this letter was delivered to me at my place of business, 416 W. 7th and was a request for an electrotype from the party to whom my brother had given a contract to make for us a quantity of soap for advertising purposes bearing our trade-mark, the "American Girl."

Objection to the foregoing answer is made on the ground
176 that it contains volunteered matter not responsive to the question, objection is also made to the witness stating what was contained in this envelope of the contents of any letter that might have been contained in the envelope for the reason that such letter would be the best evidence.

Counsel for complainant offers in evidence the envelope identified by the witness and asks that the same be marked "Complainant's Exhibit No. 116," which is accordingly done.

Objection to the introduction in evidence of this envelope is made for the reason stated following the introduction in evidence of "Complainant's Exhibit" No. 115.

Counsel for complainant offers in evidence bulletin No. 26 of the

Bureau of the Census, entitled "Illiteracy in the United States," published 1905 by the Government Printing Office, and asks that the same be marked "Complainant's Exhibit" No. 117.

Objection to the introduction in evidence of this circular or document is made for the reason stated following Question 2, and for the further reason that document is not properly authenticated, and for the further reason that the statements therein contained are not made under oath, and that the document is wholly immaterial and irrelevant to any issue involved in this suit.

Direct examination closed.

Cross-examination by Mr. HART without waiving objections:

X Q. 1. When was the envelope offered in evidence as "Complainant's Exhibit No. 115" delivered to you?

177 A. It was delivered at our office some time during the afternoon of December 29th, according to the post-marks on the back of the envelope.

X Q. 2. Please produce the letters contained in the envelopes offered in evidence of "Complainant's Exhibit Nos. 115 and 116."

A. The Exhibit I have in my hand marked 115 is a letter written to my wife. I took this letter home with me and recognizing the value of this envelope, I had my wife give it to me and brought it down to our factory. I of course do not know the contents of the letter, it was purely a personal letter, hence, even if I have read it, I should have forgotten the contents. As regards the No. 116, why, I have not looked for the contents of this letter, and as I do not imagine it amounts to anything it may be possible it is not even in our files, as I stated in my direct examination just about what this letter contains.

Counsel for defendant now calls upon complainant to produce the two letters referred to, and gives notice that in the event of a failure to produce said letters a motion will, at the proper time and place, be made to strike the deposition of this witness from the record, particularly that portion relating to Complainant's Exhibits Nos. 115 and 116, and the Exhibits themselves.

X Q. 3. In answer to Question 5 in your direct examination you used the term or expression, "fools and idiots," please state at whose suggestion you used this *suggestion?*

A. Having read it in the records I asked my counsel if it was permissible for me to answer in the manner that I did and he told me that there would be nothing wrong if I answered that way if it was

178 my own expression, and as I felt called upon to protect as far as possible the intelligence of our post-office department here in Cincinnati, I answered as I did.

X Q. 4. The expression was used then, as I understand you either at the suggestion of complainant's counsel or after consultation with him in regard to it. Is that correct?

A. There was no consultation except what Mr. Hart saw in this room and which I stated before, but was brought about Mr. Bakewell's question and the answer of Mr. Walter H. Spahr, Question 54

on page 98 of defendant's record, and again Question 62 on page 102 of defendant's printed record.

X Q. 5. In answer to X Q. 2 you state as follows: "Recognizing the value of this envelope, I had my wife give it to me and brought it down to our factory." Please state what you mean by this statement?

A. We were at that time contending in Washington against the Hamilton-Brown Co., having the name which they used the "American Lady," trade marked and I thought that this might be of some value to Mr. Jones in this contention.

X Q. 6. When did you call the matter of the receipt of these two envelopes to the attention of your counsel?

A. I do not know. I gave them to my brother and I don't know when he gave them to Mr. Hopkins, or Mr. Jones.

X Q. 7. When you or your brother received the letter offered in evidence as "Complainant's Exhibit, Appendix E," do you recall whether or not the lid of the "American Lady" carton which accompanied that letter was a lid similar to the lids of carton offered in evidence as Defendant's Exhibits, "Defendant's Shoes, McElroy, A, B and C?

A. I don't recall the circumstances in regard to that letter; my brother will, in all probability, be able to answer this question.

179 Cross examination closed.

(Signed) SAM B. WOLF.

Sworn to and subscribed before me this 10th day of October, 1907.

(Signed) WILLIAM SCHUCHARDT,

[NOTARIAL SEAL.] *Notary Public and Special Examiner.*

MILTON ADLER, recalled on behalf of the complainant being again sworn, testifies as follows:

Direct examination, by Mr. HOPKINS:

Q. 1. Are you the same Milton Adler who formerly testified for the complainant in this case?

A. Yes.

Q. 2. What experience, if any, have you had in dealing with the shoe trade in the Southern States which has familiarized you with the class of persons to whom women's shoes are sold, and by whom such shoes are used, with reference to the illiteracy of such persons, and the range of prices at which such women's shoes are sold to the consumer?

By Mr. HART: Objection to this question is made on the ground that it does not call for any matter tending to rebut any proofs offered on behalf of the defendant and that any answer the witness may make to this question would not be proper in rebuttal and would not rebut or tend to rebut any proofs offered on behalf of the defendant.

It is stipulated by counsel that this objection may be considered as made and reserved against every question put to and answer made by this witness.

A. Upwards of ten years of direct contact with the retail shoe trade in the Southern country, from Texas to Virginia has enabled
180 me to know the character of the consuming trade in the south, and to realize the illiteracy existing in this section, and more particularly so among the negro-, many of whom cannot read, and to many of whom specific articles would only be recognizable by specific designs. The illiterate class of the South are notoriously shiftless, and having money as they have had for the last several years would purchase only such goods as they might want and without regard to their price. It is a well known fact, and one often commented on that the Southern negro will buy a "Hanan Shoe," and a "Stetson hat," two of the highest class articles in their class made, even though such purchase might exhaust their entire funds. This same condition will also apply to the female.

Q. 3. In your transactions in the Southern states, have you come in competition with the "American Girl" shoe of The Wolf Bros. & Co.

Objected to as immaterial.

A. I have frequently.

Q. 4. In the course of that competition, what, if anything, have you learned as to the value of the pictures of a girl's head as used by The Wolf Bros. & Co. in connection with their trade-mark, the "American Girl," in that part of the trade where dealings with the illiterate whites or negroes are involved?

Objected to as calling for a conclusion in the opinion of the witness and for the further reason that the witness is not shown to be in possession of such facts as would enable him to give an intelligent or accurate answer to the question.

A. As answer to the question I would state, I can give no better example than a personal experience which I have had with a customer of both The Wolf Bros. & Co. and our concern. We
181 both sell an account atAtlanta, Ga., to whom I have repeatedly attempted to sell a line of shoes of our manufacture in competing prices to those made by The Wolf Bros. & Co. I have been invariably told by the buyer that he could not use my goods at these prices, even though they were better than those made by The Wolf Bros. & Co., because of the fact, a large part of their business was with a class of trade who knew the "American Girl" shoe, and who recognized it only by its identifying marks. It is a custom of this particular house to have all their shoes, with the exception of the "American Girl" shoe packed in carton- from which all names, excepting those controlled by them, have been removed, and it is only in the case of the "American Girl" shoe that they allow the use of a trade marked carton. They have contended that this is a valuable asset to their business. I might add that this concern to whom I refer was Byck Bros. & Co. Atlanta, Ga., and that following this conversation my attention was directed after the return to the store to several customers who came in calling for the "American Girl" shoe. These customers were both negroes.

Direct examination closed.
Cross-examination waived.
Signature waived.

JAMES J. WOLF, recalled on behalf of the complainant testifies as follows:

Q. 1. You are the same James J. Wolf who has heretofore testified for the complainant in this cause?
A. I am.
Q. 2. I show you an envelope post-marked

182 Pittsburg, Pa.,
May 15,
7 P. M.
1906.

and addressed

"American Lady" Shoe Company,
Cincinnati, Ohio.

Please state if you identify this envelope, and if so whether it was received by you at the place of business of The Wolf Bros. & Co. in this city in the regular course of the mail?

By Mr. HART: Objection to this question is made on the grounds that it does not call for any matter tending to rebut any proofs offered on behalf of the defendant and that any answer the witness may make in answer to this question would not be proper in rebuttal and would not rebut or tend to rebut any proofs offered on behalf of the defendant.

It is stipulated by counsel that this objection may be considered as made and reserved against every question put to and answer made by this witness.

Objection also made on the ground that the envelope inquired about or any matter connected with it does not appear to have been post-marked or anything done in connection with the same until after the filing of the bill of complaint in this cause, and therefore anything the witness may say in answer to this question must be immaterial and irrelevant.

A. I do identify it, and it was received by me at the office of The Wolf Bros. & Co. of this city in the regular course of the mail.

Q. 3. Can you produce the letter which was contained in this envelope when you received it? If so, please produce it.

183 Last objection repeated.

A. I can, and here produce it. This letter reads as follows:

PITTSBURG, PA., May 15th, 1906.

"American Lady" Shoe Company, Cincinnati, Ohio.

GENTLEMEN: I would kindly ask you to send me one of your catalogues, also state where in Pittsburg, your shoes can be pur-

chased, also state whether they can be purchased direct from you should the store not carry the size desired; which is a No. 4½ AA straight last, or a No. 5 AAA straight last? I always have a great deal of trouble in getting what I need and am told that it does not pay them to carry such a narrow last, therefore they try to talk me into getting a shorter and wider shoe which is never comfortable, and I cannot wear it.

Thanking you for an early reply, I remain,

Yours very truly,

A. S. HARROLD (Miss).

Address:

P. O. Box No. 606, Pittsburg, Pa.

Objection to the witness — of what is contained in the letter is made on the grounds that the letter itself would be the best evidence of such facts.

Counsel for complainant offers in evidence the envelope and letter identified by the witness and asks that the same be marked "Complainant's Exhibit No. 118," and "Complainant's Exhibit No. 119" respectively, which is accordingly done.

Objection to the introduction in evidence of this letter and envelope is made for the reason that the author and sender of them has not been produced as a witness to testify in regard to the contents and markings on said letter and envelope, or as to his or
184 her good or bad faith in writing this letter in making the markings on this envelope or as to the inducements which may have led him or her to write said letter or make the markings on said envelope, and for the reason that the origin and authenticity of said letter and envelope and markings thereon are not accounted for by any sworn testimony in the case, and so far as appears in the testimony of this witness, he knows nothing whatever except that they were received.

Objection is also made for the reason stated following Question 2 put to this witness.

Q. 4. What experience, if any, have you had in dealing with the shoe trade in the Southern State- which has familiarized you with the matter of the illiteracy of the ultimate purchasers and users of women's shoes in those states?

A. I traveled the Southern States prior to 1897, for several years but have done no traveling since then, in a Commercial way. When I did travel in the South I would often on a Saturday afternoon and night help out a customer or prospective customer in selling shoes. My experience acquainted me with the fact of the illiteracy prevailing among the poorer whites and negroes among the consumers purchasing from such customers or prospective customers. Some of the purchasers at these stores at which I helped make sales had no socks or stockings upon their feet, and I often, as was the custom, handed the purchaser a pair of socks or stockings for them to put on before trying on the shoes.

Q. 5. In that experience did you have opportunity of observing

the range of prices at which women's shoes were purchased by illiterate persons, whites and negroes; if so, state what that range of price was.

185 A. I did, and the price they were willing to pay depended entirely upon how much money they had upon their person; in fact, as concerns the negro, my experience has been that if I offered him or her, as the case might be a shoe at three dollars and a half and he or she liked the shoe, he or she would take no other shoe, and if he or she did not have sufficient to pay for that particular shoe, it was either cut the price or no sale.

Q. 6. Referring to the testimony of H. W. Smith, "Defendant's Printed Record," page 68, please state what the facts are concerning the sale of the "American Girl" shoe in Norris City, Ill.

A. We have sold the "American Girl" shoe to Frank De Board & Son, Norris City, Ill., continuously since Ja-uary, 1905. I further find that we circulated catalogues of the "American Girl" shoe to consumers in and about Norris City, Ill., these catalogues having been mailed in the spring of 1905, in the spring of 1906 and in the fall of 1906, the list of names to whom these catalogues were mailed having been furnished by Messrs. Frank De Board & Son, they having paid the postage for the mailing of same. Since January, 1905 we have made between fifteen and twenty shipments of the "American Girl" shoe to Messrs. Frank De Board & Son, Norris City, Ill.

Q. 7. Referring to the testimony of Homer Tanner, "Defendant's Printed Record" page 52, please state what the facts are as to the sale and advertisement of the "American Girl" shoe in Litchfield, Ill.

A. At Litchfield, Ill., we have sold the "American Girl" shoe to L. Maas & Bro. I find no record of having distributed catalogues at the instance of L. Mass & Bro., but we did send them ad-

186 vertising display matter of the "American Girl" shoe.

Q. 8. Referring to the testimony of Robert D. Kelly, "Defendant's Printed Record", page 62, please state whether or not the "American Girl" shoes have been sold at Clinton, Ill.?

A. Yes, but not for about four years, we having sold J. Fosnaugh at Clinton, Ill., about four years ago.

Q. 9. At page 98 of "Defendant's Printed Record" in Q. 52 of his examination of "Defendant's witness, Spahr, "Defendant's Counsel" has pointed out that in your former testimony given in December, 1906, you failed to segregate, in response to Q. 33 of your former direct examination that portion of the amount expended by the Complainant and Wolf Bros. & Co., the co-partnership in advertising the "American Girl" shoe prior to the institution of this suit, which was filed January 29, 1906. Please state as nearly as you can the total amount of money which has been expended by this Complainant and its said immediate predecessor in advertising the "American Girl" shoe prior to the institution of this suit?

A. Approximately $55,000 (fifty-five thousand dollars).

Q. 10. Please state the proportion of the Complainant's trade in the "American Girl's" shoes which it has with the Southern States;

distinguishing in your answer the states which you include in the term Southern States.

A. In the states south of the Ohio River the Complainant's trade in the sale of the American Girl shoe is approximately seventy-five per cent of the whole. The states I refer to include Kentucky, Tennessee, Georgia, Alabama, Mississippi, Florida, Virginia, Arkansas, North and South Carolina, Louisiana, Texas, Oklahoma, Indian Territory, West Virginia, District of Columbia, Maryland.

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Direct examination closed.

Cross-examination by Mr. HART:

X Q. 1. Referring now to Complainant's Exhibits Nos. 118 and 119, I will ask you to state when you first called the matter of the receipt of those exhibits to the attention of your counsel?

A. I can't state the exact date, but I sent these exhibits to Mr. Hopkins at St. Louis, having sent him from time to time any matter received by us or called to our attention which I thought might be material in this cause, the merits of same to be judged by him.

X Q. 2. Was this sent to Mr. Hopkins, or called to his attention in any way prior to January 1, 1907?

A. I can't fix the date, or even about the date, having kept no record of the dates.

X Q. 3. How long after you had received anything which you thought would have a bearing on this litigation would it usually be before you called the same to the attention of either Mr. Jones or Mr. Hopkins, your counsel in this case?

A. If I could answer that, Mr. Hart, I would have answered same in answer to first and second cross-questions.

X Q. 4. Will you state positively that it was since January 1, 1907, that you first called this matter to the attention of either Mr. Jones or Mr. Hopkins?

A. I will give you the same answer. I cannot state positively. In fact, I had given the letter no further thought, after sending same to Mr. Hopkins, until he called same to my attention today.

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X Q. 5. Please state when the matter of the receipt of Complainant's Exhibits 115 and 116 was first called to the attention of either Mr. Jones or Mr. Hopkins?

A. As regards these two exhibits, I can't answer differently than I have as regards Complainant's Exhibits 118 and 119.

X Q. 6. Please state, if you recall, whether or not the lid of the American Lady carton which accompanied Complainant's Exhibit Appendix E was a lid similar to the lids of cartons offered in evidence as Defendant's Exhibits "Defendant's Shoes McElroy A, B and C"?

A. I have no recollection of having seen the McElroy exhibits, but the lid of the carton referred to had on it the full figure of a woman.

Cross-examination closed.

The attention of the court is called to the fact that practically the entire testimony taken at this session of the depositions in so-called rebuttal is not in any particular rebuttal testimony, and that it appears from the record in this case that the matters brought out at this session of the depositions was known to complainant and complainant's counsel at the time of taking proofs in chief in this case and could have been made a part of the record at that time; and defendant's counsel gives notice now that they will at the proper time and place move to strike from the record herein all of this so-called rebuttal testimony which is not in truth and in fact rebuttal testimony.

(Signature waived.)

STATE OF OHIO,
Hamilton County, ss:

189 I, William Schuchardt, a notary *of* public in and for said County and State, and Special Examiner herein by agreement of counsel, hereby certify that the above witnesses, John F. Hudson, Samuel B. Wolf, Milton Adler and James J. Wolf, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that their respective depositions were reduced to typew-iting by Adah Denis in the presence of the said witnesses respectively, and when completed read over to said witnesses respectively, and subscribed by them in my presence (except as therein noted) and in the presence of such of the parties and counsel as attended; that said depositions were taken pursuant to agreement of counsel at the office of John E. Jones, 519 Main Street in the City of Cincinnati, County of Hamilton, State of Ohio, beginning on the ninth day of October, 1907, and being concluded on the tenth day of said month; that the parties were represented at the taking of said depositions by their respective counsel as set forth; that the several exhibits recited were offered in evidence and marked as specially noted therein; and that I am not of counsel or related to either party to the action by blood or marriage, or otherwise interested in the event of this suit.

I further certify that the fees for the taking and transcribing of these depositions were paid by the Complainant in the sum of $19.10 and the said sum is a proper charge therefor.

In testimony whereof I have hereunto set my hand and official seal this tenth day of October, 1907.

[NOTARIAL SEAL.] WILLIAM SCHUCHARDT,
Notary Public in and for Hamilton County, Ohio, and Special Examiner.

Witness fees:

4 witnesses at $1.50.
$6.00 paid by Complainant.

190 In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri.

No. 5262. In Equity.

THE WOLF BROTHERS & COMPANY, Complainant,
vs.
HAMILTON-BROWN SHOE COMPANY, *Respondent.*

Proofs in Rebuttal on Behalf of Complainant Taken Under and in Pursuance of the 67th Rule in Equity as Amended at the Law Offices of Hopkins & Eicks, 400 Columbia Building, Southeast Corner Eighth and Locust Streets, on Monday, the 21st Day of October, 1907, Before Walter C. Stein, a Notary Public in and for the City of St. Louis, Missouri, and Acting as Special Examiner, Beginning at the Hour of Eleven o'Clock in the Forenoon.

Appearances:

James L. Hopkins, Esquire, on behalf of Complainant.
Luke E. Hart, Esquire, of Bakewell & Cornwall, on behalf of Respondent.

ROBERT E. HARRISON, a witness produced on behalf of Complainant, being first duly sworn, testified as follows:

Direct examination by Mr. HOPKINS:

Q. 1. Are you the same Robert E. Harrison who heretofore testified on behalf of the Complainant.

A. I am.

Q. 2. What position do you occupy in the Complainant corporation?

A. I am traveling salesman and vice-president of the corporation.

191 Q. 3. In your testimony given in Complainant's proofs in chief, you have testified that your territory in which you travel embraces the States of Texas, Oklahoma, Louisiana, Indian Territory, Arkansas, Mississippi, Alabama, Kentucky and Tennessee. Are you still traveling in that territory?

A. I am.

Q. 4. How often do you cover that territory annually?

A. I make two trips a year. One in the fall and one in the spring of the year.

Q. 5. How much time does each of those trips consume?

A. About three months and a half.

Q. 6. Please state approximately the number of miles which you travel in the states named on each of those trips?

A. I couldn't tell you exactly; I suppose I travel between 8,000 and 10,000 miles in each trip.

Q. 7. To what extent if at all do you come in contact with persons

who buy the "American Girl" shoes from the retail dealers to whom you sell those shoes?

A. Why, I see them constantly in the store; I come in contact with them in the store of the dealers.

Q. 8. On busy days when I am in town, I go around the stores and help them sell shoes.

Q. 9. How long have you been traveling in your present territory?

A. Over twenty-five years.

Q. 10. Have you been engaged in selling shoes during all of that time?

A. I have.

Q. 11. Women's shoes?

A. Yes, ladies' shoes all that time. I have never handled men's shoes.

Q. 12. With what houses were you identified in your work in this territory prior to the establishment of your connection with Wolf Bros., the Complainant?

A. I was formerly with William Cosgrove & Co. of Cin-
192 cinnati, M. Felix & Company, also of Cincinnati, and then Felix, Wolf & Company, Cincinnati; Wolf Bros. & Company, Cincinnati, and now The Wolf Brothers & Company, Cincinnati.

Q. 13. Can you produce a specimen of the woven fabric bearing the trade-marks of the Complainant, which fabric is used as top-facing in the "American Girl" shoes? If so, please do so.

Objection to the question is made on the ground that it does not call for any matter tending to rebut any proofs offered on behalf of the defendant and that any answer the witness may make in answer to this question would not be proper in rebuttal and would not rebut or tend to rebut any proofs offered on behalf of the defendant. It is stipulated by counsel that this objection may be considered as made and reserved against every question put to and answer made by this witness.

A. I can and here produce it.

Counsel for Complainant offers in evidence the strip of fabric produced by the witness and asks that the same be marked "Complainant's Exhibit American Girl Top-Facing," which is accordingly done.

Objection to the introduction in evidence of this exhibit is made for the reason stated in the objection following Q. 13.

Q. 14. In regard to the picture of the head of the lady which appears upon the top-facing of the American Girl shoes, state if you know, whether or not that picture was used in conjunction with the name American Girl by the Dana-Little Shoe Company?

A. No, they did not use it in the top-facing.

Q. 15. When did the Complainant first begin the use
193 of the picture on the top-facing?

A. Well, to my best recollection, about 1899.

Q. 16. Prior to the use of the picture, how were the top-facings used by Wolf Brothers & Company marked?

A. Why, we used what we call a stamp or a die, and we stamp that in the top-facing, and used a silver or gold leaf or aluminum; it merely bore the name "American Girl."

Q. 17. From the results of your actual experience and observation of the consumers to whom the "American Girl" shoes are sold by your retail customers in your territory, please state to what extent, if at all, the "American Girl" shoes are finally bought and used by illiterate white or colored?

Objected to as immaterial.

A. I couldn't state exactly what per cent, but a very large proportion of the "American Girl" shoes are bought and worn by that class of people on account of the popular price.

Q. 18. At what range of prices do such illiterates buy the "American Girl" shoes?

A. Why, the negro class, when they have money, they will pay most any price for a shoe, but when the times are hard and money scarce, they will buy $2.50 and $3.00 shoes.

Q. 19. Please state how the "American Girl" shoes are known to such illiterate consumers?

A. They are known by the trade-mark, the lady's head in the top-band, and the lady's head on the end of the carton.

Q. 20. How are the "American Girl" shoes called for by such illiterates?

A. They will come in and ask the dealer for a shoe with the lady's head in it.

Q. 21. Can you give some specific instances of the "Amer-
194 ican Girl" shoe being so called for by illiterates? If so, please give such instances.

A. I was in Marlin, Texas, on show day in my customer's store, Cheeves & Linthicum's store; they were very busy and I was helping them out. One of the clerks was waiting on some negroes and I volunteered to help him out, as he didn't seem to know exactly what they wanted, and I asked them what kind of shoe they wanted, and one of the women said she wanted to get a pair like her sister got. I asked her what kind of a shoe it was, and she said it was a shoe with a lady's head in it, and then I told her it was the "American Girl." She said, yes, she believed that's what the clerk did call it. I showed them the shoe and sold them four pair.

Down in Bryan, Texas, in Burton Norwood's store, that is another section of the country where the negro population is largely in majority, it is called Black Belt on account of there — about two negroes to one white man, and they came in and called for shoes with the lady's head in it; that is, a negro woman.

Well, when we first commenced making the "American Girl" shoe, as I stated in my former evidence, I sold in New Orleans several dealers with the name "American Girl" in the top band without the head, that is, when we first commenced making the shoes, and afterward I gave the sale of the "American Girl" shoe to F. Roth

for New Orleans, and several years afterward a dealer opened up across the street from Roth's store on Canal street, who bought a lot of these shoes that were made with the plain "American Girl" in the top-band, without the head, from Alphonse Verleque. The party to whom I refer as opening the store across the street from Roth
195 was Toppino Shoe Company. He bought these shoes and advertised them at a cut price. I went over and asked Jim Blanco, the manager and buyer, why he done this. He says, "Why, Harrison, this don't hurt you, as when they come and I show them the shoe, they say it's an imitation, as the lady's head made in the top-band is not embossed in the top-band, as the customers would come in and call for the shoes with the lady's head in the top-band."

Objection to that portion of the answer commencing with the words, "He says, 'Why, Harrison,'" is made on the ground that the same is a mere repetition by the witness of unsworn statements by the parties, and mere hearsay and secondary evidence.

Q. 22. Please name such other places as you can readily recollect where you have heard the "American Girl" shoes called for as the shoes having the picture of the lady's head?

A. Cheeves Bros. & Co., Cameron, Texas; Cheeves Bros. & Co., Waxahachie, Tex., and Cheeves Bros. & Co., Mexia; Mathews Bros., Ennis, Tex.; Gus Blass Dry Goods Co., Little Rock, Ark.; J. W. Patrick Shoe Co., Ft. Smith, Ark.; Baer & Bros., Vicksburg, Miss.; W. B. Dicks & Co., Natchez, Miss.; J. D. Holmes & Co., Eufaula, Ala.; F. Roth, New Orleans, La.; Morgan & Verhine & Co., Union City, Tenn.

Q. 23. How frequently have you heard the "American Girl" shoes so called for?

A. It's almost a daily occurrence in almost every town where we have a dealer.

Q. 24. And during how long a time has this been the case?

A. Well, for a number of years since the shoe has grown into popularity.

196 Q. 25. And over how much of your territory is the shoe so called for?

A. Oh, the entire territory in which I travel.

Q. 26. State in what other way, if any, the illiterate class of customers have called for the "American Girl" shoes in your presence?

A. I have been in store where the "American Girl" shoe is sold and while there would be dozens of the "American Girl" setting out prominent on the shelves, the customers would come in and say I want another pair of the "American Lady" shoes like the one I have on, which would be the "American Girl" shoe.

Direct examination closed.

Cross-examination by Mr. HART:

X Q. 27. How much stock in the Complainant company do you own?

A. I own five thousand dollars.

X Q. 28. What other remuneration do you receive from the Complainant company outside from your dividend on this stock?

A. Why, I get pay for selling shoes on the road, five per cent commission.

X Q. 30. How much does this amount to annually?

A. Well, it goes over five thousand dollars.

X Q. 31. Please give the names of the proprietors of the stores referred to in your answer to Q. 26 of your direct examination, and their addresses.

A. F. Roth, New Orleans, La., on Canal street; of course, it's hard to bring this to your mind and name all the stores, but it is a common occurrence. Of course, I could go back and name a whole lot of them. I have heard them called for in Waco, Tex.. Brelsford Shoe Co.; Gus Blass D. G. Co., Little Rock; that's all I recollect at present.

197 X Q. 32. Please give the names of the parties referred to by you as having purchased four pairs of shoes from you at the store of Cheeves & Linthicum at Marlin, Tex.

A. That would be impossible to give, as they were negroes and paid cash for the shoes and therefore did not need their names.

X Q. 33. Who else was present during this transaction except you and the purchaser?

A. I do not know that there was anybody around when I made the sale but the people I sold them to.

X Q. 34. What was the name of the clerk whom you state you volunteered to assist and whom you were assisting when you made that sale?

A. I don't know his name.

X Q. 35. When did this transaction take place?

A. About a year ago, I could not state the exact date. It was show day; it would be easy to find the date.

Cross examination closed.

Direct examination by Mr. HOPKINS:

Q. 37. How frequently have the "American Girl" shoes been called for as "American Lady" shoes in your presence?

A. Why, it is almost a daily occurrence.

Q. 38. And in what parts of your territory has it occurred?

Objected to as not proper re-direct examination.

A. In my entire territory and in all towns where the "American Girl" shoe is sold.

Redirect examination closed.

Recross-examination by Mr. HART:

R. X Q. 39. Please give me the names and addresses of the
198 stores and the proprietors of the stores in which this has occurred?

A. I could not give them all to you. Baer & Bros., Vicksburg;

W. B. Dicks & Co., Natchez, Miss.; Nelms & Blum, Greenville, Miss., are some of the places where I have so heard them called for.

R. X Q. 40. Do you know whether or not the "American Lady" shoe was handled at those places?

A. No, I have not kept in track of them much; I suppose they are, though.

R. X Q. 41. Would the calls for shoes during such transactions or on such occasions be just a call for the "American Lady"?

A. There is so much similarity between the names that the customers often get confused and call for the "American Lady" when they want the "American Girl" shoe.

The answer is objected to as volunteered and not responsive to the question and as being a mere conclusion of the witness.

R. X Q. 42. Upon the occasions referred to by you when you stated that the "American Girl" shoe was called for as the "American Lady," was such calls just ordinary calls for shoes with the name "American Lady" used to designate the shoe wanted by the customer?

A. They come in to buy a pair of "American Girl" shoes and called for "American Lady."

R. X Q. 43. The call was just an ordinary call for shoes with the name "American Lady" used to designate the shoe wanted, is that a fact?

A. They came in and called for "American Lady" shoes.

Re-cross examination closed.

Redirect examination by Mr. HOPKINS:

R. Q. 4-. How did you know what shoes these people called — when they asked for "American Lady"?

199 Objected to as calling for a conclusion and the opinion of the witness, and for the reason that the witness is not capable of stating what was in the minds of the customers or what their wants may have been in this regard.

A. It was a natural supposition that they wanted the "American Girl" shoe as the shoe was called for in the store where the "American Girl" shoe was sold and not the "American Lady."

Re-direct examination closed.

ROBERT E. HARRISON.

Subscribed and sworn to before me this 21st day of October, 1907.

[SEAL.] WALTER C. STEIN,
Notary Public.

Complainant announces that its rebuttal testimony is closed.

Certificate.

STATE OF MISSOURI,
City of St. Louis, ss.

I, Walter C. Stein, a Notary Public in and for the City of St. Louis, and by agreement of counsel for the respective parties to the suit identified by the above caption, acting as Special Examiner therein, do hereby certify that the deposition of Robert E. Harrison, Esquire, a witness recalled on behalf of the Complainant, was taken before me pursuant to the 67th Rule in Equity as Amended, at the Law Offices of Hopkins & Eicks, 400 Columbia Building, southeast corner 8th and Locust streets, in the City of St. Louis, Missouri, by consent of the parties, commencing on the 21st day of
200 October and concluding on the same day, and reduced to typewriting, counsel consenting, by L. A. L. McIntyre, under my direction, from the dictation of the witness, in the presence of counsel.

I further certify that I was attended on said date by James L. Hopkins, Esquire, counsel for Complainant, and Luke E. Hart, Esquire, counsel for Respondents, and by the witness as appears on the record.

That said witness being of lawful age and sound mind, was by me duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, in answer to questions propounded by counsel, before the commencement of his testimony.

I further certify that the witness subscribed and swore to his testimony after reading the same, and in my presence.

I further certify that I am not of counsel or attorney or solicitor for either party to this suit, nor connected by blood or marriage with either of said parties, or in any way interested in the event of said suit.

I further certify that my fees for taking this deposition are $13.50, and that the same has been paid by Complainant.

In testimony whereof I hereunto set my hand and affix my Notarial Seal this 21st day of October, A. D. 1907, at the City of St. Louis, in the State of Missouri.

My commission expires Nov. 22, 1910.

[SEAL.] WALTER C. STEIN,
Notary Public and Special Examiner.

201 (APPENDIX A.)

Know All Men By These Presents:

That the Dana-Lytle Shoe Co., a corporation organized under the laws of Ohio, for and in consideration of Three Thousand Dollars ($3,000.00) to it in hand paid by Wolf Bros. & Co., of Cincinnati, Ohio, one-half cash, the balance in a sixty-day note without interest, the receipt of which is hereby acknowledged, does hereby sell, transfer, assign and set over to said Wolf Bros. & Co., their successors, or assigns, all its right, title and interest in and to all the machinery,

lasts, dies, patterns, fixtures, shafts, pulleys, belts, hangers and all other appliances now used by it in the manufacture of shoes at the northwest corner of Ninth and Sycamore streets, Cincinnati, Ohio, as more particularly appears in Schedule "A," hereto attached and made part hereof, and all its right, title and interest and good will in and to the trade-mark The American Girl, and to its good will generally.

In witness whereof the said The Dana-Lytle Shoe Co., by George F. Dana, Secretary and Treasurer, and James E. Lytle Manager, in pursuance of a resolution of its Board of Directors, passed at a meeting held Wednesday, May 11th, 1898, has hereunto set its hand and affixed its seal this 11th day of May, 1898.

THE DANA-LYTLE SHOE CO.

[SEAL.] GEORGE F. DANA,
Sec'y and Treas.
JAMES E. LYTLE, *Manager.*

Scalloping dies, $3.00.
12 Cutting boards.

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Benches and tables in cutting.
1 Tip perforator.
Leather bins.
57 Shop boxes.
2 Lining stampers.
1 Desk and rack in stands, etc.
4 Leather racks.
1 Hartford Grading Machine.
1 Pair Hartford Shears.
1 Pattern binder.
1 Corner cutter.
About 4,000 patterns.
Pattern tip cutter.
1 Pattern rack.
1 Pattern press.
1 Miller treeing outfit.
1 Krieg Embosser.
1 Stamping machine.
Packing tables.
Power eyeletter.
Bobbin winder.
4 Single stitcher, 1 needle.
1 Singer lining machine.
1 Union special layer.
1 Union special seamer.
1 Morley button machine.
1 Singer piecefly machine.
1 Singer Order.
1 Wheeler & Wilson Emb. machine.
1 Singer tacker.

1 Singer toe seamer.
1 Lufkin folder.

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7 Afazeen skiver.
1 Singer cylinder, 1 needle.
1 Singer 2 needle vamper, close.
1 Singer 1 needle stitcher.
1 Singer 2 needle vamper space.
2 Singer inseamers.
Singer cylinder 2 needle close.
1 Single stop needle 2 " space.
1 Watson beader.
1 Wheeler & W. stitcher.
1 Ey-let punch, foot power.
1 Simpson stud.
2 Eureka eyeletters.
1 Pinking machine.
1 Crease vamp machine.
35 Ft. single table and shafting.
30 Ft. double table and shafting.
24 Tables and chairs.
2 Cement pots.
1 Rub down iron.
1 Gas stove.
4 Pasting forms.
3 Irons.
19 Bowen rack.
8 Shelf rack.
3 Pin rack.
1 Heel press.
1 Oil can.
Sole pattern racks.
1 Splitter pulleys and belts.
1 Rounding machine and pulleys and belts.
1 Goodyear outfit pulleys, etc.

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1 Fisher Flap turner, pulleys, etc.
1 Beadedger.
1 McKay channels.
1 Iron pin.
1 Gas stove.
1 Pair scales.
1 Closet.
1 Set shank brushes and shafts P. & B.
1 Wetting down shaft 2 brushes P. & B.
1 Sander & Naumkey P. & B.
1 Drying box.
1 Single Union Edge Setter P. & B.
1 Electric Brush shaft and brushes P. & B.

1 Rose Moyer scourer P. & B.
2 Edge trimmers P. & B.
1 Bussell heel trimmer P. & B.
1 Heel breaster.
1 Wire grip machine.
1 Loose nailer.
1 Heeling machine.
3 Pricking forms.
4 Iron lasts.
Pricking machine B. & P.
2 Nailing blocks.
1 Iron jack.
1 Bresnahan leveler.
21 Lasts, iron.
8 Top forms.
Iron lasts, hand levelling.
1 Turn iron.
1 Turn jack.
2 Iron pins.

205

1 Grind-stone.
1 McKay machine.
1 Tacker.
Last racks and bins.
2 Mallets.
2 Blocks.
21 Sole dies.
20 Top piece dies.
1 Heel building block.
5 Dies, heel.
1 Truck.
5 Trunks.
Benches, tables, fixtures, etc.
175 Feet shafting, hangers, pulleys, oil cups, etc.
1612 Iron sole patterns.
About 3600 second lasts.
About 600 first lasts.
1 Flat top desk.
1 Safe.

This entire inventory stands on our books at $11,704.30 and is insured at $10,500.00.

206 WOLF BROTHERS' EXHIBIT APPENDIX B.

A communication was then read from Messrs. Wolf Bros. & Co., which was as follows:

"CINCINNATI, O., June 12, 1905.

Messrs. Wolf Bros. & Co., 412-18 W. 7th St., City.

GENTLEMEN: We do hereby offer to sell and transfer to your corporation, The Wolf Brothers and Company, for the sum of Two

Hundred and Fifty Thousand ($250,000) Dollars, the following property of the partnership of Wolf Bros. & Company:

All shoes manufactured and in process of manufacture; all materials in process of manufacture, or in the raw stock; all findings in process of manufacture or in stock; all merchandise; shafting; pulleys; hangers; belts; lasts; dies and patterns; all fixtures all samples whether at home or on the road; all interest in the trademark and trade name known as 'The American Girl,' and all other trade-marks and trade names owned by said partnership; all notes, drafts; accounts receivable, claims and choses in action of whatever kind and nature due and owing, or to become due and owing to the partnership of Wolf Bros. & Company, including those in the black ledger of said partnership; all cash in bank or in the safe; all the good will of said partnership as it now exists; as well as all personal property of whatever kind, nature and description wheresoever situated, not hereinbefore enumerated belonging to the partnership of Wolf Bros. & Co., save life insurance policies.

207 All the above, however, to be sold and transferred to your corporation, subject to and conditioned on the assumption and payment by your corporation of all indebtedness of whatever kind or nature, and of whatever description now due and owing, or to become due and owing by the partnership of Wolf Bros. & Co.

SAMUEL B. WOLF,
JAMES J. WOLF,
Partners as Wolf Bros. & Co."

On motion of Mr. Huber, seconded by Simeon M. Johnson, it was resolved, twenty-five hundred shares voting aye, that it was the sense of the corporation that the above offer be accepted by the Board of Directors, and that they be requested and directed to accept the same.

A written instrument of lease, with the initials "R. C." and "S. J." at the top thereof, was presented to the stockholders, as proposed to be entered into by Laura C. Taylor and The Wolf Brothers & Company. It was resolved on motion of Samuel Hu'·er, seconded by Simeon M. Johnson, twenty-five hundred shares voting aye, that it is the sense of this corporation, that the above lease and all its terms be approved and confirmed by the Board of Directors, and that they be requested and directed to authorize the same to be entered into on behalf of the Company by the President and Secretary. On motion, adjourned.

SAM. B. WOLF, *Pres.*

A. B. CONWAY, *Secretary.*

208 (APPENDIX C.)

Received for record August 1st, 1903, and recorded in Liber — W 67, page 338, of Transfers of Patents.

In Testimony Whereof, I have caused the seal of the Patent Office to be hereunto affixed.

[SEAL.]

F. I. ALLEN,
Commissioner of Patents.

Exd. L. H. C., Jr.

Whereas, the Gale Shoe Manufacturing Company, a corporation duly established under the laws of the Commonwealth of Massachusetts on June 4, 1901, registered as a trade-mark under the laws of the United States in the office of the Commissioner of Patents of the United States, the words "American Girl," for use on boots and shoes, being registered trade-mark numbered 36514, a copy of which registered trade-mark is hereto annexed.

Now, therefore, know all men by these presents that said Gale Shoe Manufacturing Company in consideration of one (1) dollar and other valuable considerations paid by Samuel B. Wolf and John J. Wolf, both of Cincinnati, in the State of Ohio, co-partners under the firm name of Wolf Brothers and Company, the receipt whereof is hereby acknowledged, does hereby assign, transfer and set over unto said Samuel B. Wolf and John J. Wolf, all right, title and interest in and to said trade-mark registered June 4, 1901, and numbered 36,514, above referred to, and in and to the use thereof.

In witness whereof, the said Gale Shoe Manufacturing Company has caused its corporate seal to be hereto affixed and these
209 presents to be signed in its name and behalf by Herbert E. Gale, its Treasurer, this 20th day of June, A. D., 1903.

[SEAL.]

GALE SHOE M'F'G CO.,
By HERBERT E. GALE, *Treas.*

COMMONWEALTH OF MASSACHUSETTS,
Essex, ss:

On this 22nd day of June, A. D. 1903, before me, a Notary Public, within and for said Commonwealth, personally appeared Herbert E. Gale, who being duly sworn, did say that he is the Treasurer of the Gale Shoe Manufacturing Company, the corporation whose name is signed to the foregoing instrument, that the seal affixed to said instrument is the seal of said corporation, and that said instrument was signed and said seal affixed by the authority of the Board of Directors of said corporation; and he duly acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.]

JOSEPH H. PEARL,
Notary Public.

(Printed copy of trade-mark attached.)

210

(APPENDIX D.)

(Copy.)

Wolf Bros. & Co.,
Makers of The American Girl.
Trade-Mark:
"A Shoe as Good as Its Name."

CINCINNATI, O., U. S. A., Jan. 7, 1901.

Mess. Hamilton, Brown Shoe Co., St. Louis, Mo.

GENTLEMEN: Our attention has been called to your ad. in the Shoe and Leather Gazette of Jan. 5 of "The American Lady" shoe.

As we feel a concern of your reputation would not knowingly infringe upon our right, we beg to advise that by the use of this name you are infringing upon our established Trade-Mark "The American Girl," as applied to shoes, and we trust this will be all the notice necessary for your prompt discontinuance of the name "The American Lady" or any similar name.

We trust to hear from you and with our good wishes, we are,

Very truly yours,

WOLF BROS. & CO.

Dict. J. J. W.

211 (APPENDIX E.)

Hamilton, Brown Shoe Co.

Manufacturers Exclusively for Cash.

ST. LOUIS, U. S. A.

(Without date, but received Jan. 9, 1901.)

Wolf Bros. & Co., Cincinnati, Ohio.

GENTLEMEN: We have yours of the 7th inst. and note contents. The term, American Lady, as used by us, refers to one particular shoe we make; it is not the central idea of our business, as the "American Girl" seems to be of yours. We advertise it as Hamilton, Brown Shoe Co.'s American Lady Shoe; the idea, of course, being that our name will give the shoe an immediate distinction that it otherwise would not have. The picture we use in connection with this advertisement is copyrighted and is entirely unlike the head used by you. You may be very sure that we have no idea of conflicting with you or anyone else in the use of this combination, and upon giving the matter a little more consideration, we hope you will conclude with us that you are not likely to suffer in any way through our use of it. We take pleasure in sending you today a box-cover with our advertisement on it that you may be the better judge of the matter from our standpoint.

Yours very truly,

HAMILTON, BROWN SHOE CO.,
R. F. SPENCER, *Treas.*

212 (APPENDIX F.)

Wolf Bros. & Co.,
Makers of The American Girl.
Trade-Mark:
"A Shoe as Good as Its Name."

CINCINNATI, O., U. S. A., Jan. 9, 1901.

Messrs. Hamilton, Brown Shoe Co., St. Louis, Mo.

GENTLEMEN: We are in receipt of your favor of the 7th inst. and thank you for your courtesy and prompt reply. The very fact that

the name "American Lady" does distinguish the shoe is a point in question, and we beg to say, gentlemen, we cannot agree with you that the name, "American Lady" would not likely cause us loss.

If you will consult in the matter, we know you will find that you are infringing upon our Trade-Mark "The American Girl" by the use of the name "American Lady" and we respectfully ask you to desist from your use of the name "American Lady" and advise us that you have done so.

This matter can be adjusted just as well between ourselves as legally, and we assure you that we, on our part, entertain the most courteous feeling toward you, and we trust that you will see the correctness of our premises and that you will advise us that you have discontinued the use of the name "American Lady" in connection with shoes.

We ask the courtesy of your prompt reply to this, and we are, with regards,

Very truly yours,

WOLF BROS. & CO.

Dict. J. J. W.-B.

213 (APPENDIX G.)

These articles of incorporation of the Dana-Lytle Shoe Company.

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Dana-Lytle Shoe Company.

Second. Said corporation is to be located at Cincinnati, in Hamilton County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of manufacturing women's shoes and placing same upon the market and all things necessary and incident thereto.

Fourth. The capital stock of said corporation shall be One Hundred Thousand Dollars ($100,000), divided into one thousand (1,000) shares of One Hundred Dollars ($100.00) each.

In witness whereof, we have hereunto set our hands, this 6th day of November, A. D. 1896.

S. F. DANA.
E. O. DANA.
GEORGE F. DANA.
J. E. LYTLE.
T. F. McGRANE.

THE STATE OF OHIO,
County of Hamilton, ss:

214 Personally appeared before me, the undersigned, a Notary Public, in and for said county, this 6th day of November, A. D. 1896, the above-named S. F. Dana, E. O. Dana, George F. Dana, J. E. Lytle and T. F. McGrane, who each severally ac-

knowledged the signing of the foregoing articles of incorporation, to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

[SEAL.] C. R. HOLTERHOFF,
Notary Public.

THE STATE OF OHIO,
County of Hamilton, ss:

I, Geo. Hobson, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that C. R. Holterhoff, whose name is subscribed to the foregoing acknowledgment as a Notary Public, was at the date thereof a Notary Public, in and for said county, duly commissioned and qualified, and authorized as such to take such acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Cincinnati, this 7th day of November, A. D. 1896.

[SEAL.] GEO. HOBSON, *Clerk,*
By LOUIS N. REIF, *Deputy.*

(Certificate under Section 906, Revised Statutes of the United States.)

UNITED STATES OF AMERICA,
State of Ohio, Office of the Secretary of State:

I, Lewis C. Laylin, Secretary of State of the State of Ohio,
215 and being the officer who, under the Constitution and Laws of said State, is duly constituted the keeper of the records of articles of incorporation of all companies incorporated under the laws thereof, and the records of all papers relating to the creation of said incorporated companies, and empowered to authenticate exemplifications of the same, do hereby certify that the annexed instrument is an exemplified copy, carefully compared by me, with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of "The Dana-Lytle Shoe Company," filed in this office on the 9th day of November, A. D. 1896, and recorded in Volume 70, page 591, of the Records of Incorporations; that said exemplification is in due form and made by me as the proper officer, and is entitled to have full faith and credit given it in every Court and office within the United States.

In testimony whereof, I have hereunto attached my official signature and the Great Seal of the State of Ohio, at Columbus, this 12th day of January, A. D. 1906.

[The Great Seal of the State of Ohio.]

LEWIS C. LAYLIN,
Secretary of State.

216 (APPENDIX H.)

These articles of incorporation of The Wolf Brothers and Company,

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Wolf Brothers and Company.

Second. Said corporation is to be located at Cincinnati, in Hamilton County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of manufacturing and selling boots and shoes of all kinds and description, and for the manufacture and selling in connection therewith leather, findings, and all supplies requisite to the manufacture of boots and shoes; and to acquire and own such real estate and personal property as may be necessary or convenient to the successful accomplishment of the above objects and purposes.

Fourth. The capital stock of said corporation shall be Two Hundred and Fifty Thousand Dollars ($250,000), divided into twenty-five hundred (2500) shares of One Hundred Dollars ($100) each.

In witness whereof, we have hereunto set our hands this 7th day of June, 1905.

SAMUEL B. WOLF.
JAMES J. WOLF.
SAMUEL HUBER.
GEORGE A. McPHEE.
SIMEON M. JOHNSON.

217 THE STATE OF OHIO,
County of Hamilton, ss:

Personally appeared before me, a Notary Public, in and for said County, this 7th day of June, 1905, the above named Samuel B. Wolf, James J. Wolf, Samuel Huber, George A. McPhee and Simeon M. Johnson, who each severally acknowledged the signing of the foregoing Articles of Incorporation to be his free act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year aforesaid.

[SEAL.] WALLACE BURCH,
Notary Public.

THE STATE OF OHIO,
Hamilton County, ss:

I, Chas. Weidner, Jr., Clerk of the Court of Common Pleas, a court of record within and for the County and State aforesaid, do hereby certify that it appears of record in this office that Wallace Burch, whose name is subscribed to the annexed instrument was at the time of taking such proof, or acknowledgment, a Notary Public, in and for said County, duly commissioned and qualified, and duly authorized to administer oaths, to take acknowledgment of deeds, etc.

And further, that I am well acquainted with the handwriting of said Wallace Burch, and verily believe that the signature to the said certificate, or proof of acknowledgment, is genuine.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Court, at Cincinnati, this 7th day of June, A. D. 1905.

[SEAL.]

CHAS. WEIDNER, JR., *Clerk,*
By FRED DREIHS, *Deputy.*

218 UNITED STATES OF AMERICA,
State of Ohio,
Office of the Secretary of State:

I, Lewis C. Laylin, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of "The Wolf Brothers and Company," filed in this office on the 8th day of June, A. D. 1905, and recorded in Volume 68, Page 325, of the Records of Incorporations.

Witness my hand and Official Seal at Columbus, this 8th day of June, A. D. 1905.

[The Seal of the Secretary of the State of Ohio]

LEWIS C. LAYIN,
Secretary of State.

The Wolf Brothers and Company — Company.

Certificate of Subscription.

CINCINNATI, OHIO, June 12, 1905.

To the Secretary of State, Columbus, Ohio:

We, the undersigned, incorporators of The Wolf Brothers and Company — Company, do hereby certify that on the 12th day of June, 1905, all the incorporators of said Company did order, in writing, that books be opened for subscriptions to the capital stock of said Company, at 401 Johnston Building, Cincinnati, Ohio on the 12th day of June, 1905, at 12 o'clock M., and at the same time, did waive in writing, the notice by publication, of the time
219 and place of such opening of books of subscription, required by law, and further, said books having been opened at the time and place ordered, that ten per cent of the capital stock of said Company has been subscribed.

SAMUEL B. WOLF,
JAMES J. WOLF,
GEORGE A. McPHEE,
SAMUEL HUBER,
SIMEON M. JOHNSON,
Incorporators.

UNITED STATES OF AMERICA,
State of Ohio,
Office of the Secretary of State, ss:

I, Lewis C. Laylin, Secretary of State, of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Certificate of Subscription to the capital stock of The Wolf Brothers and Company — Company filed in this office under Sec. 3244 of the Revised Statutes on the 13th day of June, A. D. 1905, and recorded in Volume 112, page 12, of the Records of Incorporations.

Witness my hand and Official Seal at Columbus, Ohio, this 13th day of June, A. D. 1905.

[The Seal of the Secretary of the State of Ohio.]

LEWIS C. LAYLIN,
Secretary of State.

220 (APPENDIX I.)

In the United States Patent Office.

Opposition No. 39.

THE WOLF BROTHERS & COMPANY
vs.
HAMILTON-BROWN SHOE COMPANY.

Notice of Opposition.

(Trade-mark.)

To the Commissioner of Patents:

In the matter of an application for the registration of a trade-mark for Women's High and Low Cut Leather Shoes, Serial No. 4,383, filed May 5th, 1905, by Hamilton, Brown Shoe Co., of St. Louis, Missouri, we, The Wolf Bros. & Co., a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, with principal offices and place of business located at Cincinnati, State of Ohio, hereby give notice of our intention to oppose the registration of said trade-mark "(American Lady)" which was published on page 2,246, No. 4,383, of the Official Gazette of June 20th, 1905.

The grounds for opposition are as follows:

As owners of the trade-mark "American Girl" for Ladies' Leather Shoes, by common law usage since early in the year 1896, and also, by title derived by purchase from The Dana-Lytle Shoe Co., of Cincinnati, State of Ohio, and also, by assignment to us of the title of Gale Shoe Manufacturing Co., of Haverhill, State of Massachusetts, who registered said name "(American Girl)" June 4th, 1901, No. 36,514, we, The Wolf Bros. & Co., above named, believe that

we are and have been materially damaged by the use of the words "American Lady" as a trade-mark by the Hamilton, Brown
221 Shoe Co., aforesaid, and will be more particularly and incalculably damaged if the words "American Lady" are registered by the United States Patent Office pursuant to the said application and notice of publication, the said words "American Lady" and "American Girl" being well known as correlative or mutual terms, the word "Lady" and the word "Girl" being used synonymously and interchangeably, especially in the United States, to express the young lady, and the word "Lady" being likely to confuse and calculated to deceive the ordinary purchaser as against the (our) word "Girl" if both are permitted to be used by competing manufacturers and dealers. It will be noted that a prior registration, No. 43,640 by the said Hamilton, Brown Shoe Co., under date November 8th, 1904, discloses the fact that their use of said words "American Lady" began in the year 1900, giving no definite month or day, which is rather an uncertain disclosure. It is believed that such previous registration under the late former law of 1881 was unwarranted and should not have been granted in view of close resemblance or similarity (calculated to deceive and mislead, which the law aimed to avoid), of the words "Girl" and "Lady" and of the said prior registration in 1901 of the aforesaid Gale Shoe Manufacturing Co. trade-mark.

Dated this 28th day of June, 1905.

[SEAL.] THE WOLF BROTHERS & COMPANY,
By JAMES J. WOLF, *Treasurer.*

STATE OF OHIO,
County of Hamilton, ss:

On this 28th day of June, 1905, before me, a notary public,
222 in and for said County and State, personally appeared James J. Wolf, Treasurer of The Wolf Bros. & Co., the above named party, who, being duly sworn, deposes and says that, to the best of his knowledge and belief, the facts above stated are true.

[SEAL.] JOHN ELIAS JONES,
Notary Public.

223 (APPENDIX J.)

In the United States Patent Office.

In the Matter of Opposition to Registration of Trade-mark.

No. 39.

Before the Examiner of Interferences.

Application No. 4383, Filed May 5, 1905, Published June 20, 1905, for Women's High and Low-cut Leather Shoes.

THE WOLF BROTHERS AND COMPANY, Opponent,
vs.
HAMILTON-BROWN SHOE COMPANY, Applicant.

Answer of Hamilton-Brown Shoe Company.

1.

This applicant, Hamilton, Brown Shoe Company, now and at all times hereafter saving to it-elf all and all manner of benefit and advantage of exception or otherwise that can be or may be had or taken to the many errors, uncertainties and imperfections in the said notice of opposition contained, for answer thereto or to so much thereof as this applicant is advised it is material or necessary for it to make answer unto, answering says:

2.

This Applicant has no information or belief save that derived from the notice of opposition, and it therefore denies that Opponent, the Wolf Brothers and Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio,
224 or that it has principal offices and a place of business at Cincinnati in said State.

3.

And this Applicant, further answering, admits that it is a resident of and doing business in the City of St. Louis, State of Missouri, and that it is the Applicant in the application to register a trade-mark consisting of the words "American Lady," for women's high and low cut leather shoes, Serial No. 4,383, filed May 5, 1905, published on page 2,246 of the Official Gazette of June 20, 1905.

4.

And this Applicant, further answering, admits that on June 4, 1901, Gale Shoe Manufacturing Company of Haverhill, State of Massachusetts, registered the words "American Girl" as a trade-mark, for — No. 36,514, but this Applicant avers on information and belief that such registration was unwarranted and should not have been granted.

5.

And this Applicant, further answering, says that it has no information or belief, save that derived from the notice of opposition, and it therefore denies that Opponent derived title to a trade-mark in the words "American Girl," for ladies' leather shoes, by purchase or otherwise, from the alleged The Dana-Lytle Shoe Company of Cincinnati, Ohio, or by assignment or otherwise from Gale Shoe Manufacturing Company, of Haverhill, Massachusetts, or that
225 either the alleged The Dana-Lytle Shoe Company or Gale Shoe Manufacturing Company had a good and lawful right to use said words or mark as a trade-mark for ladies' leather shoes, or that Opponent is now using, or that it ever used, said words or mark in that connection, or that it is now or ever was entitled by common law usage to use them as such.

6.

And this Applicant, further answering, avers on information and belief that the words "American Girl," as applied to ladies' leather shoes, were in common use and not capable of exclusive appropriation as a trade-mark at and before the time that Applicant commenced to use the words, "American Lady" as a trade-mark for women's leather shoes, and, therefore, the words "American Girl" can not be set up in opposition to the use by this Applicant of the words "American Lady" as a trade-mark for women's leather shoes.

7.

An- this Applicant, further answering, denies that the words "American Lady" and "American Girl" are correlative or mutual terms, or that the word "Lady" and the word "Girl" are used synonymously or interchangeably, in the United States, or elsewhere, to express or describe a young lady, or that the word "Lady" as against the word "Girl" is likely to confuse or calculated to deceive ordinary purchasers, if both are permitted to be used by competing manufacturers or dealers.

8.

And this Applicant, further answering, denies that Op-
226 ponent has been damaged by the use by this Applicant of the words "American Lady" as a trade-mark, or that Opponent will be damaged by the registration of said words as a trade-mark, pursuant to the aforesaid application to register the same.

9.

An- this Applicant, further answering, admits that it registered the words "American Lady" as a trade-mark under date of November 8, 1904, No. 43,640, and Applicant states that such registration was proper and perfectly lawful; that even if the words "American Girl" had been properly registered prior to that time (which Applicant denies), that there was not then and is not now sufficient re-

semblance or similarity between the words "Lady" and "Girl" to cause confusion or deception, or to warrant the United States Patent Office in refusing to register the words "American Girl" as a trade-mark.

Wherefore, this Applicant prays that its trade-mark be registered pursuant to its application and Opponent's opposition dismissed.

HAMILTON, BROWN SHOE CO.,
Applicant,

By A. D. BROWN, *Pt.*

PAUL BAKEWELL,
F. R. CORNWALL,
Attorneys for Applicant.

STATE OF MISSOURI,
City of St. Louis, ss:

A. D. Brown, being duly sworn, on his oath states that he is President of the Hamilton, Brown Shoe Company, Applicant in
227 the above entitled case, that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

A. D. BROWN.

Sworn to and subscribed before me, this 1st day of November, 1905.

My term expires December 31, 1907.

[SEAL.] CHAS. W. MOORE,
Notary Public.

STATE OF OHIO,
Hamilton County, ss:

I, William Schuchardt, a notary public in and for said County and State, and Special Examiner herein by agreement of counsel, hereby certify that the above witnesses, Allie Friedman, Bernard H. Heithaus, Millard F. Thompson, Edgar A. Peck, Emanuel Peck, Jackson H. Duncan, Robert E. Harrison, Anthony J. Fries, William T. Pinckney, Albert L. Hauck, Sol Hirschberg, Samuel Marcus Fechheimer, Val Duttenhofer, Samuel B. Wolf, Thomas F. McGrane, Albert W. Highlands, Milton Adler, Edgar Bettmann, Victor M. Abraham, and James J. Wolf, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that their depositions were reduced to typewriting by Douglas A. Brown in the presence of the said witnesses respectively, and when completed read over to said witnesses respectively, and subscribed by them in my presence and in the presence of such of the parties and counsel as attended; that said depositions were taken pursuant to the annexed stipulation or agreement, at the office of John E. Jones, 519
228 Main street, in the city of Cincinnati, County of Hamilton, State of Ohio, beginning on the 27th day of December, 1906,

and continuing from day to day as set forth; that the parties were represented at the taking of said depositions by their respective counsel as set forth; that the several exhibits recited were offered in evidence and marked as specially noted in the foregoing depositions; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

I further certify that the fees for the taking and transcribing of these depositions were paid by the Complainant, amounting to $136.00, and are proper charges therefor.

In testimony whereof I have hereunto set my hand and official seal, this 11th day of January, A. D. 1907.

(Signed) WILLIAM SCHUCHART,
[NOTARIAL SEAL.] *Notary Public and Special Examiner.*

Eighteen witness fees at $1.50 each, paid by Complainant, $27.00.

(Here follow exhibits marked pages 229, 230, 231, 233, and 235.)

"COMLAINANT'S EXHIBIT AMERICAN GIRL TOP FACING."

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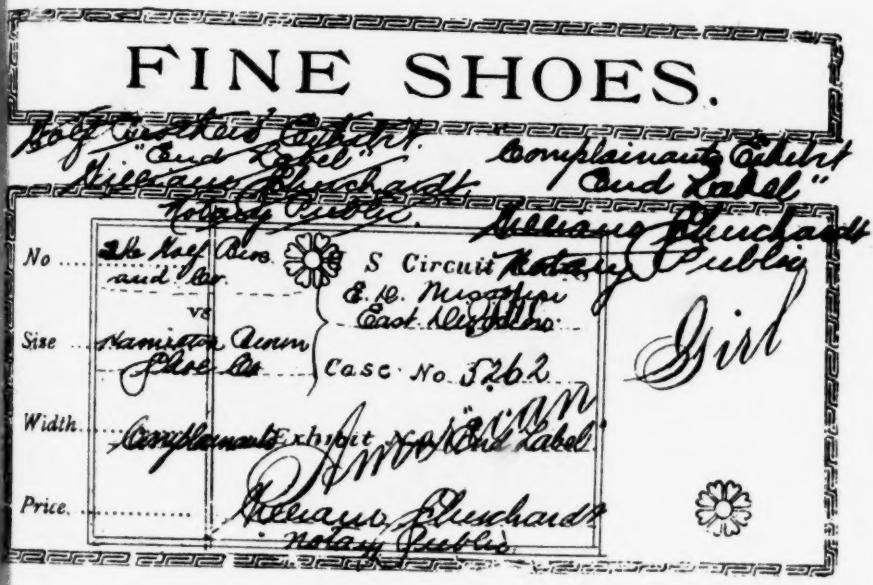
COMPLAINANT'S EXHIBIT, COMPLAINANT'S TOP LABEL.

(Offered at page 24).

COMPLAINANT'S EXHIBIT, COMPLAINANT'S END LABEL.

(Offered at page 240.



COMPLAINANT'S EXHIBIT No. 104.
(Offered at page 128).

DEFENDANT'S TOP LABEL FROM CARTON.
Complainant's Exhibit 104.

DEFENDANT'S END LABEL TAKEN FROM SAME PACKAGE.

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COMPLAINANT'S APPLICATION OF ITS CATCH-PHRASE.

(Taken from Complainant's Exhibits, Miscellaneous advertisements offered at page 96).

TRADE-MARK.

No. 43,640. REGISTERED NOV. 8, 1

HAMILTON, BROWN SHOE CO.

LADIES' LEATHER SHOES.

APPLICATION FILED SEPT. 26, 1904.

American Lady

Proprietor

Hamilton, Brown Shoe

by a. D. Brown

No. 43,640. Registered November 8, 1904.

UNITED STATES PATENT OFFICE.

HAMILTON, BROWN SHOE CO., OF ST. LOUIS, MISSOURI.

TRADE-MARK FOR LADIES' LEATHER SHOES.

STATEMENT and DECLARATION of Trade-Mark No. 43,640, registered November 8, 1904.

Application filed September 26, 1904.

STATEMENT.

To all whom it may concern:

Be it known that the HAMILTON, BROWN SHOE CO., a corporation duly organized under the laws of the State of Missouri, and located and doing business in the city of St. Louis, in said State, has adopted for its use a Trade-Mark for Leather Boots and Shoes, of which the following is a full, clear, and exact description.

As shown in the accompanying facsimile, the trade-mark consists of the words "AMERICAN LADY."

This trade-mark has been continuously used in the business of the said corporation since the year 1900.

The class of merchandise to which the said trade-mark is appropriated is boots and shoes, and the particular description of goods comprised in said class upon which said trade-mark is used is ladies' leather shoes. It is usually displayed on the ends of the cases, on the ends of the individual cartons, and on the bottom of the shoes, either by label, stencil, or stamp, on which the described trade-mark is shown.

HAMILTON, BROWN SHOE CO.,
By A. D. BROWN,
Pt.

Witnesses:
J. M. SLOAN,
CHAUNCEY LADD.

DECLARATION.

State of Missouri, city of St. Louis, ss:

A. D. BROWN, being duly sworn, deposes and says that he is president of the corporation the HAMILTON, BROWN SHOE COMPANY, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that the said corporation at this time has a right to the use of the trade-mark therein described; that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the trade-mark is used by said corporation in commerce between the United States and foreign nations or Indian tribes, and particularly with the Republic of Mexico, and that the description and facsimiles presented for record truly represent the trade-mark sought to be registered.

A. D. BROWN.

Sworn and subscribed before me, a notary public, this 22d day of September, 1904.

[L. S.] CHAS. W. MOORE,
Notary Public.

TRADE-MARK.

No. 56,100. REGISTERED AUG. 21, 1906.

THE WOLF BROTHERS AND COMPANY.

LADIES' LEATHER SHOES.

APPLICATION FILED NOV. 25, 1905.

The American Girl.

Witnesses:

William Schuchardt

Proprietor.

The Wolf Brothers and Company

UNITED STATES PATENT OFFICE.

THE WOLF BROTHERS AND COMPANY, OF CINCINNATI, OHIO.

TRADE-MARK FOR LADIES' LEATHER SHOES.

No. 56,100. Statement and Declaration. Registered Aug. 21, 1906.

Application filed November 25, 1905. Serial No. 14,991

STATEMENT.

To all whom it may concern:

Be it known that THE WOLF BROTHERS AND COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and located in the city of Cincinnati, in the county of Hamilton, in said State, and doing business at 412–416 West Seventh street, in said city of Cincinnati, has adopted for its use the trade-mark shown in the accompanying drawing.

This trade-mark has been used continuously in business by the said corporation and by those from whom its title is derived in due and proper form since April, 1896.

The class of merchandise to which this trade-mark is appropriated is No 36, Leather and leather manufactures not otherwise classified, and the particular description of goods comprised in said class upon which the said trade-mark is used is ladies' leather shoes

This trade-mark is applied to the said goods by stamping it on the bottom of the soles thereof and also upon the top facing within the shoes. It is and has been applied to the packages, boxes, and cartons in which said goods are packed and sold by printing or otherwise applying it on the top and face thereof or on labels applied or attached thereto.

[L. S.] THE WOLF BROTHERS AND COMPANY
By JAMES J. WOLF,
Vice-President and Treasurer

Attest
A. B. CONWAY,
Secretary.

DECLARATION.

State of Ohio, county of Hamilton, ss:

JAMES J. WOLF, being duly sworn, deposes and says that he is the vice-president and treasurer of the corporation, the applicant named in the foregoing statement; that he believes that the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States and particularly between the States of Ohio, Indiana, Illinois, Missouri, Kentucky, Arkansas, Iowa, Kansas, Nebraska, Texas, Louisiana, Tennessee, California, Maine, New York, Pennsylvania, and in fact more or less every one of the States and Territories of the Union; and also between the United States and foreign nations, or Indian tribes, and particularly with Canada, Mexico, Great Britain and Ireland, and Belgium; and that the description, drawing, and specimens presented truly represent the trade-mark sought to be registered.

JAMES J WOLF

Subscribed and sworn to before me, a notary public, this 21st day of November, 1905

[L. S.] JOHN ELIAS JONES,
Notary Public.

240 In the United States Patent Office.

The Wolf Brothers & Company, Opponent,
No. 39. vs. Opposition.
Hamilton-Brown Shoe Company, Applicant.

Record of the Wolf Brothers & Company.

JAMES L. HOPKINS and
JOHN ELIAS JONES,
Attorneys for The Wolf Brothers & Company.

(Stamped) Docket Clerk. Apr. 3, 1906. U. S. Patent Office.

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243 In the United States Patent Office.

The Wolf Brothers & Company,
No. 39. vs. Opposition.
Hamilton-Brown Shoe Company.

Notice of Opposition.

(Trade Mark.)

To the Commissioner of Patents:

In the matter of an application for the registration of a trade-mark for Women's High and Low Cut Leather Shoes, Serial No. 4,383, filed May 5th, 1905, by Hamilton, Brown Shoe Co., of St. Louis, Missouri, we, The Wolf Bros. & Co., a corporation duly organized and existing under and by virtue of the laws of the State of Ohio with principal offices and place of business located at Cincinnati, State of Ohio, hereby give notice of our intention to oppose the registration of said trade-mark "(American Lady)" which was published on page 2,246, No. 4,383, of the Official Gazette of June 20th, 1905.

The grounds for opposition are as follows:

As owners of the trade-mark "American Girl" for Ladies' Leather Shoes, by common law usage since early in the year 1896, and, also, by title derived by purchase from The
244 Dana-Lytle Shoe Co., of Cincinnati, State of Ohio, and, also, by assignment to us of the title of Gale Shoe Manufacturing Co., of Haverhill, State of Massachusetts, who registered said name "(American Girl)" June 4th, 1901, No. 36,514, we, The Wolf Bros. & Co., above-named, believe that we are and have been materially damaged by the use of the words "American Lady" as a trade-mark by the Hamilton, Brown Shoe Co., aforesaid, and will be more particularly and incalculably damaged if the said words "American Lady" are registered by the United States Patent Office pursuant to the said application and notice of publication, the said words "American Lady" and "American Girl" being well-known as correlative or mutual terms, the word "Lady" and the word "Girl" being used synonymously and interchangeably, especially in the United States to express the young lady, and the word "Lady" being likely to confuse and calculated to deceive the ordinary purchaser as against the (our) word "Girl" if both are permitted to be used by competing manufacturers and dealers. It will be noted that a prior registration, No. 43,640, by the said Hamilton, Brown Shoe Co., under date of November 8th, 1904, discloses the fact that their use of said words "American Lady" began in the year 1900, giving no definite month or day, which is rather an uncertain disclosure. It is believed that such pre-

vious registration under the late former law of 1881 was unwarranted and should not have been granted in view of close resemblance or similarity (calculated to deceive and mislead, which the law aimed to avoid) of the words "Girl" and "Lady" and of the said prior registration in 1901 of the aforesaid Gale Shoe Manufacturing Co. trade-mark.

Dated this 28th day of June, 1905.

THE WOLF BROTHERS & COMPANY,
(Seal) By James J. Wolf, Treasurer.

245 State of Ohio,
County of Hamilton—ss.

On this 28th day of June, 1905, before me, a notary public in and for said County and State, personally appeared James J. Wolf, Treasurer of The Wolf Bros. & Co., the above-named party, who being duly sworn, deposes and says that, to the best of his knowledge and belief, the facts above stated are true.

(Seal) JOHN ELIAS JONES,
(In duplicate) Notary Public.

In the United States Patent Office.

In the Matter of Opposition to Registration of Trade-Mark.

Application No. 4383, filed May 5, 1905, published June 20, 1905, for women's high and low cut leather shoes.

The Wolf Brothers and Company, Opponent,
No. 39. vs.
Hamilton-Brown Shoe Company, Applicant.

Before the Examiner of Interferences.

ANSWER OF HAMILTON, BROWN SHOE COMPANY.

1.

This applicant, Hamilton, Brown Shoe Company, now and at all times hereafter saving to itself all and all manner of benefit and advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said notice of opposition contained, for an-
246 swer thereto or to so much thereof as this applicant is advised it is material or necessary for it to make answer unto, answering says:

2.

This applicant has no information or belief save that derived from the notice of opposition, and it therefore denies that Op-

ponent, the Wolf Brothers and Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, or that it has principal offices and a place of business at Cincinnati in said State.

3.

And this Applicant, further answering, admits that it is a resident of and doing business in the City of St. Louis, State of Missouri, and that it is the Applicant in the application to register a trade-mark consisting of the words "American Lady," for women's high and low cut leather shoes, Serial No. 4,383, filed May 5, 1905, published on page 2,246 of the Official Gazette of June 20, 1905.

4.

And this Applicant, further answering, admits that on June 4, 1901, Gale Shoe Manufacturing Company of Haverhill, State of Massachusetts, registered the words "American Girl" as a trade mark, for....., No. 36,514, but this Applicant avers an information and belief that such registration was unwarranted and should not have been granted.

5.

And this Applicant, further answering, says that it has no information or belief, save that derived from the notice of opposition, and it therefore denies that Opponent derived title to a trade-mark in the words "American Girl," for ladies' leather shoes, by purchase or otherwise, from the alleged The
247 Dana-Lytle Shoe Company of Cincinnati, Ohio, or by assignment or otherwise from Gale Shoe Manufacturing Company, of Haverhill, Massachusetts, or that either the alleged The Dana-Lytle Shoe Company or Gale Shoe Manufacturing Company had a good and lawful right to use said words or mark as a trade-mark for ladies' leather shoes, or that Opponent is now using, or that it ever used, said words or mark in that connection, or that it is now or ever was entitled by common law usage to use them as such.

6.

And this Applicant, further answering, avers on information and belief that the words "American Girl," as applied to ladies' leather shoes, were in common use and not capable of exclusive appropriation as a trade-mark at and before the time that Applicant commenced to use the words "American Lady" as a trade-mark for women's leather shoes, and, therefore, the words "American Girl" can not be set up in opposition to the use by

this Applicant of the words "American Lady" as a trade-mark for women's leather shoes.

7.

And this Applicant, further answering, denies that the words "American Lady" and "American Girl" are correlative or mutual terms, or that the word "Lady" and the word "Girl" are used synonymously or interchangeably, in the United States or elsewhere, to express or describe a young lady, or that the word "Lady" as against the word "Girl" is likely to confuse or calculated to deceive ordinary purchasers, if both are permitted to be used by competing manufacturers or dealers.

8.

And this Applicant, further answering, denies that Opponent has been damaged by the use by this Applicant of
248 the words "American Lady" as a trade-mark, or that Opponent will be damaged by the registration of said words as a trade-mark, pursuant to the aforesaid application to register the same.

9.

And this Applicant, further answering, admits that it registered the words "American Lady" as a trade-mark under date of November 8, 1904, No. 43,640, and Applicant states that such registration was proper and perfectly lawful; that even if the words "American Girl" had been properly registered prior to that time (which applicant denies), that there was not then and is not now sufficient resemblance or similarity between the words "Lady" and "Girl" to cause confusion or deception or to warrant the United States Patent Office in refusing to register the words "American Girl" as a trade-mark.

Wherefore, this Applicant prays that its trade-mark be registered pursuant to its application and Opponent's opposition dismissed.

HAMILTON, BROWN SHOE CO., Applicant.
By A. D. Brown, Pt.

Paul Bakewell,

F. R. Cornwall,

Attorneys for Applicant.

State of Missouri,
City of St. Louis—ss.

A. D. Brown, being sworn, on his oath, states that he is President of the Hamilton, Brown Shoe Company, Applicant in the above-entitled case, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his

own knowledge, except as to matters therein stated on information and belief and as to those matters he believes them to be true.

A. D. BROWN.

249 Sworn to and subscribed before me this 1st day of November, 1905.

My term expires December 31, 1907.

(Seal) CHAS. W. MOORE,
Notary Public.

In the United States Patent Office.

In the Matter of Opposition to Registration of Trade-Mark, Application No. 4383, filed May 5, 1905, published June 20, 1905, for women's high and low cut leather shoes.

The Wolf Brothers & Co., Opponent,
No. 39. vs.
Hamilton-Brown Shoe Co., Applicant
Before the Examiner of Interferences.

Testimony.

Depositions of Witnesses Examined on behalf of the Wolf Brothers & Company, Opponents, pursuant to the annexed at the office of John Elias Jones, Rooms 310-312 Lincoln Inn Court, No. 519 Main street, in the City of Cincinnati, County of Hamilton, State of Ohio, before William Schuchadtt, a notary public in and for said county and state, duly commissioned and qualified, on January 12, 1906.

Present: John Elias Jones, Esq., on behalf of Opponent; James Love Hopkins, Esq., of Counsel. F. R. Cornwall, Esq., of Bakewell & Cornwall on behalf of Applicant.

250 Deposition of James J. Wolf.

Stipulation.

It is stipulated and agreed by and between the counsel for the respective parties that the documentary exhibits offered by the respective parties may remain in the custody of the counsel for the party offering them till the hearing subject to the right of the opposing party to call for their production upon the taking of any of the testimony.

It is further stipulated that printed uncertified Patent Office copies of trade-mark registrations may be introduced with the same force and effect as if the same were duly certified, or the originals.

James J. Wolf, a witness produced in behalf of the Wolf Brothers & Company, being duly sworn, testified as follows, to-wit:

Direct Examination

By Mr. Hopkins.:

Question 1. Please state your name, age, residence and occupation.

A. My name is James J. Wolf; residence, Avondale, Cincinnati; my age is thirty-seven. I manufacture ladies' shoes.

Q2. How long and where have you been engaged in the manufacture of shoes?

A. I have been engaged in the manufacture of shoes in the City of Cincinnati since March, 1897.

3. Prior to that time in what business were you engaged and where?

A. Prior to that time I was engaged in the shoe business at Boston, Mass., both as jobber and manufacturer, from the fall of 1888 to the spring of 1897. Prior to going to Boston I was engaged in the shoe business in Cincinnati from 1886.

4Q. Are you connected with the Wolf Brothers & Company, and if so, in what capacity?

A. I am Treasurer and Vice-President of the Wolf
251 Brothers & Company. And have been since the organization of the company, June 12, 1905.

5Q. Is the Wolf Brothers & Company a corporation; and, if so, under the laws of what State?

A. The Wolf Brothers & Company is a corporation, organized under the laws of the State of Ohio.

6Q. Prior to the incorporation of your company, what was the style of the concern with which you were connected?

A. Prior to the organization of our stock company we were a partnership under the name of Wolf Brothers & Company.

7Q. In what business was that partnership engaged; where and how long?

A. That partnership was engaged in business from December, 1897, up to June 12, 1905, and from March 1897, to December, 1897, the firm name was Felix Wolf & Company. And I was a partner in the firm of Felix Wolf & Company. Both the partnerships of Felix Wolf & Company and Wolf Brothers & Company were engaged in the manufacture of ladies' shoes in Cincinnati.

8Q. Has the shoe manufacturing business to which you have referred been conducted continuously by the two copartnerships, and the corporation to which you have referred from March, 1897, to the present time in the City of Cincinnati?

A. It has.

9Q. Where is the factory of the Wolf Brothers & Company located in the City of Cincinnati?

A. On the north side of Seventh street west of Central avenue.

10Q. How long has it been located there?

A. Since November 1st, 1902.

11Q. Was the present factory acquired by the corporation, the Wolf Brothers & Company, upon its corporation from Wolf Brothers & Company, the copartnership?

A. It was.

12Q. Prior to November 1st, 1902, where was the factory of Wolf Brothers & Company, the copartnership, lo-
252 cated?

A. On Sycamore street between Seventh and Eighth, in the City of Cincinnati.

13Q. How long was the factory in that location?

A. The firm of Felix Wolf & Company were located in the factory between Seventh and Eighth on Sycamore street from the inception of the partnership in March, 1897, and the firm of Wolf Brothers & Company, who, in December, 1897, succeeded Felix Wolf & Company, remained in the same location until May, 1898, at which time the factory was partially destroyed by fire, forcing them to seek other quarters. Two or three days following our fire we bought the plant of the Dana-Lytle Shoe Company. It was located at Ninth and Sycamore streets, Cincinnati, Ohio, and continued making ladies' shoes at that factory, Ninth and Sycamore, until July, 1898, at which time we again moved to our old location, on Sycamore between Seventh and Eighth, the factory having been rebuilt.

14Q. I hand you an instrument signed by the Dana-Lytle Shoe Company, and dated May 11, 1898, and having a schedule in lead pencil attached thereto, and ask you if you can identify same; if so, please state what the instrument is?

A. The instrument in question is a bill of sale of the factory plant of the Dana-Lytle Shoe Company, together with its trade-mark, "The American Girl," and its good-will generally.

(Counsel for Opponent offers the bill of sale and schedule identified by the witness in evidence, and asks that same be marked "Wolf Brothers Exhibit, Dana-Lytle bill of sale," which is accordingly done).

15Q. Does the date upon this bill of sale from the Dana-Lytle Company correctly indicate the date when Wolf Brothers & Company, the partnership, purchased this factory and brand from the Dana-Lytle Company?

A. The date, May 11th, the date upon which we purchased same, is very fresh in my mind without reference to the
253 bill of sale itself, we having burned out on May 8th, Friday, and bought the plant and trade-mark from them the Monday following, May 11th.

16Q. Are you acquainted with a trade publication known as the "Boot and Shoe Recorder?" A. I am.

17Q. I will hand you a copy of that publication bearing date December 30, 1896, and ask you to state if you know whether or not this is an issue of that publication which was made upon the date indicated upon the title page? A. It is.

18Q. What is the general nature of this publication, the Boot and Shoe Recorder?

A. It is recognized as the leading boot and shoe journal.

19Q. Does it still occupy that position? A. It does.

(Counsel for Opponent offers in evidence the publication identified above by the witness, with particular reference to the advertisement on page 50 thereof, and asks that same be marked "Wolf Brothers Exhibit Boot and Shoe Recorder, Dec. 30, 1896," which is accordingly done.)

20Q. Please state, if you know, whether the Dana-Lytle Shoe Company was preceded in its shoe manufacturing business by any other cornern, and if so, by whom?

A. The Dana-Lytle Shoe Company was preceded in the manufacture of shoes in the City of Cincinnati by George F. Dana & Company.

21Q. I now hand you the issue of the Boot and Shoe Recorder, dated April 29, 1896, and ask you to state if you know whether or not this is the copy of that periodical which was regularly issued upon that date? A. I know that it is.

(Counsel for Opponent offers in evidence the periodical identified by witness, with particular reference to the advertisement on page 42 thereof; and asks that same be marked
254 "Wolf Brothers' Exhibit, Boot and Shoe Recorder, April 29, 1896," which is accordingly done.)

23Q. Do you know to what extent shoes were made and sold under the trade-mark, "The American Girl," by George F. Dana & Company, and the Dana-Lytle Company; and in what territory those shoes were sold?

(Counsel for Applicant objects to the above question as calling for secondary evidence, as the books of the companies in question are the best evidence of their sales. The question is further objected to as calling for hearsay testimony, as the witness was in the City of Boston from 1888 to March 1897.)

A. Practically all the shoes that were marketed by them from the inception of the trade-mark, "The American Girl,"

were sold under the brand of "The American Girl." They sold goods in Pennsylvania particularly. Dana-Lytle Company, or at least Mr. George F. Dana, of Dana-Lytle & Company, who was also the George F. Dana of George F. Dana & Company was engaged and is still engaged in the manufacture of freezers, and to the best of knowledge the one set of books answered for the purposes of the shoe and the freezer businesses. Their books did not come into our possession, but we were given a list of their trade, and almost immediately after acquiring their plant and the trade-mark, "The American Girl," we had one of our salesmen visit the Pennsylvania market; and in addition there were some few orders turned over to us by Dana-Lytle Shoe Company, one of which I remember was for shipment to a party in Montgomery, West Va., whose name, if I recall rightly is J. Friedman.

23Q. Are you able to state from the use which your firm made of this list of the trade which was turned over to you by the Dana-Lytle Company, whether or not that company had an established trade on the American Girl shoe at the time of the assignment of that trade-mark to your company?

A. Yes.

255 24Q. From the time when, following the assignment to your company from Dana-Lytle Company, your firm continued the manufacture of shoes under the brand, "The American Girl," in what territory have you sold those shoes under that brand?

A. We have sold the shoes in every state and territory in the Union with the possible exception of Nevada and Arizona; I am not quite sure but we have sold goods there as well.

25Q. In what manner have those shoes been marked?

A. They have been branded on the sole, "The American Girl." This brand also appeared on the top facing of the shoe, as well as on the cartons in which the shoes were packed. This brand, "The American Girl," also appears on the wooden cases in which the shoes were packed, the same being printed before boxes are delivered to us by our box-maker, on the wooden boxes in which the shoes are packed for shipment. We are now and have for the past few years been using woven facings in the shoes, the brand "The American Girl," with head of the girl appearing in these facings, same being woven in.

26Q. Will you please produce specimens of the various applications of the mark, "The American Girl," as used by you upon the shoes themselves, and the pasteboard boxes or cartons in which they are packed for shipment and sale?

A. I here produce them.

(Counsel for Opponent offers in evidence the specimens produced by witness, and ask that same be marked "Wolf Bro-

thers' Exhibit, American Girl imprint;" which is accordingly done.)

27Q. Can you now produce the Minute-Book of The Wolf Brothers & Company, with particular reference to the record of the transaction by which the assets of the co-partnership, Wolf Brothers & Company, were conveyed to the corporation?

A. I can, and here produce it.

(Counsel for Opponent offers the said Minute-Book of
256 the Opponent in evidence, with particular reference to the entries on page 9 thereof, and it is stipulated by counsel that the entries upon said page may be copied in the record, and attached hereto as "Appendix B" hereto.)

28Q. Please state what the character of the sales made by Wolf Brothers & Company, the copartnership, and the Wolf Brothers & Company, the corporation, of shoes under the mark, "The American Girl," has been with reference to those sales being continuous, or interrupted?

A. The sales have been continuous.

29Q. Please state as accurately as you can, what the volume and gross amount of those sales of shoes under the brand, "The American Girl," by both the said partnership, and corporation, has been?

(Counsel for Applicant objects to the question as calling for secondary evidence, as the books of the company are the best evidence of the business done.)

A. About two million dollars.

30Q. To what extent, if at all, have you advertised the brand, "The American Girl," during the life of the said partnership and of the said corporation?

A. We have advertised over the United States in general, through the medium of the several trade journals, particularly The Boot and Shoe Recorder; also by posters, of which we furnished each dealer a quantity; by transfer pictures; various in-door and out-door signs; by magazines entitled "Our Girl," which we issued monthly ourselves; in a magazine called the "American Girl;" through the daily and weekly papers in part at cost to ourselves, and in part at cost of our customers; and in various other ways.

31Q. Please state as accurately as you can the total amount that you have so expended in advertising "The American Girl" shoes? I refer both to the corporation and the copartnership?

(Last above objection repeated.)

257 A. About fifty thousand dollars. In addition, we have made advertising allowances to a number of our customers, which they deducted from their accounts when remitting us.

32Q. Can you produce specimens of the periodical publications entitled "Our Girl," and "The American Girl," which you have referred to?

A. I will, and hereby produce same.

(Counsel for Opponent introduces in evidence the specimen numbers introduced by witness, and asks that same be marked "Wolf Brothers' Exhibit, 'Our Girl,' " and "Wolf Brothers' Exhibit, The American Girl,' " respectively, which is accordingly done.)

33Q. I note in the publications which have just been introduced in evidence, that the mark, "The American Girl," is accompanied by the catch phrase, "A Shoe as Good as its Name." To what extent, and how long have your corporation and its predecessor copartnership used this catch phrase in connection with the mark, "The American Girl"?

A. As early as March, 1900, to my certain knowledge, and very likely before that date.

34Q. I hand you herewith a translucent window sign, bearing the mark, "The American Girl," and the catch phrase referred to, and ask you to state when this advertisement was issued?

A. To the best of my knowledge, in the spring of 1900; and to my certain knowledge, some time during the year 1900.

35Q. I notice that in your answer to Question No. 33, you have not stated to what extent this catch phrase, "A Shoe as Good as its Name," has been used by you in connection with the mark, "The American Girl;" please answer that portion of my former question?

A. Since we adopted the catch phrase, we have used it in every advertisement of "The American Girl;" if it has
258 been omitted at any time, it has been a typographical error, and our customers in advertising "The American Girl" shoe have been in the habit of using this catch phrase as well.

36Q. Please produce as many various forms of advertising matter as you conveniently can, illustrating the use of this catch phrase in connection with the name, "The American Girl"?

(Direct Examination of Mr. Wolf interrupted.)

January 12, 1906.

Met pursuant to adjournment; parties present as before.

Jackson H. Duncan, a witness called in behalf of the Opponent, being duly sworn, testified as follows, to-wit:

Direct Examination

By Mr. Hopkins:

1Q. Please state your name, age, residence and occupation.

A. Jackson H. Duncan; age, forty-nine, reside in Cincinnati, occupation, paper-box manufacturer.

2Q. How long have you been engaged in that business in the City of Cincinnati, Mr. Duncan?

A. About nineteen years.

3Q. Were you acquainted with the firm of George F. Dana & Company? A. Yes, sir.

4Q. In what business were they engaged when you knew them?

A. They were in the shoe business, and also the freezer business in the same building.

5Q. Did you manufacture any shoe boxes for them; and if so, when?

A. In the year 1896, on July the 25th, we made boxes for them, George F. Dana & Company.

6Q. What is this book to which you refer?

259 A. Our journal. It was opened January 23rd, 1896, and extends to December 29, 1896.

7Q. Was this journal kept in the regular course of your business? A. Yes, sir.

8Q. In what manner were the entries made in this book; from what source were they obtained?

A. The entries in this journal were placed there the hour that the goods left the house. The wagon cannot go without the bill. It is the book of original entry.

9Q. Referring to page 319, of this journal, under date of July 25, 1896, I find the following entry:

"George F. Dana & Co.

525 L single 20th cent.....8.66
1 electro engraving American Girl.....5.00
Comp. & Ptg. ends White, Young & Co. gilt.....1.50 15.16"

Please explain the reference in this entry to the electro engraving, "American Girl?"

A. It was an electro engraving of "The American Girl" gotten up by us on Dana's order for "The American Girl," top and end label, of which I produce copies. We printed them at that time in blue ink.

(Counsel for Opponent offers in evidence the labels referred to by the witness and asks that same be marked as "Wolf Brothers' Top Label," and "Wolf Brothers' End Label," respectively; which is accordingly done.)

10Q. Referring to the same journal, under date of July 27th, at page 320, I find the item charged to "George F. Dana & Company," as follows:

Comp. & Ptg. 3 M labels American Girl blue and black 6.00

Comp. & Ptg. 1 M labels American Girl gilt, T & E 2.50"

[—] Please explain what this entry means?

A. "T. & E. Means top and end label. The first entry refers to three thousand sets of Top and End labels, printed in blue and black; and the second item refers to one thousand sets of Top and End labels, printed in gilt.

260 11Q. Were these labels applied to boxes by you?

A. Yes sir.

12Q. Did you ever deliver them to George F. Dana & Company except upon boxes? A. No, sir.

13Q. What sized boxes were these?

A. They were ladies single pair boxes. Each box was adapted to hold one pair of shoes.

14Q. Without asking you specifically, I will ask you to go through this book, and read into the record the entries subsequent to the one of July 27th, 1896, relating to the manufacture and sale by you to George F. Dana & Company, or to its successor, Dana, Lytle & Company, of these "American Girl" shoe boxes?

A. At page 343, August 8th, 1896, the following entry appears: as charged to George F. Dana & Company—

Comp. & Ptg. T. & E. American Girl Blue.....2.00

That entry means one thousand sets. At page 402, under date of September 8, 1896, is this entry: charged to George F. Dana & Company, viz:

Comp. & Ptg. T. & E. American Girl.....2.00

This means one thousand sets American Girl labels.

On October 7th, 1896, at page 453, a charge to George F. Dana & Company, viz:

Comp. & Ptg. T. & E. American Girl, blue.....2.00

This means two thousand sets of American Girl labels.

At page 509, under date of November 7, 1896, I find charged to George F. Dana & Company, the following:

Comp. & Ptg., T. & E., 2 M, American Girl.....4.00

This means two thousand sets American Girl labels.

The next entry is at page 579, under date of Dec. 15, 1896, charged to Dana-Lytle Shoe Company, viz:

Comp. & Ptg. 1 M, T. & E. American Girl, gilt.....2.50

This means one thousand sets American Girl labels.

15Q. Between the dates of these last two entries to which you have referred, do you know whether Dana-Lytle
261 Shoe Company had succeeded George F. Dana & Company in the manufacture of the American Girl shoe?

A. They did.

16Q. Did you continue during the following year of 1897, and until the purchase of the Dana-Lytle Shoe Company's factory and business by Wolf Brothers & Company to make and furnish to Dana-Lytle Shoe Company the cartons for the American Girl Shoes? A. Yes, sir.

17Q. Were all of the American Girl cartons which you furnished to George F. Dana & Company and to the Dana-Lytle Shoe Company provided with top and end labels of design which you have been identified in the exhibits here?

A. That is a pretty hard question to answer in regard to that; they may have changed electrotypes, but the design was always the same.

Cross-Examination waived.

JACKSON H. DUNCAN.

State of Ohio,
Hamilton County—ss.

Sworn to and subscribed before me this 12th day of January, 1906.

(Seal) WILLIAM SCHUCHARDT,
Notary Public in and for Hamilton Co. Ohio.

James J. Wolf, resuming.

Direct Examination.

Continued by Mr. Hopkins:

(Question No. 36 repeated to the witness.)

(Counsel for the Applicant objects to all testimony relating to the catch phrase "A Shoe as Good as Its Name," as the same is immaterial to the issues in this case, and does not form part of the trade-mark "American Lady" sought to be registered by the applicant.)

262 A. I here produce a number of specimens of our advertising device to which you refer.

(Counsel for Opponents offers the said specimens in evidence,

and asks that the same be marked "Wolf Brothers Advertising Exhibits," Nos. 1-17 inclusive, which is accordingly done.)

37Q. In further reference to the catch phrase "A Shoe as Good as Its Name," please state if you know whether or not Wolf Brothers & Company, the copartnership, was the first to employ that catch phrase in the advertising and sale of shoes?

(Last objection repeated.)

A. They were.

38Q. I hand you herewith a page numbered "2," and marked "Shoe and Leather Gazette," containing an advertisement of the Applicant, Hamilton, Brown Shoe Company, and the catch phrase, "She wears the American Lady Shoe, and says the shoe deserves its name," this phrase accompanying the mark "American Lady," and the picture of a girl, and ask you when and in what publication you first saw this advertisement?

(Last objection repeated.)

A. I first saw the advertisement you refer to in the Shoe and Leather Gazette, a St. Louis publication, issue of Oct. 22, 1903.

(At this point counsel for Opponent offers in evidence the advertisement referred to as "Wolf Bros. Exhibit, Hamilton Brown ad of Oct. 22, 1903," and a printed Patent Office copy of Trade-Mark Registration No. 36,514, Registered June 4, 1901, on the Application of Gale Shoe Manufacturing Company, of Haverhill, Mass., the mark registered being the words "American Girl," applied to shoes; and asks that same be marked "Wolf Brothers Exhibit Gale Registration," which is accordingly done.)

263 (Counsel for Opponent, for the purpose of showing the abandonment by the Gale Shoe Manufacturing Company of its claim to the said trade-mark offers in evidence an assignment executed by Gale Shoe Manufacturing Company to Wolf Brothers & Company, under date of June 20, 1903, recorded in the Patent Office August 1, 1903, in Liber W67, Page 338, of Transfers of Patents, and it is stipulated by counsel that said Assignment may be copied into these depositions as Appendix C.)

39Q. Prior to the institution of these Opposition proceedings did Wolf Brothers & Company, the copartnership, have any correspondence with the Applicant, Hamilton, Brown Shoe Company, in regard to the question of conflict between the

mark "American Girl" and the mark "American Lady;" if so, please produce that correspondence?

A. I hereby produce the correspondence referred to, which is as follows; our letter of Jan. 7, 1901, which is a copy, the original being in the letter-press book; Hamilton, Brown Shoe Company's letter answering our letter of Jan. 7, 1901; our letter of Jan. 9, 1901, a copy, the original being in our letter-press book.

(By agreement of counsel copies of the above correspondence are hereto attached as Appendix, D, E and F.)

(Counsel for Opponent offers in evidence a printed uncertified Patent Office copy of Hamilton, Brown Shoe Company's trade-mark registration, No. 45,640, registered Nov. 8, 1904; being the registration of the mark "American Lady" applied to shoes, and ask that the same be marked "Wolf Brothers Exhibit, Hamilton, Brown Shoe Co., 1904 Registration"; which is accordingly done.)

40Q. In your letter to Hamilton, Brown Shoe Company, which has been introduced in evidence, you have referred to an advertisement of "The American Lady" shoe; can you
264 produce a copy of that advertisement; and if so, please state in what publication it appeared, and when?

A. I hereby produce a copy of the advertisement you refer to. This advertisement appeared in the Shoe and Leather Gazette, a St. Louis publication, issue of Jan. 5th, 1901.

(Counsel for Opponent offers the advertisement identified by the witness in evidence, and asks that same be marked "Wolf Brothers Exhibit, Hamilton, Brown Advertisement of Jan. 5, 1901," which is accordingly done.)

41Q. In the conduct of your sales department, has your company employed traveling salesmen; and if so, how many, and in what territory?

A. We have and do employ traveling salesman, covering the United States in general; also Mexico, and more or less into Canada. We employ usually twelve salesmen; have had as high as twenty.

42Q. What has been the effect in regard to confusion in the trade, of the use of the mark "American Lady" upon shoes by the Hamilton, Brown Shoe Company, in competition with your "American Girl" shoe?

A. Our salesmen have reported at various times general confusion; in fact, they have reported that when they have introduced themselves to dealers with whom we had no account, such dealers often would state, "Oh, yes, your shoes are made

by the Hamilton, Brown Shoe Company." And my personal experience has been among my friends, who continually refer to our shoe as "The American Lady" when inquiring as to the condition of trade, and so forth.

(The answer of the witness is objected to, by counsel for Applicant as heresay and incompetent.)

Cross Examination

By Mr. Cornwall:

XQ43. When did you first learn that the Hamilton, Brown Shoe Company was making the "American Lady" shoe?

A. The matter was first brought to my attention
265 through their advertisement, appearing in the Shoe & Leather Gazette of January 5, 1901.

XQ44. Are the three letters, dated Jan 7 and 9th, 1901, from you to Hamilton, Brown Shoe Company, and their letter to you, which is marked "Received Jan. 9, 1901," the only letters passing between you and that company concerning your trade-mark, "American Girl"?

A. They are the only ones I have present record of. Although there may be others in our files.

45XQ. Did you ever take steps to institute proceedings against the Hamilton, Brown Shoe Company for what you claim to be an infringement of your trade-mark, "American Girl," other than this present opposition? A. No, sir.

46XQ. Did you understand the word "steps" in the last question to mean the same thing as legal proceedings?

A. Yes, sir.

47XQ. Can you give approximately the number of pairs of shoes sold by your company from May 1898, to January, 1899, under the brand of "American Girl"?

A. I cannot say with any degree of definiteness, but I should say that within that period we manufactured at least ten thousand pairs.

48XQ. State approximately the number of pairs made and sold by your company during the year 1899?

A. It is hard for me to answer that, aside from the fact that I know there has been an increasing demand and sale of the shoes each succeeding year.

49XQ. Were your sales during the year 1901 larger than during the year 1900?

A. To the best of my recollection, yes, sir.

50XQ. What has been the percentage of increase in your sales during the years 1901, 1902, 1903, 1904 and 1905?

A. Off-hand, I should say about ten per cent over the year preceding.

51XQ. To whom are the American Girl shoes sold, job-
266 bers, dealers, or directly to consumers?

A. Retail dealers.

52XQ. Are they sold at a uniform price per pair?

A. They vary accordingly to the style of the shoe fifteen cents in button and lace boots, or high shoes; and as much as fifty cents in low cuts. This variation of as much as fifty cents per pair in low cuts, as to the styles, is due to the fact that some of these low cuts retail at two dollars; that is to say, are sold to the consumer by the retail dealers at two dollars; while others are sold by him to the consumer at two dollars and fifty cents a pair.

53XQ. Please give the lowest and highest prices at which you sell boots or high shoes, and low cut shoes to the dealers, and also state the highest and lowest prices charged by the dealer to the consumer?

A. Our prices on low cuts to the dealer range in price from one fifty to two dollars at present; while our price on boots or high cut shoes to the dealer ranges from one eighty-five to two dollars, with some special styles at two fifteen. The price of boots or high shoes from the dealer to the consumer is two fifty, except as to the specials or extras, which is three dollars. The price at which low cuts are sold by the dealers to the consumers are for some styles two dollars, some styles, two fifty.

54XQ. Do you know the prices charged by the Hamilton, Brown Shoe Company to the dealer of "The American Lady" boots and low cut shoes, and dealers' prices of these?

A. I am not familiar with Hamilton, Brown Shoe Company's prices to the dealer; but from the advertisements of the American Lady shoe in the magazines, I note that the prices of shoes to the consumers, of high shoes, is three dollars, and low cuts two fifty.

55XQ. When did you first adopt the picture of a young girl's head in connection with the end label on cartons
267 used in connection with the "American Girl" shoes?

A. In either December, 1899, or January, 1900.

56XQ. And did you also use in connection therewith the figures "$2.50"? A. Yes, sir.

57XQ. When did you first adopt the catch phrase "A Shoe as Good as Its Name"?

A. Not later than February, 1900; and I am not sure but that we adopted it as early as December, 1899.

58XQ. And these features, to-wit, the picture of a young girl's head, and price mark, have been identified with the words "The American Girl" on the end labels of all shoe boxes since the early part of 1900?

A. Yes, but the price at times did not appear, and at other times the price was three dollars, two fifty, or two dollars, as the style or the circumstances of the case warranted.

Re-direct Examination

By Mr. Hopkins:

58RDQ. I hand you two pamphlets, each bearing the imprint of Hamilton, Brown Shoe Company, and being shoe catalogues, one being dated 1904, and the other bearing no date upon its title-page and ask you to state if you recognize these as catalogues issued by the Hamilton, Brown Shoe Company?

A. I so recognize them.

(Counsel for Opponent introduces the catalogues identified by the witness, and asks that the same may be marked "Wolf Brothers' Exhibit, Hamilton, Brown 1904 Catalogue," and "Wolf Brothers' Exhibit, Hamilton, Brown Shoe Company's Catalogue No. 2"; which is accordingly done.)

By agreement of parties, further taking of this deposition now adjourned until 10:00 o'clock a. m., Saturday, January 13, 1906, at same place.

Saturday, January 13,1906.

10:00 o'clock a. m.

Met pursuant to adjournment, same parties present.

268 (Counsel for Opponent introduces in evidence certified copy of the Articles of Incorporation of the Dana-Lytle Shoe Company, executed Nov. 6, 1896; and ask that the same be marked "Wolf Brothers' Exhibit, Dana-Lytle Articles;" which is accordingly done.) (Said Exhibit is appended hereto, as Exhibit G.)

Cross Examination of James J. Wolf, Continued.

60XQ. In answer to Cross-Question No. 50, as to the increase in percentage in your sales during the years 1901 to 1905, inclusive, you answered "Off-hand I should say about ten per cent over the year preceding"; do you mean ten per cent each year over the year preceding

A. I am glad you asked this question, as I want to qualify my previous answer; our increase in the sale of "The American Girl" shoe in the year 1900 over the year 1899 was about one hundred and fifty thousand pairs. By reference to our records I find that the following year, 1901, we made less shoes, and each year following 1901, up to the present time, our increase has been about ten per cent, due largely to more effort in advertising in other ways on our part.

61XQ. Did your friends to whom you refer in answer to Q42, who mentioned "The American Lady" as the name of your shoe when inquiring as to the condition of trade, know that you marketed the "American Girl" shoe?

A. That is just the point in question. They no doubt knew we marketed the American Girl but having seen advertisements of the American Lady, they confused one name with the other.

62XQ. How do you know they confused one name with the other?

A. By the very fact of their inquiry regarding the "American Lady" shoe.

63XQ. Might not your friends have inquired concerning the condition of trade in the American Lady shoe, with
269 the full knowledge that the Hamilton, Brown Shoe Company was marketing that brand, their inquiry being the result of a desire to know how the trade in American Lady Shoe was as compared to the trade in American Girl shoes?

A. I doubt if my friends were ever aware of the existence of Hamilton, Brown Shoe Company; but did know of the American Lady, having seen the ads without having given attention to the makers of same, and assumed that the American Lady was our shoe. I feel satisfied they had no interest whatever in Hamilton, Brown's condition of trade, and had no reason to inquire as to it.

64XQ. Do you know as a matter of fact that your friends in referring to the American Lady shoe were in ignorance of the name of the makers thereof, to-wit, Hamilton, Brown Shoe Company?

A. When they would speak of the American Lady, and I would correct them and say, "We don't make the American Lady Shoe," they would say, "Well, if you don't, who does?" And I have told them almost invariably, "Hamilton, Brown Shoe Company."

65XQ. Were these friends your business acquaintances?

A. They were these friends of mine most of them in business, and some of them were ladies not engaged in business, and all consumers of shoes; none of them to my knowledge being dealers in shoes.

66XQ. Did you ever speak to any one on the subject of the American Lady shoe, either man, woman or child, who was not a consumer of shoes?

A. Perhaps none except my baby before she wore shoes.

67XQ. Of course you had interesting discussion with your baby? A. To myself, yes.

JAMES J. WOLF.

State of Ohio,
Hamilton County—ss.

Sworn to and subscribed before me this 13th day of January, 1906.

(Seal) WILLIAM SCHUCHARDT,
Notary Public, Hamilton County, Ohio.

270 And also, Samuel B. Wolf, a witness produced on behalf of the Opponent, being first duly sworn, testified as follows, to-wit:

Direct Examination

By Mr. Hopkins:

1Q. Please state your name, age, residence and occupation?

A. Samuel B. Wolf; 48 last October; reside 2624 Stanton avenue, Walnut Hills, Cincinnati, O.; shoe manufacturer.

2Q. State your connection with the Opponent?

A. I am President of The Wolf Brothers & Company, and have been since its incorporation.

3Q. How long have you been engaged in the business of manufacturing shoes?

A. You mean strictly the idea of manufacturing, or manufacturing in all its branches?

4Q. In the trade in any way?

A. I was connected with the firm of Adolph Meyer & Co., manufacturing shoes in Cincinnati, Ohio, in 1879; and I have been in the shoe manufacturing business in its different branches since that date. A portion of the time, from 1889 until the Fall of 1890, I was in Boston, having charge of their Eastern manufacturing department. From 1890 to 1893 I lived in Nashville, and was in the same business, and with the exception of those years that I was in Boston and in Nashville, I have resided in Cincinnati all the time; continuously in the shoe business since 1879, in the manufacturing business.

5Q. When you first became acquainted with the shoe trade-mark American Girl, by whom was that trade-mark being used?

A. George F. Dana & Co., Cincinnati.

6Q. Who, if you know, succeeded George F. Dana & Co. in the manufacture of the American Girl shoe?

A. The Dana-Lytle Shoe Company, also of Cincinnati.

271 7Q. Is that the same Dana-Lytle Shoe Company from whom you acquired the trade-mark?

A. Yes, sir.

8Q. At the present time what duties do you perform in connection with the business of Wolf Brothers & Company as to the sales of the American Girl shoes?

A. I get out a line of samples in conjunction with our other salesmen, and make a trip twice a year over my old territory.

9Q. Do you have supervision of the correspondence of your house with the trade? A. I do not.

10Q. In what territory do you travel?

A. I go to Louisville, Chattanooga, Atlanta, Columbus, Ga., Savanah, Ga., Charleston, S. C., and Washington, D. C., and Augusta, Ga.

11Q. In the course of your business have you encountered any instances of confusion in the mind of the trade in regard to the American Girl shoe, and the American Lady shoe, made by the Hamilton, Brown Shoe Company; if so, state what you have discovered in that regard?

A. The trade that I call on are naturally old time acquaintances and friends of mine, and I have sold them the American Girl shoe in fair quantities and without much comment. Our men, however, have continuously complained to me about the interference and confusion of the two names, claiming when they would go into a town where we have before not been represented and offer the American Girl shoe for sale, they are met with the remark, "That shoe is sold in this town now." When they dispute the fact, the trade or customer in question will then mention the name of some particular man in town who is selling the American Lady shoe; my men then tell me that they tell the party, "I am not selling the American Lady, but the American Girl," and it requires a great deal of hard work to convince the party on whom they may call that they
272 could successfully handle our shoe while another shoe of such a similar name was on sale in that locality. In 1900, I think it was, we had a man traveling for us in the State of Illinois by the name of L. J. Selig or J. L. Selig; this man while in our employ and under our pay went to St. Louis and engaged himself to the Hamilton, Brown Shoe Company. We knew nothing of his engagement until the term of his service with us had nearly expired. We were, of course, at a disadvantage, and had to pick up the first man we could get over the territory. Our trade in the State of Illinois, the territory which he covered, we imagine he must have carried with him nearly intact, as our sales in the State of Illinois up to within a short time ago have been practically nothing; in order words have been so small we would hardly consider they were worthy of a line of samples. My natural surmise is that the people to whom Selig sold American Girl shoes have been and are now using the American Lady. There is another case of interference comes to my mind, in the case of a man who does advertising for other people. The firm of R. A. Jones & Co. were given a contract by my brother to make for us a certain quantity of soap, with the advertisement of the American Girl on same, a sample of which is shown in Exhibit No. 15. Mr. Jones wanted an electro to print this soap, and in the absence of my brother from the factory I received this letter which I now produce, in which he says: "Wolf Bros. & Co., City: Gentlemen—Please give the large and four small American Lady cuts to this girl and oblige, R. A. Jones." I received this letter on December 9, 1905. The large cut refers to the cut that we used on

the outside of the carton containing the soap, the small ones to be used in the printing right on the soap. Both are shown in Exhibit No. 15. I have four or five letters here from the trade that I want to offer in evidence, as they speak for themselves.

(Counsel for Opponent offers in evidence the letter of R.
273 A. Jones identified by the witness, as "Wolf Brothers Exhibit Jones Letter;" and also offer in evidence the letters last above produced by witness as "Wolf Brothers Exhibit, Boston Store Co. Letter," "Pocket Shoe Co. Letter," "Wolf Brothers Exhibit McVey Letter," and "Wolf Brothers Exhibit, Hurrle Letter;" and the same are accordingly so marked respectively.)

(Counsel for Applicant objects to the last answer of the witness, as hearsay and incompetent. Counsel for Applicant also objects to letters referred to by the witness in his last answer and offered in evidence, as secondary evidence; said letters being in the nature of self serving declarations which cannot have any force or effect in this controversy.)

Cross Examination

By Mr. Cornwall:

12XQ. Please produce a copy of your letter of January 9, 1905, which elicited the four responsive letters just introduced in evidence?

A. I wrote no letter to any of the people whose letters you have here in January, or can I remember of ever writing to any of these people.

13XQ. Please refer to your letter-press copy book, if you have one, and read into the record the letter of Wolf Brothers & Company to the concerns writing the four letters referred to in your last answer?

A. I will do so, if possible, if one was written.

14XQ. Didn't I understand you correctly in your direct examination to say that you did not have charge of the correspondence of Wolf Brothers & Company?

A. Yes, sir.

15XQ. Who has charge of the correspondence of that company? A. Mr. James J. Wolf.

16XQ. And he is the person who has just testified as a witness in the case, is he not? A. Yes, sir.

274 17XQ. Will you please explain when Mr. Selig left your employ; I mean, please give the date?

A. I think his contract expired on March 1st, 1901, if I am not mistaken.

(By agreement of counsel the cross examination of Mr. Samuel B. Wolf is here closed, with the understanding that when

the letter called for in XQ13 is produced, that Mr. James J. Wolf will take the stand and respond to questions which may be propounded to him by Mr. Cornwall in connection with said matter and correspondence resulting therefrom.)

SAMUEL B. WOLF.

State of Ohio,
County of Hamilton—ss.

Sworn to and subscribed before me this 13th day of January, 1906.

(Seal) WILLIAM SCHUCHARDT,

Notary Public in and for Hamilton Co., Ohio.

William T. Pinckney, a witness produced on behalf of the Opponent, being first duly sworn, testified and deposed as follows, to-wit:

Direct Examination

By Mr. Hopkins:

1Q. State your name, residence, and occupation?

A. William T. Pinckney; age, thirty-two; residence, Cincinnati, Ohio; occupation, traveling shoe salesman for The Wolf Brothers and Company.

2Q. In what territory do you travel?

A. Missouri, Kansas, Nebraska, Iowa, and any other territory that they may specify.

3Q. Have you covered any other territory in the past for Wolf Brothers & Company; and, if so, what territory?

A. Part of the South, east of the Mississippi river, embracing Mississippi, Alabama, Georgia, Florida, North and
275 South Carolina, and part of Tennessee and Kentucky.

4Q. What experience have you had in dealing with the shoe trade with reference to the existence of any confusion in the minds of the trade concerning the identity of the American Girl shoe of Wolf Brothers & Company with the American Lady shoe of the Hamilton, Brown Shoe Company?

A. I have found invariably on making towns where I had never offered for sale the American Girl shoe, I was met with the question from the merchant solicited by me, "Isn't your shoe represented here?" when, on stating that I had never been to the town before, they would tell me, or he would tell me, that some merchant had the line. On questioning him further I would find that he had in mind the American Lady shoe instead of the American Girl.

5Q. In how many instances have you met with this experience?

A. Almost invariably where I have made new towns. Especially so during my recent trip.

Cross Examination

By Mr. Cornwall:

6XQ. Please give some specific instances?

A. At this time I can recall no name of the merchant, or any specific case.

WILLIAM T. PINCKNEY.

State of Ohio,
County of Hamilton—ss.

Sworn to and subscribed before me this 13th day of January, 1906.

(Seal) WILLIAM SCHUCHARDT,
Notary Public in and for Hamilton Co., Ohio.

276 And also Millard F. Thompson, a witness produced on behalf of the Opponent, being first duly sworn, deposed and testified as follows, to-wit:

Direct Examination

By Mr. Hopkins:

1Q. State your name, age, residence and occupation?

A. Millard F. Thompson; age, over twenty-one; reside, Cincinnati, Ohio; occupation, traveling shoe salesman.

2Q. In what territory and for whom do you travel?

A. I travel for the Wolf Brothers Shoe Company, in the state of Ohio, West Virginia, portion of Maryland, and Western Pennsylvania.

3Q. How long have you been so connected with Wolf Brothers & Company? A. One year.

4Q. What experience have you had in dealing with the shoe trade with reference to the existence of any confusion in the minds of the trade concerning the identity of the American Girl shoe of Wolf Brothers & Company with the American Lady shoe of the Hamilton, Brown Shoe Company?

A. Upon introduction of myself and line to new trade I would generally be met with the remark "This line is already in this town; what is the matter with him?" Upon correction upon my part I would invariably find that the prospective customer had been thinking of the American Lady line instead of the American Girl?

5Q. How frequently have you had this experience?

A. Almost invariably in all new towns.

Cross Examination

By Mr. Cornwall:

6XQ. Please give some specific instances of that?

A. That I am unable to do, at this time.

MILLARD F. THOMPSON.

State of Ohio,
County of Hamilton—ss.

Sworn to and subscribed before me this 13th day of January, 1906.

(Seal) WILLIAM SCHUCHARDT,
Notary Public in and for Hamilton Co., Ohio

277 And also, Edgar A. Peck, a witness produced on behalf of the Opponent, being first duly sworn, deposed and testified as follows, to-wit:

Direct Examination

By Mr. Hopkins

1Q. State your name, age, residence and occupation?

A. Edgar A. Peck; age, twenty-three; residence, 22 Somerset Flat, Avondale, Cincinnati, Ohio; occupation, traveling shoe salesman for Wolf Brothers & Company.

2Q. In what territory do you travel?

A. In Louisiana, Mississippi, Tennessee, and a part of Kentucky.

3Q. What experience have you had in the trade with reference to the confusion of the two brands, American Girl and American Lady?

A. I have found cases on entering a new town and introducing my line of the American Girl that they have answered me in this way, "That shoe is made by the Hamilton, Brown people, and it is being sold here in town;" and they would add, "Are you trying to copy the name from Hamilton, Brown"?

4Q. In what parts of your territory have you had this experience?

A. Mostly in Louisiana and Mississippi.

5Q. How frequently have such instances occurred?

A. I cannot recall how frequently, but quite a number of times.

6Q. Did it occur so frequently that you became accustomed to receive such inquiries on making new territory?

A. It has occured often enough that I became accustomed to it and was always prepared.

Cross Examination

By Mr. Cornwall:

7XQ. What response did you make when the inquiry was propounded to you?

A. I simply explained the differences in the name, and
278 told them that the American Girl was made by a Cincinnati specialty house, or manufacturer.

8XQ. Did you say that the American Girl Shoe which you represented was an entirely distinct brand from the American Lady Shoe, and made by a different manufacturer?

A. I explained to them that it was made by an entirely different concern.

9XQ. Did you say that the two brands were the same, or did you explain that they were different?

A. I explained that the American Girl shoe was the original shoe.

10XQ. Please answer my question, which is one of fact peculiarly within your knowledge?

A. Why, I explained that they were different, that they had no connection at all.

11XQ. Did you ever sell the American Girl shoe in a town where a dealer was handling the American Lady?

A. Yes, sir.

12XQ. Did you ever sell the American Girl shoe to a dealer who had in his stock the American Lady shoe?

A. If I did, I cannot recall, I don't remember.

13XQ. Is it not a fact that the Hamilton, Brown Shoe Company offer a complete line of shoes to dealers?

A. As far as I know it is a fact.

14XQ. So that if the Hamilton, Brown Shoe Company had a customer in a town, that customer's stock could be completed by purchases from the Hamilton, Brown Shoe Company?

A. As far as I know, yes.

EDGAR A. PECK.

State of Ohio,
County of Hamilton—ss.

Sworn to and subscribed before me this 13th day of January, 1906.

(Seal)

WILLIAM SCHUCHARDT,
Notary Public for Hamilton County, Ohio.

279 And also, Emanuel Peck, a witness produced on behalf of the Opponent, being first duly sworn, deposed and testified as follows, to-wit:

Direct Examination

By Mr. Hopkins:

1Q. State your name, age, residence and occupation?

A. Emanuel Peck; of lawful age; reside Somerset Building, Flat 22, Avondale, Cincinnati, Ohio; occupation, traveling shoe salesman for Wolf Brothers & Company, of Cincinnati.

2Q. In what territory and how long have you been connected with that house?

A. The State of Indiana, part of Illinois, and a few points in Kentucky. Have been connected with the house for about seven years.

3Q. What experience have you had in your territory with reference to any confusion in the minds of the trade between the marks American Girl, and American Lady?

A. In calling on new trade in my territory and in representing the American Girl shoe, the question would often be put to me, saying that "This is Hamilton, Brown's shoe"? And my time would be taken up unnecessarily to explain that we were not the Hamilton, Brown people, that our shoe was made by the Wolf Brothers & Company, of Cincinnati, and was called the American Girl shoe.

4Q. In what parts of your territory and how frequently have such instances occurred?

A. All of my Illinois territory, and the greater portion of Indiana.

5Q. In Illinois do you cover any part of the territory formerly traveled by Mr. Selig for Wolf Brothers & Company?

A. I do.

Cross Examination

By Mr. Cornwall:

6XQ. Did you ever sell the American Girl shoe in a town where a dealer was handling the American Lady?

280 A. Not to my recollection, I cannot recall it right now.

7XQ. My last question did not refer to sales of the American Girl shoe to a dealer who was handling the American Lady shoe, but had reference to sales to other dealers in the same town where a dealer was selling the American Lady shoe?

A. My answer would be the same, that I cannot recall at the present time.

Redirect Examination

By Mr. Hopkins:

8RDQ. Have you had any other experience than that which you gave upon your direct examination in regard to the confusion between the American Girl and the American Lady shoes, or of the substitution of the latter for the former? If so, state what it was?

A. During my solicitation of a customer in the town of Marion, Illinois, I came in contact with a traveling shoe salesman by the name of Mr. Le Sage, and during my conversation with this customer this salesman joined, and stated that he had been traveling in Illinois for quite a while, and knowing that Mr. Selig who formerly represented the Wolf Brothers & Company, the makers of the American Girl shoe, had sold a great many American Girl shoes in that territory, Mr. Selig had disconnected himself with the Wolf Brothers & Company and engaged his services to the Hamilton, Brown Shoe Company; and in soliciting his trade, he Selig, found that he had to have some shoe similar in name to the American Girl to sell his trade;

and possibly the name of the American Lady substituted through him.

(Counsel for Applicant objects to the answer as hearsay and incompetent in so far as it attempts to relate what some one else told him Mr. Selig had done. The assumption of the witness as to what Mr. Selig may possibly have done is also objected to as incompetent. Without waiving these objections, Mr. Cornwall cross-examines.)

281 Re-cross Examination

By Mr. Cornwall:

9RXQ. Did Mr. Le Sage tell you that in soliciting orders "Selig found that he had to have some shoe similar in name to the American Girl to sell to his trade," or is that a gratuitous opinion of your own?

A. It is no opinion of my own; it is the remark that Mr. Le Sage had made.

10RXQ. When did Mr. Le Sage make this gratuitous statement to you? A. On January 11th, 1906.

Q. (By Mr. Hopkins): With what house is Mr. Le Sage connected?

A. Edward Stanwood & Company, of Chicago, a shoe house.

EMMANUEL PECK.

State of Ohio,
Hamilton County—ss.

Sworn to and subscribed before me this 13th day of January, 1906.

(Seal)

WILLIAM SCHUCHARDT,
Notary Public, in and for Ham. Co., O.

2:00 o'clock p. m., Jany. 13, 1906.

Resumed pursuant to recess, same parties present.

Thereupon the witness, James J. Wolf, heretofore sworn, was recalled at request of Applicant, for

Further Cross Examination

By Mr. Cornwall:

60XQ. Have you a copy of the letter referred to by your brother, Mr. Samuel B. Wolf, as having been sent out on January 9th, 1906, and which elicited the responses in the form of the four letters referred to in answer to Question 11 of your brother's testimony?

A. I have and hereby produce it.

282 (By consent the said letter above referred to is included as a part of Exhibit H, in Appendix hereto, which Appendix will also include the five letters introduced in connection with the testimony of the witness Samuel B. Wolf.)

61XQ. How many letters like the one you have just produced were mailed to your customers?

A. I don't know how many. My instructions were to write to a number of our customers, taking the names at random.

62XQ. Were there as many as one hundred letters of this kind sent out?

A. I doubt if there were that many.

63XQ. Were there as many as seventy-five?

A. I cannot say that definitely.

64XQ. Were there over fifty?

A. I cannot answer that; but I think there were perhaps around that number.

65XQ. Referring to the letter dated January 10, 1906, from The Pocket Shoe Company, of Evansville, Indiana, will you please state whether this letter is in response to one of your general letters of January 9, 1906?

A. I have no way of positively determining that such is the case.

66XQ. In the last paragraph of The Pocket Shoe Company letter is found the expression: "We thank you for your inquiry;" what inquiry is there meant?

A. When you handed me the letter before I had not noticed that; and I judge that they perhaps referred to the inquiry as contained in the several letters sent out under date of January 9th.

Further Redirect Examination

By Mr. Hopkins:

67RDQ. I hand you a metal die containing the words: "The American Girl;" and will ask you if you can identify it; and if so to state how long it has been in the possession of yourself, or your company?

283 A. I identify this die as the one we use for branding the soles of all shoes marketed by us under the name of "The American Girl." This is the original die, which was included in our purchase from Dana-Lytle Shoe Company, and is the same one that they and their predecessors used for stamping the name "The American Girl" on the soles of shoes.

(Counsel for Opponent offers the die identified by the witness in evidence, together with an impression thereof; and asks that the same be marked "Wolf Brothers' Exhibit, Die and Impression;" which is accordingly done.

JAMES J. WOLF.

State of Ohio,
Hamilton County—ss.

Sworn to and subscribed to before me this 13th day of January, 1906.

(Seal) WILLIAM SCHUCHARDT,
Notary Public, in and for Ham. Co. O.

And also, Anthony J. Fries, produced as a witness on behalf of the Opponent, being first duly sworn, deposed and testified as follows, to-wit:

Direct Examination

By Mr. Hopkins:

1Q. State your name, age, residence and occupation.

A. Anthony J. Fries; age, forty-three; residence, 2935 Cleinview avenue Cincinnati, Ohio; occupation, engraver and stamp cutter.

2Q. How long have you been engaged in that business in the city of Cincinnati?

A. Twenty-three years.

3Q. I will hand you a metal die which has been introduced in evidence, as "Wolf Brothers' Exhibit Die," and ask you to state if you recognize it?

A. Yes, sir, I recognize this die fully.

284 4Q. Is it your workmanship?

A. It is my workmanship; yes sir.

5Q. When did you make it?

A. July the 14th, 1896.

6Q. What enables you to fix this date?

A. Why, I can refer to my book for that.

7Q. What is this book which you produce here?

A. That is what I call the day-book.

8Q. When was that book opened?

A. This was opened in January, 1896, and was closed in December of the same year.

9Q. Please give the page, and read into the record the entry which relates to the sale of this die?

A. At page 40 appears this entry, viz: "George F. Dana & Co., 1896, July 14, To one steel stamp (Here follows impression of Wolf Brothers' Exhibit Die) 3.37."

10Q. Do you recollect the firm of George F. Dana & Co. as being the purchaser of that die?

A. Yes, sir; I do,

11Q. Did you ever see any of the shoes made by George F. Dana & Co. bearing the imprint of this die?

A. Yes, sir.

12Q. Did you make any other dies corresponding in words to this die for George F. Dana & Company, or Dana-Lytle & Company?

A. We made one top facing stamp for them, the George F. Dana firm. We made some also for Dana-Lytle Company, the successors of George F. Dana & Company.

Cross-Examination waived.

ANTHONY J. FRIES.

State of Ohio,
Hamilton County—ss.

Sworn to and subscribed before me this 13th day of January, 1906.

(Seal) WILLIAM SCHUCHARDT,
Notary Public, in and for Ham. Co., O.

285 Robert E. Harrison, called as a witness in behalf of Opponent, being first duly sworn, deposed and testified as follows, to-wit:

Direct Examination

By Mr. Hopkins:

1Q. State your name, age, residence and occupation.

A. Robert E. Harrison; age, about 49; residence, Cincinnati, Ohio; occupation, shoe salesman. Am in the employ of Wolf Brothers & Company.

2Q. In what territory have you traveled for Wolf Brothers & Company?

A. I travel through the two Territories, Oklahoma and Indian Territory, Arkansas, Louisiana, Alabama, Mississippi, Kentucky and Tennessee.

3Q. How long have you been connected with Wolf Brothers & Company?

A. Ever since they have been in business.

4Q. What has been your experience with reference to finding any existing confusion in the minds of the retail dealers in shoes between the American Girl shoe of Wolf Brothers & Company and the American Lady shoe of the Hamilton, Brown Shoe Company?

A. Where you get into territory in a town where the dealers are not properly versed with the two lines they get the two names mixed up, you know.

5Q. In what manner have you found that to be the fact; how did you learn it?

A. Through the dealer.

6Q. In what parts of your territory have you had such experience?

A. Well, in nearly every state I travel in.

7Q. Have you ever had occasion to explain to the retail dealers the difference between the two shoes referred to as to name?

A. I have had to make that explanation dozens of times. I have often gone into a customer and tell him who I was with, and he would say, "That is Hamilton, Brown's," and I
286 would have to make an explanation and tell him the difference between the two lines of shoes, that we were the makers of "American Girl" and Hamilton, Brown were the makers of the "American Lady."

Cross Examination

By Mr. Cornwall:

8XQ. Did you ever sell the American Girl shoes to a dealer who was handling the American lady shoe?

A. In some cases I have, yes, sir.

ROBERT E. HARRISON,

State of Ohio,
Hamilton County—ss.

Sworn to and subscribed before me this 13th day of January, 1906.

(Seal) WILLIAM SCHUCHARDT,
Notary Public in and for Hamilton Co., Ohio.

Albert W. Highlands, produced as a witness in behalf of the Opponent, being first duly sworn, deposed and testified as follows, to-wit:

Direct Examination

By Mr. Hopkins:

1Q. State your name, age, residence and occupation?

A. Albert W. Highlands, age, forty; residence, Mt. Auburn, Cincinnati, Ohio; occupation, publisher.

2Q. Are you connected with the Boot and Shoe Recorder?

A. I am.

3Q. In what manner and how long have you been so connected with it?

A. I have charge of the Ohio and Southern Department; I have been connected with the Boot and Shoe Recorder since 1894. Both in the news and advertising departments.

4Q. Has your connection with that publication brought you in contact with the boot and shoe trade during that period?

A. It has

287 5Q. During your acquaintance with the boot and shoe trade have you become acquainted with the American Girl shoe; and if so, how long have you been acquainted with the shoe made under that mark?

A. I have, since April 1896.

6Q. During that time by whom has this shoe been made?

A. By George F. Dana & Company; the Dana-Lytle Shoe Company, successors to George F. Dana & Company; Wolf Brothers & Company, and The Wolf Brothers & Company.

7Q. You referred to your occupation as being that of "publisher;" with what other publication besides the Boot & Shoe Recorder are you connected?

A. The Cincinnati Trade Review.

8Q. In your work for the Boot & Shoe Recorder, are you brought in personal contact with the manufacturers and jobbers of shoes in this territory?

A. I am every day.

9Q. Are you acquainted with the American Lady shoe, of the Hamilton, Brown Shoe Company?

A. Only in so far as reading their advertisements and hearing the comments of other manufacturers and retailers.

10Q. In your contact with the boot and shoe trade in this territory, have you learned of any confusion or tendency to confuse, in the trade between the American Girl shoe, of Wolf Brothers & Company, and the American Lady shoe, of the Hamilton, Brown Shoe Company?

A. I have frequently heard manufacturers state when speaking of the American Girl shoe, that there was another shoe in the market by the name of the American Lady shoe, made by the Hamilton, Brown Shoe Company, of St. Louis, and that they thought such shoe was being marketed in direct conflict with the American Girl shoe, and was working an injury to the Wolf Brothers & Company, and that if they were in Wolf Brothers & Company's position, they would certainly
288 endeavor to stop it.

(Counsel for Applicant objects to the gratuitous opinions of manufacturers and others referred to by the witness,as being hearsay and incompetent.)

11Q. In your experience as a publisher, and as the representative of The Boot and Shoe Recorder, have you had occasion to study with particular attention the advertising matter and methods employed in the boot and shoe trade, as well as the brands used in that trade in this territory?

(Counsel for Applicant objects to the question as calling for evidence wholly immaterial to any of the issues in this case, and the question is, therefore, incompetent.)

A. I have.

12Q. What experience, if any, have you had in writing and preparing the dress of advertisements in connection with the publications?

(Last objection repeated.)

A. It is part of my business to draft and write the advertisements of a number of my customers. This has been the case during the past eight or nine years.

13Q. Have you seen and examined any of the advertising matter used by the Hamilton, Brown Shoe Company in connection with the American Lady Shoe?

(Last objection repeated.)

A. I have read the advertisements published in the various shoe trade journals and also a number of the leading magazines in which said advertisement appeared.

14Q. In the light of your experience and observation, what is your opinion as to the tendency of the use of the mark, American Lady and the accompanying advertising matter which you have seen and examined, with reference to its being calculated to clearly distinguish the Hamilton, Brown Shoe Com-
289 pany's product as its own, or to confuse it in the mind of consumers of shoes with the American Girl shoe of Wolf Brothers & Company?

(Last objection repeated.)

A. In my opinion, it would tend to confuse the mind of the average purchaser.

Cross Examination

By Mr. Cornwall:

15XQ. Does the Hamilton, Brown Shoe Company use advertising space in either of the publications with which you are connected?

A. It uses space in the Boot and Shoe Recorder.

16XQ. Does it advertise the American Lady shoe in the Boot and Shoe Recorder?

A. It does from time to time.

17XQ. Do you compose those advertisements?

A. I do not.

18XQ. Do you compose the advertisements of The Wolf Brothers & Company?

A. I have composed the advertisements of The Wolf Brothers & Company from time to time, and assisted in writing them almost ever since they began to manufacture the American Girl shoe.

19XQ. Who composes the Hamilton, Brown Shoe Company American Lady advertisements?

A. According to my best information, they have a regular advertising man employed for this service; although considerable of the copy for the Boot and Shoe Recorder is prepared by the advertising experts of the Boot and Shoe Recorder at the Boston office.

20XQ. Which concern uses the greater amount of space? The Hamilton, Brown Shoe Company, in advertising the American Lady shoe, or the Wolf Brothers Company, in advertising the American Girl shoe—in the Boot and Shoe Recorder?

A. For the past year the Hamilton, Brown Shoe Company has probably used a little more space than The Wolf
290 Brothers & Company. Prior to that time, according to my best belief, Wolf Brothers & Company have used more space, and have been continuously before the readers of the Boot and Shoe Recorder.

21XQ. Do you get a commission for advertising space taken by Wolf Brothers & Company in the Boot and Shoe Recorder?

A. I am employed on the basis of a guaranty and commission. And consequently receive a commission on the business of The Wolf Brothers & Company.

22XQ. I will ask the same question with reference to the Hamilton, Brown Shoe Company?

A. It is not in my territory, and hence I do not.

A. W. HIGHLANDS.

State of Ohio,
Hamilton County—ss.

Sworn to and subscribed before me this 13th day of January, 1906.

(Seal) WILLIAM SCHUCHARDT,
Notary Public in and for Ham. Co., Ohio.

(APPENDIX A.)

KNOW ALL MEN BY THESE PRESENTS

That the Dana-Lytle Shoe Co., a corporation organized under the laws of Ohio, for and in consideration of Three Thousand Dollars ($3,000.00) to it in hand paid by Wolf Bros. & Co., of Cincinnati, Ohio, one half cash, the balance in a sixty-day note without interest, the receipt of which is hereby acknowledged, does hereby sell, transfer, assign and set over to said Wolf Bros. & Co., their successors, or assigns, all its right, title and interest in and to all the machinery, lasts, dies, patterns, fixtures, shafts, pulleys, belts, hangers and all other appli-
ances now used by it in the manufacture of shoes at the
291 northwest corner of Ninth and Sycamore streets, Cincinnati, Ohio, as more particularly appears in Schedule "A," hereto attached and made part hereof, and all its right, title and interest and good will in and to the trade-mark The American Girl, and to its good will generally.

In witness whereof the said The Dana-Lytle Shoe Co. by George F. Dana, Secretary and Treasurer, and James E. Lytle,

Manager, in pursuance of a resolution of its Board of Directors, passed at a meeting held Wednesday, May 11th, 1898, has hereunto set its hand and affixed its seal this 11th day of May, 1898.

(Seal)

THE DANA-LYTLE SHOE CO.,
George F. Dana, Sec'y. and Treas.
James E. Lytle, Manager.

Scalloping dies $3.00
12 Cutting boards
Benches and tables in cutting
1 Tip perforator
Leather bins
57 Shop boxes
2 Lining stampers
1 Desk and rack in stands, etc.
4 Leather racks
1 Hartford Grading Machine
1 Pair Hartford Shears
1 Pattern binder
1 Corner cutter
About 4,000 Patterns
Pattern tip cutter
1 Pattern rack
1 Pattern press
1 Miller treeing outfit
1 Krieg Embosser
1 Stamping machine
292 Packing tables
Power Eyeletter
Bobbin winder
4 Singer stitcher, 1 needle
1 Singer lining machine
1 Union special layer
1 Union Special seamer
1 Morley button machine
1 Singer piecefly machine
1 Singer order
1 Wheeler & Wilson Emb. machine
1 Singer tacker
1 Singer toe seamer
1 Lufkin folder
7 Amazeen skiver
1 Singer cylinder 1 needle
1 Singer 2 needle vamper close
1 Singer 1 needle stitcher
1 Singer 2 needle vamper space
2 Singer inseamers

Singer cylinder 2 needle close
1 Singer stop needle 2″ space
1 Watson beader
1 Wheeler & W. stitcher
1 Eyelet punch foot power
1 Simpson stud
2 Eureka eyeletters
1 Pinking machine
1 Crease vamp machine
35 Ft. single table & shafting
30 Ft. double table & shafting
24 Tables & Chairs
2 Cement pots
1 Rub down iron
1 Gas stove
4 Pasting forms
3 Irons
19 Bowen rack
293 8 Shelf rack
3 Pin rack
1 Heel press
1 Oil can
Sole pattern racks
1 Splitter Pulleys & belts
1 Rounding machine & Pulleys & belts
1 Good year outfit Pulleys etc.
1 Fisher Flap turner Pulleys etc.
1 Beadedger
1 McKay channels
1 Iron pin
1 Gas stove
1 Pair scales
1 Closet
1 Set Shank brushes & shafts P. & B.
1 Wetting down shaft 2 brushes P. & B.
1 Sander & Naumkey P. & B.
1 Drying Box
1 Single Union Edge Setter P. & B.
1 Electric Brush shaft & brushes P. & B.
1 Ross Moyer scourer P. & B.
2 Edge trimmers P. & B.
1 Bussell heel trimmer P. & B.
1 Heel breaster
1 Wire grip machine
1 Loose nailer
1 Heeling machine.
3 Pricking forms
4 Iron lasts.

Pricking machine B. & P.
2 Nailing blocks
1 Iron jack
1 Bresnahan leveller
21 Lasts iron
8 Top forms
Iron lasts hand levelling
1 Turn iron
294 1 Turn jack
2 Iron pins
1 Grind-stone
1 McKay machine
1 Tacker
Last racks and bins
2 Mallets
2 Blocks
21 Sole dies
20 Top piece dies
1 Heel building block
5 Dies heel
1 Truck
5 Trunks
Benches, tables, fixtures, etc.
175 Feet shafting, hangers, pulleys, oil cups, etc.
1612 Iron sole patterns
about 3600 Second lasts
about 600 First lasts
1 Flat top desk
1 Safe.

This entire inventory stands on our books at $11,704.30 and is insured at $10,500.00.

(Wolf Brothers' Exhibit Appendix B.)

A communication was then read from Messrs. Wolf Bros. & Co., which was as follows:

"Cincinnati, O., June 12, 1905.

Messrs. Wolf Bros. & Co.,
412-18 W. 7th St. City.

Gentlemen: We do hereby offer to sell and transfer to your corporation, The Wolf Brothers and Company, for the sum of Two Hundred and Fifty Thousand ($250,000) Dollars, the following property of the partnership of Wolf Bros. & Company:

All shoes manufactured and in process of manufacture;
295 all materials in process of manufacture, or in the raw stock; all findings in process of manufacture or in stock; all merchandise; shafting; pulleys; hangers; belts; lasts; dies

and patterns; all fixtures; all samples whether at home or on the road; all interest in the trade-mark and trade name known as "The American Girl," and all other trade-marks and trade names owned by said partnership; all notes, drafts; accounts receivable, claims and choses in action of whatever kind and nature due and owing, or to become due and owing to the partnership of Wolf Bros. & Company, including those in the black ledger of said partnership; all cash in bank or in the safe; all the good will of said partnership as it now exists; as well as all personal property of whatever kind, nature and description wheresoever situated, not hereinbefore enumerated belonging to the partnership of Wolf Bros. & Co., save life insurance policies.

All the above however, to be sold and transferred to your corporation, subject to and conditioned on the assumption and payment by your corporation of all indebtednes of whatever kind or nature and of whatever description now due and owing or to become due and owing by the partnership of Wolf Bros. & Co.

SAMUEL B. WOLF,
JAMES J. WOLF,
Partners as Wolf Bros. & Co."

On motion of Mr. Huber, seconded by Simeon M. Johnson, it was resolved, twenty-five hundred shares voting aye, that it was the sense of the corporation that the above offer be accepted by the Board of Directors, and that they be requested and directed to accept the same.

A written instrument of lease, with the initials "R. C." and "S. J." at the top thereof, was presented to the stock-holders, as proposed to be entered into by Laura C. Taylor and The Wolf Brothers & Company. It was resolved on motion of Samuel Huber, seconded by Simeon M. Johnson, twenty-five
296 hundred shares voting aye, that it is the sense of this corporation, that the above lease and all its terms be approved and confirmed by the Board of Directors, and that they be requested and directed to authorize the same to be entered into on behalf of the Company by the President and Secretary. On motion, adjourned.

SAM. B. WOLF, Pres.
A. B. Conway, Secretary.

(Appendix C.)

Received for record August 1st, 1903, and recorded in Liber .....W 67, page 338, of Transfers of Patents.

In Testimony Whereof, I have caused the seal of the Patent Office to be hereunto affixed.

(Seal) Exd L H C Jr

F. I. ALLEN,
Commissioner of Patents.

Whereas, the Gale Shoe Manufacturing Company, a corporation duly established under the laws of the Commonwealth of Massachusetts on June 4, 1901, registered as a trade-mark under the laws of the United States in the office of the Commissioner of Patents of the United States, the words "American Girl," for use on boots and shoes, being registered trade-mark numbered 36,514, a copy of which registered trade-mark is hereto annexed.

Now, Therefore, Know All Men by These Presents that said Gale Shoe Manufacturing Company in consideration of one (1) dollar and other valuable considerations paid by Samuel B. Wolf and John J. Wolf, both of Cincinnati, in the State of Ohio, copartners under the firm name of Wolf Brothers and Company, the receipt whereof is hereby acknowledged, does hereby assign, transfer and set over unto said Samuel B. Wolf and John J. Wolf, all right, title and interest in and to said trade-mark registered June 4, 1901, and numbered 36,-
297 514, above referred to, and in and to the use thereof.

In Witness Whereof the said Gale Shoe Manufacturing Company has caused its corporate seal to be hereto affixed and these presents to be signed in its name and behalf by Herbert E. Gale, its Treasurer, this 20th day of June, A. D. 1903.

(Seal) GALE SHOE MFG. CO.,
By Herbert E. Gale, Treas.

Commonwealth of Massachusetts,
Essex—ss.

On this 22nd day of June, A. D. 1903, before me a notary public within and for said Commonwealth, personally appeared Herbert E. Gale, who being duly sworn, did say that he is the Treasurer of the Gale Shoe Manufacturing Company, the corporation whose name is signed to the foregoing instrument, that the seal affixed to said instrument is the seal of said corporation, and that said instrument was signed and said seal affixed by the authority of the Board of Directors of said corporation; and he duly acknowledged said instrument to be the free act and deed of said corporation.

(Seal) JOSEPH H. PEARL,
Notary Public.

(Printed copy of trade-mark attached.)

(APPENDIX D.)

Wolf Bros & Co.,

(Copy.)

Makers of The American Girl.

Trade-Mark:

"A Shoe as Good as Its Name."

Cincinnati, O. U. S. A., Jan. 7, 1901.

Mess. Hamilton, Brown Shoe Co.,
St. Louis, Mo.

Gentlemen: Our attention has been called to your ad
298 in the Shoe and Leather Gazette of Jan. 5 of "The American Lady" shoe. As we feel a concern of your reputation would not knowingly infringe upon our right, we beg to advise that by the use of this name you are infringing upon our established Trade-Mark "The American Girl," as applied to shoes, and we trust this will be all the notice necessary for your prompt discontinuance of the name "The American Lady" or any similar name.

We trust to hear from you and with our good wishes, we are
Very truly yours,
WOLF BROS. & CO.

Dict. J. J. W.
(Copy.)

(APPENDIX E.)

Hamilton, Brown Shoe Co.

Manufacturers Exclusively for Cash.

St. Louis, U. S. A.

(Without date, but received Jan. 9, 1901.)

Wolf Bros. & Co.
Cincinnati, Ohio.

Gentlemen: We have yours of the 7th inst. and note contents. The term, American Lady, as used by us, refers to one particular shoe we make; it is not the central idea of our business as the "American Girl" seems to be of yours. We advertise it as Hamilton, Brown Shoe Co.'s American Lady Shoe; the idea, of course, being that our name will give the shoe an immediate distinction that it otherwise would not have. The picture we use in connection with this advertisement is copyrighted and is entirely unlike the head used by you. You may be very sure that we have no idea of conflicting with you or

anyone else in the use of this combination, and upon giving the matter a little more consideration, we hope you will conclude with us that you are not likely to suffer in any way through our use of it. We take pleasure in sending you to-day
299 a box-cover with our advertisement on it that you may be the better judge of the matter from our standpoint.

Yours very truly,

HAMILTON, BROWN SHOE CO.,
R. F. Spencer, Treas.

(Copy.)

(APPENDIX F.)

Wolf Bros. & Co.,
Makers of The American Girl.
Trade-Mark:

"A Shoe as Good as its Name."

Cincinnati, O., U. S. A., Jan. 9, 1901.

Messrs. Hamilton, Brown Shoe Co.,
St. Louis, Mo.

Gentlemen: We are in receipt of your favor of the 7th inst. and thank you for your courtesy and prompt reply. The very fact that the name "American Lady" does distinguish the shoe is a point in question, and we beg to say, gentlemen, we cannot agree with you that the name, "American Lady" would not likely cause us loss.

If you will consult in the matter, we know you will find that you are infringing upon our Trade-Mark "The American Girl" by the use of the name "American Lady," and we respectfully ask you to desist from your use of the name "American Lady" and advise us that you have done so.

This matter can be adjusted just as well between ourselves as legally, and we assure you that we, on our part, entertain the most courteous feelings towards you and we trust that you will see the correctness of our premises and that you will advise us that you have discontinued the use of the name "American Lady" in connection with shoes.

300 We ask the courtesy of your reply to this, and we are, with regards,

Very truly yours,

Dict. J. J. W./B. WOLF BROS. & CO.

(APPENDIX G.)

THESE ARTICLES OF INCORPORATION OF THE DANA-LYTLE SHOE COMPANY.

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify—

First. The name of said corporation shall be The Dana-Lytle Shoe Company.

Second. Said corporation is to be located at Cincinnati, in Hamilton County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of manufacturing women's shoes and placing same upon the market and all things necessary and incident thereto.

Fourth. The capital stock of said corporation shall be One Hundred Thousand Dollars ($100,000), divided into one thousand (1,000) shares of One Hundred Dollars ($100.00) each.

In Witness Whereof, We have hereunto set our hands, this 6th day of November, A. D. 1896,

S. F. DANA,
E. O. DANA,
GEORGE F. DANA,
J. E. LYTLE,
T. F. McGRANE.

The State of Ohio,
County of Hamilton—ss .

Personally appeared before me, the undersigned, a Notary Public in and for said county, this 6th day of November,
301 A. D. 1896, the above-named S. F. Dana, E. O. Dana, George F. Dana, J. E. Lytle and T. F. McGrane, who each severally acknowledged the signing of the foregoing articles of incorporation, to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

(Seal)

C. R. HOLTERHOFF,
Notary Public.

The State of Ohio,
County of Hamilton—ss.

I, Geo. Hobson, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that C. R. Hol-

terhoff, whose name is subscribed to the foregoing acknowledgment as a Notary Public, was at the date thereof a Notary Public, in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Cincinnati, this 7th day of November, A. D. 1896.

(Seal)

GEO. HOBSON, Clerk.
By Louis N. Reif, Deputy.

(Certificate under Section 906, Revised Statutes of the United States.)

United States of America,
State of Ohio,
Office of the Secretary of State.

I, Lewis C. Laylin, Secretary of State of the State of Ohio, and being the officer who, under the Constitution and Laws of said State, is duly constituted the keeper of the records of articles of incorporation of all companies incorporated
302 under the laws thereof, and the records of all papers relating to the creation of said incorporated companies, and empowered to authenticate exemplifications of the same, do hereby certify that the annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of "The Dana-Lytle Shoe Company," filed in this office on the 9th day of November, A. D. 1896, and recorded in Volume 70, page 591, of the Records of Incorporations; that said exemplication is in due form and made by me as the proper officer, and is entitled to have full faith and credit given it in every court and office within the United States.

(The Great Seal of the State of Ohio.)

In Testimony Whereof, I have hereunto attached my official signature and the Great Seal of the State of Ohio, at Columbus, this 12th day of January, A. D. 1906.

LEWIS C. LAYLIN,
Secretary of State.

(APPENDIX H.)

Wolf Bros. & Co.,
Makers of The American Girl.
Trade-Mark:
"A Shoe as Good as Its Name."

Cincinnati, O., U. S. A.

Dear Sir: There is being marketed by Hamilton, Brown Shoe Company of St. Louis, a line of shoes under the name of "American Lady."

Will you be good enough to advise if that shoe has come into competition with you, and if it has come into competition with you, with what results? Has it interfered with you in
303 any way, or has it acted as a detriment to you in the sale of "The American Girl" shoe?

Our object in writing this letter is to protect you in the sale of "The American Girl" shoe.

We shall much appreciate the favor of a prompt reply, and beg to enclose herewith stamped and addressed envelope.

With kind regards, and wishing you all the good things that the New Year may bring, we are,

Very truly yours,
THE WOLF BROS. & CO.

Boston Store Co.,
418-420-422-424 Washington St.
112 West Fifth St.

Marion, Ind., Jan. 10, 1906.

The Wolf Bros. & Co.,
Cincinnati, O.

Gentlemen: Yours of the 9th inst. regarding the American Lady Shoe at hand, and in reply we wish to say that we have not come into competition with the American Lady Shoe as the Hamilton, Brown Shoe Co. has no agency in this city. We occasionally have a call for the American Lady shoe. In this instance we submit the American Girl and the customer has never yet distinguished the difference in the name.

Recently one of our salesmen had a call for the American Girl Shoe and in reply to the explanation of the good qualities of the American Girl, said that she had been all through their factory when she was in St. Louis. So you see the names are so near the same that the public does not distinguish one from the other.

Hoping this will be satisfactory, we remain,

BOSTON STORE COMPANY.

304 Pocket Shoe Company.
Shoes for
Men and Women.

Evansville, Ind., January, 10, 1906.

Wolf Bros. & Co.
Cincinnati, Ohio.

Gentlemen: We have repeated calls for "American Lady" shoes. We tried at the time (and shall do so in the future) to learn whether they really meant "American Girl" or "American Lady." We finally concluded that it was just a mistake. They had read of the American Girl and by mistake called for the American Lady.

We thank you for the inquiry and the interest manifested and like you cherish high hopes for the success of the "American Girl." With best wishes, we are,

Yours very truly,
B. H. H. POCKET SHOE COMPANY.

E. W. McVEY & Co.
Clothing, Boots, Shoes, Hats, Caps and Gents Furnishing Goods.

Paoli, Indiana, January 11, 1906.

Wolf Bros. & Co.
Cincinnati, Ohio.

Gentlemen: Your letter of 9th at hand. In reply would say: Buskirk & Bro. of this place handle the American Lady shoe. Once in a while we have a call for this shoe. And it, like the American Girl has its customers who will have nothing else. Sometimes when a customer calls for an American Lady we sell them an American Girl, but at other times they leave without looking at our stock because they prefer the American Lady shoe. We cannot say just how much the American Lady shoe affects our trade in the American Girl. It is a good name for a shoe and possibly if it were some other we would
305 sell more American Girl shoes.

Resp. yours,
E. W. McVEY & CO.

John Hurrle,
Manufacturer and Dealer in
Boots and Shoes.
Nos. 227 and 229 Pearl Street.

New Albany, Ind., Jan. 11, 1906.

Wolf Bros. & Co.
Cincinnati, O.

Gentlemen: In reply to your favor of the 9th inst. will say the "American Lady Shoe" has come in competition with us

quite a number of times and it has helped us sell quite a number of pairs. We have had quite a number of people ask for the American Lady Shoe and we would show them the American Girl; they would never know the difference, only several parties noticed the difference in the price as the American Lady sells for $3.00, but they always bought and all we have sold to are well pleased with the shoe.

Yours truly,

JOHN HURRLE & SON,

Cincinnati, O., Feb. 9, 1906.

Met by consent, same parties present, with the exception that Mr. Geo. P. Burleigh, instead of Mr. Hopkins, is present representing the Opponent.

Mark Sternberg, produced as a witness in behalf of the Opponent, of lawful age, being first duly cautioned and sworn, was examined and deposed and testified as follows, to-wit:

Direct Examination

By Mr. Burleigh:

1Q. State your name? A. Mark Sternberg.

306 2Q. Your age, residence and occupation is what?

A. Age, twenty-nine; residence, Fort Gaines, Georgia. Occupation, merchant.

3Q. In your business do you handle any shoes?

A. Yes, sir.

4Q. Are you familiar with any of the leading brands of American shoes?

A. Yes, sir, I am pretty familiar with them.

5Q. Do you know of the "American Girl" shoe?

A. Yes, sir.

6Q. How long have you known the "American Girl" shoe? Approximately from your memory?

A. I think we have been selling them for about four years, if I am not mistaken.

7Q. Do you know the "American Lady" shoe?

A. Yes, sir.

8Q. Have any facts or circumstances come under your observation tending to show the existence or absence of confusion in the mind of your customers concerning the "American Girl" and the "American Lady" shoes?

A. Yes, sir; I remember some facts showing some confusion between the two brands of shoes.

9Q. Can you state specific instances?

A. Yes, sir. In calling for ladies' shoes I show them a leading brand—my leading brand—which is the "American Girl" shoe, telling them that we are the sole agents for that shoe in

our city; and they at once reply, "I can get the same shoe down street that Mr. J. M. Culpepper handles there"; then this necessitates me to explain the difference in the shoes, you know, so that they will know the difference between the "American Girl" and the "American Lady."

10Q. What shoes does Mr. Culpepper handle?

A. He handles the Hamilton, Brown shoes, and handles W. L. Douglas and Steston shoe.

11Q. What brand, or brands, of Hamilton, Brown shoes
307 does he sell?

A. I do not know of any one except that "American Lady."

12Q. Then the confusion is caused by the fact that the "American Girl" shoe and the "American Lady" shoe are thought to be one and the same?

(Counsel for Applicant objects to the question, as manifestlq leading and incompetent.)

A. Yes, sir.

Cross-Examination

By Mr. Cornwall:

1XQ. What is the selling price of the "American Girl" shoe?

A. Two and a half, retail price.

2XQ. And of the "American Lady"?

A. I do not know; you can see in the magazine; I do not notice the price of it.

3XQ. Have you ever seen the advertisements of the "American Lady" shoe ?

A. I have noticed the ads.

4XQ. And in that way did you learn of that brand?

A. No, sir.

5XQ. Is it not a common thing for customers to come into your store and ask for a brand of shoes which you do not handle?

A. No, sir; not in the place we live in; why, they do not call for any special brand.

6XQ. What is the population of Fort Gaines?

A. About fifteen hundred.

7XQ. How many shoe dealers are there there?

A. I think there is seven that I can remember.

At this point witness wishes to add to his answer XQ5. above, as follows:

The Witness: I have had calls for shoes that I do not carry.

8XQ. Have you ever had calls for shoes that are not sold in the town?

A. Yes, sir; I have had calls for shoes not sold there.

9XQ. Please give the names of the different brands
308 of shoes for which you have had calls, and which brands were either not sold by you, or in the town?

A. I can remember the "Queen Quality" and the Clapp shoe.

10XQ. Both of these brands are largely advertised, are they not. A. Not in our town.

11XQ. How do you know of these brands?

A. I suppose the people when they get off somewhere buy them, and they ask for them after they get back home.

Re-direct Examination

By Mr. Burleigh:

1RDQ. How long have you been engaged in the shoe business? A. About fourteen years.

2RDQ. From your experience in handling shoes do you think that there is such a similarity between the trade-mark of "American Girl" and "American Lady" as applied to shoes, to cause confusion in the mind of the purchasing public concerning the two brands of shoes?

(Objected to by counsel for Applicant, as being improper on re-direct examination, and, therefore, incompetent.)

A. Yes, sir; I do.

And further deponent saith not.

MARK STERNBERG.

(Affidavit of Notary appended to original in longhand.)

And also, Bernard Heithaus, of lawful age, produced as a witness in behalf of the Opponent, being first duly sworn, deposed and testified as follows, to-wit:

Direct Examination

By Mr. Burleigh:

1Q. State your name, age, residence and occupation?
309 A. Bernard Heithaus; age, forty-three; residence, Evansville, Indiana; occupation, shoe merchant.

3Q. How long has that been?

A. All my life since I have been working.

3. How long has that been?

A. Since the age of twelve.

4Q. Are you familiar with the leading brands of American shoes? A. I am.

5Q. Do you know the "American Girl" shoe?

A. I do.

6Q. Have you ever sold the "American Girl" shoe?

A. I have.

7Q. How extensive have your sales of the "American Girl" shoe been?

A. Possibly two thousand pair.

8Q. How long have you been selling the "American Girl" shoe? A. About eighteen months.

9Q. Do you know the "American Lady" brand of shoes?

A. I know of the "American Lady" brand.

10Q. Is the "American Lady" shoe sold in Evansville?

A. Not to my knowledge.

11Q. Have any facts or circumstances come under your observation tending to show the existence or non-existence of confusion among your customers concerning the "American Girl" and the "American Lady" shoe?

A. There have.

12Q. Can you state any specific instances?

A. Yes, sir.

13Q. Kindly do so.

A. I have had a lady call for the "American Lady" shoe. I inquired of her after having seated her, if she were not mistaken in the name? She answered, she thought not. I asked her, where she got the name? She answered by saying, she read of it through an advertisement. I inquired of her what the source of advertisement was. She answered, the newspapers. I asked her where they were for sale? She answered,
"Pocket Shoe Company." I said, "Evidently you are
310 mistaken in the name, as to the "American Girl" and
the "American Lady;" Pocket Shoe Company are the exclusive agents for "American Girl" shoe and know nothing of the 'American Lady.' " She replied, that it was the Pocket Shoe Company that had advertised them, and that she had confused the name.

14Q. Who is the "Pocket Shoe Company"?

A. They are an organization incorporated under the state laws of Indiana.

15Q. Are you connected with the Pocket Shoe Company?

A. I am.

16Q. In what capacity?

A. I am the Secretary and Treasurer and General Manager.

17Q. Had you placed any advertisement of the "American Girl" shoe in Evansville newspapers under the firm name "Pocket Shoe Company"?

A. Quite frequently in various daily papers.

18Q. Had you ever advertised the "American Lady" shoe in the Evansville newspapers?

A. We did not.

19Q. Can you recall any other instances where there has been confusion in your trade concerning the "American Girl" and the "American Lady" shoe? A. I can.

20Q. Kindly do so, stating the circumstances?

A. I was answering a letter of inquiry from a firm of Wolf Brothers & Company, makers of the "American Girl" shoe, and at the time this answer was being typewritten a customer came in the store and called for a pair of "American Lady" shoes. I heard the customer making the demand, and stepped up

towards her inquiring of her if it was possible that she was not mistaken as to the brand of the "American Lady" shoe that she was calling for; she replied, "Not as I know of." I asked her how she come to ask for the "American Lady" shoe? She replied by saying that she had heard of it through her friends who had bought them, and had also seen the advertisements, I asked her, "where did your friends buy their
311 shoes?" She stated, "At the Pocket Shoe Company." She says, "This is the Pocket Shoe Company, is it not?" I replied, "Yes, but we do not sell the 'American Lady' shoe; we sell the 'American Girl' shoe, and evidently you must be mistaken in the name." She said, "It is probable, but I am sure that this is the place where the shoes are sold."

(Counsel for Applicant objects to the above answer as hearsay and incompetent. And same objection is made to the answer to Question 13.)

21Q. Has the Pocket Shoe Company ever sold the "American Lady" shoe? A. No.

22Q. Can you recall any other instances of confusion in the trade between the two shoes?

A. There had been quite a few calls for "American Lady" shoes when we knew there was a mistake made in demanding the particular brand. I remember of a person, lady or woman, calling for "American Lady" shoes, and I showed her without further questioning, the "American Girl" brand shoe, and she asked me, where these shoes were made? I told her Cincinnati. That these were the "American Girl" shoes, and she replied saying, "I thought they were made in St. Louis." I then explained to her the difference. This [women] was a stranger in town; I cannot recall what she told me as to where she came from.

(Counsel for Applicant objects to the last answer above as hearsay and incompetent.)

23Q. Can you recall any other instances of confusion among your customers, concerning the two brands of shoes?

A. Only in a general way; and to avoid unnecessary explanation we show the trade in general our brand, the "American Girl" shoe.

24Q. From your experience in handling shoes, do you think that there is such a similarity between the trade-mark "American Girl" and "American Lady" as applied to shoes to
312 cause confusion in the minds of the purchasing public concerning the two brands of shoes?

A. That is my actual experience.

25Q. I will show you what purports to be a copy of a letter sent by the Pocket Shoe Company to Wolf Brothers & Company, signed "The Pocket Shoe Company," and with the initials

"D. H. H." and ask you, if you can identify it as a true copy of a letter sent by the Pocket Shoe Company to Wolf Brother & Company, this letter having been read into a former deposition in the case in which you are now testifying?

A. That is correct.

26Q. Who wrote or dictated that letter?

A. I personally.

Cross Examination

By Mr. Cornwall:

1XQ. What is the population of Evansville?

A. Between seventy thousand and seventy-five thousand.

2XQ. Have your customers ever asked for brands of shoes not sold by the Pocket Shoe Company?

A. They have.

3XQ. Please give the names of the brands?

A. The "Queen Quality," "Walk-Over," "Regal"—those are the principal ones.

4XQ. Would you not also include in that list the "American Lady" shoe?

A. I might have mentioned only lately.

5XQ. What is the retail selling price of the "American Girl" shoe?

A. The retail selling price of the "American Girl" shoe is two and a half.

6XQ. And of the "American Lady" shoe?

A. From the advertisements which I have read, three dollars and three and a half, I believe.

And further deponent saith not.

BERNARD HEITHAUS.

313 Sworn to and subscribed before me this 9th day of February, 1906.

(Seal) WILLIAM SCHUCHARDT,
Notary Public in and for Hamilton County, Ohio.

James J. Wolf, Re-called.

Heretofore produced and sworn as a witness in behalf of the Opponent, further deposed and testified as follows:

Direct Examination

By Mr. Burleigh:

1Q. Since the marketing of the "American Lady" shoe by the Hamilton, Brown Shoe Company began, what has been done by the Hamilton, Brown Shoe Company with reference to the introduction of the "American Lady" shoe in the same territory and to the same trade by whom the "American Girl" shoe has been sold heretofore?

A. From reports from our salesmen, as well as from letters from our trade, they have very diligently and assiduously sought our trade with the sole purpose of supplanting the "American Girl" shoe with the "American Lady" shoe.

(Counsel for the Applicant objects to the answer of the witness, as hearsay and incompetent,)

And further deponent saith not.

JAMES J. WOLF.

Sworn to and [described] before me this 9th day of February, 1906.

(Seal) WILLIAM SCHUCHARDT,
Notary Public in and for Hamilton County, Ohio.

Testimony on behalf of the Opponent now closed.

CERTIFICATE OF OFFICER.

State of Ohio,
County of Hamilton—ss.

I, William Schuchardt, a notary public in and for the
314 County of Hamilton, State of Ohio, duly commissioned and qualified, do hereby certify that the foregoing depositions of James J. Wolf, Jackson H. Duncan, Samuel B. Wolf, William T. Pinckney, Millard F. Thompson, Edgar A. Peck, Emanuel Peck, Anthony J. Fries, Robert E. Harrison, Albert W. Highlands, Mark Sternberg, and Bernard Heithaus, were taken on behalf of The Wolf Brothers & Company, in pursuance of the consent and appearance of the parties before me, at Rooms 310, 311 and 312, in the Lincoln Inn Court, in the city of Cincinnati, State of Ohio, in said county, on the 12th and 13th of January, and by consent also on the 9th of February, 1906; that said witnesses were each by me severally and duly sworn before the commencement of the testimony of the witness sworn; that the testimony of said witnesses was written directly upon the typewriter by a skilled stenographer appointed by me and in my presence; that the opposing party, Hamilton, Brown Shoe Company was represented by Frederick R. Cornwall, its attorney, during the taking of the said testimony; that said testimony was taken at the office above indicated, and was commenced at ten o'clock in the forenoon on the 12th day of January, 1906; was continued on the 13th day of the said month, and by consent further portion thereof was taken and the depositions concluded upon the 9th day of February, 1906; that the respective depositions herein were read by or to each of the witnesses before said witnesses respectively signed same; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy.

In Testimony Whereof I have hereunto set my hand and affixed my official seal at Cincinnati, in the said County, this 9th day of February, 1906.

(Seal) WILLIAM SCHUCHARDT,
Notary Public in and for Hamilton County, Ohio.

My Commission expiring December 6, 1908.

IN THE

UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF MISSOURI,

EASTERN DIVISION.

THE WOLF BROTHERS AND COMPANY,
Complainant,

vs.

HAMILTON, BROWN SHOE COMPANY,
Defendant.

} IN EQUITY
No. 5262.

PLEADINGS

— AND —

DEFENDANT'S PROOFS.

PAUL BAKEWELL and
FREDERICK R. CORNWALL,
Solicitors for Defendant.

St. Louis Law Printing Co., 311-315 Locust. Bell, Main 1819; Kinloch, Central 986L.

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IN THE

UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF MISSOURI,

EASTERN DIVISION.

THE WOLF BROTHERS AND COMPANY, Complainant,

vs.

HAMILTON, BROWN SHOE COMPANY, Respondent.

IN EQUITY

No. 5262.

PLEADINGS

— AND —

DEFENDANT'S PROOFS.

BILL OF COMPLAINT.

[Filed Jan. 29, 1906.]

IN THE CIRCUIT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION.

The Wolf Brothers and Company, Complainant,

vs.

Hamilton–Brown Shoe Company, Respondent.

In Equity.

To the Honorable Judges of the Circuit Court of the United States, for the Eastern Division of the Eastern Federal Judicial District of Missouri.

The Wolf Brothers & Company, a corporation organized, existing and doing business under and by virtue

of the laws of the State of Ohio, and having its principal office and place of business in the City of Cincinnati, in the County of Hamilton, in the State of Ohio, brings this its bill of complaint against Hamilton–Brown Shoe Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, and having its principal office and place of business in the City of St. Louis, in the State of Missouri, and being a citizen of the State of Missouri, and thereupon your Orator complains and says:

That heretofore, and on or before the first day of January, A. D. 1896, a certain co-partnership then engaged in the manufacture of shoes in the City of Cincinnati, in the County of Hamilton, in the State of Ohio, under the firm name and style of George F. Dana & Company, did adopt as a trade-mark for shoes, the mark consisting of the words "The American Girl"; which said mark was neither descriptive nor deceptive, and had never been applied to shoes by any other person or corporation, and which was susceptible of appropriation as a trade-mark for shoes, and was open to such appropriation, and was, as applied to shoes, an arbitrary and fanciful mark.

That thereafter, the said George F. Dana & Company did apply said trade-mark to shoes manufactured by it, by imprinting the said trade-mark upon the soles of said shoes, by means of a die, and by vending said shoes in paste-board cartons, each containing one pair of said shoes, the said cartons having imprinted upon their tops and ends the said trade-mark "The American Girl". That the said shoes so marked were continuously manufactured and vended by the said George F. Dana & Company until on or about the sixth day of November, A. D. 1896, when the said George F. Dana & Company was succeeded in business by the Dana–Lytle Shoe Company, an Ohio corporation, having its principal office and place of business in the City of Cincinnati, in the County of Hamilton, in the State of Ohio.

That from and after the sixth day of November, A. D.

1896, the said The Dana–Lytle Shoe Company continued to manufacture and vend the said shoes so marked and branded and labeled with the words "The American Girl" as aforesaid; the said The Dana–Lytle Shoe Company having on the sixth day of November, A. D. 1896, acquired all of the assets and effects of the said George F. Dana & Company, including the good-will of the said George F. Dana & Company, and the said trade-mark for shoes consisting of the words "The American Girl".

That the said The Dana–Lytle Shoe Company did continuously vend the shoes marked and branded with the said trade-mark as aforesaid, continuously until the 11th day of May, A. D. 1898, upon which said date, the said The Dana–Lytle Shoe Company did convey to a co-partnership, known and styled as Wolf Brothers & Company, the entire assets of its shoe manufacturing business, and the good-will of the said business, including the said trade-mark "The American Girl". That from and after the said 11th day of May, A. D. 1898, the said co-partnership, Wolf Brothers & Company did continue the manufacture of the said shoes under the said trade-mark, the trade-mark being applied and affixed to the said shoes in the manner above described, until the 12th day of June, A. D. 1905, when your Orator became incorporated under the laws of the State of Ohio, and acquired all of the assets of the said co-partnership, Wolf Brothers & Company, including its good-will and the said trade-mark for shoes, consisting of the words "The American Girl"; and that thereafter, and continuously, your Orator has carried on the making and vending of the said shoes under the said trade-mark, the said trade-mark being affixed and applied to the shoes in the manner hereinbefore described.

That your Orator's immediate predecessor, Wolf Brothers & Company, the co-partnership, did, during the year A. D. 1899, devise and originate for use in connection with the advertising and vending of the said shoes, the certain catch-phrase, consisting of the

words "A shoe as good as its name". That the said phrase had never theretofore been applied to shoes, and that following its adoption, the said Wolf Brothers & Company, the co-partnership, did apply the said catch-phrase to its advertising matter of every description; including newspaper and trade-journal advertisements, letter-heads, bill-heads, cards, and stationery of every description, display-signs of every description, printed or enrgaved on glass, metal, leather and wood, show-signs, soap, calendars, mirrors, and all of the various forms of advertising employed in promoting the sales of the said shoes distinguished by the trade-mark consisting of the words "The American Girl".

In the establishment of the said trade-mark, and in the use of the said catch-phrase, your Orator and its predecessors have extensively advertised the said shoes, particularly in the trade-journals, the leading local newspapers in various cities of the United States, and by circulars, booklets and advertising novelties.

Your Orator hereto annexes the said advertising specimens, the same being marked "Complainant's Exhibits, Specimen Advertisements", together with the name of the paper or publication, the date of its issue and place of publication.

That the use of the said catch-phrase has been continuous by your Orator and its said immediate predecessor, ever since its said adoption in the year A. D. 1898, and that the said catch-phrase immediately became, and has ever since its adoption continued to be a popular and valuable medium of advertising whereby your Orator's shoes have been and are being vended, so that the right to the use of the said catch-phrase has become an asset of great value to your Orator, and now is of the value of One Hundred Thousand ($100,000.00) Dollars, and upwards.

That the said George F. Dana & Company did use in connection with the said trade-mark "The American Girl", in the advertising of the said shoes, the portrait of a young woman, and that the said portrait has been continuously used by each of the owners of the said

trade-mark as aforesaid, and by your Orator unto this time; the said portrait being varied from time to time and taken from various ideal female subjects. That the said portraits have usually been full length. That since, to-wit, the year A. D. 1899, there has been continuously used in connection with the said mark, upon the labels affixed to the cartons containing the said shoes, the portrait of a head and bust of a young woman, which portrait has also been used upon the advertising matter of your Orator and its said immediate predecessor, Wolf Brothers & Company.

The following is a specimen of the end-labels used by your Orator and its said immediate predecessor upon the cartons in which the said shoes are packed in pairs and vended for sale:

No.....
Size.....
Width.....
Style.....
Price $2.50

THE AMERICAN
Trade Mark
GIRL.
(Design of head of girl.)

That the said portrait has become, and now is a valid and subsisting trade-mark as applied to shoes; and that your Orator's sole and exclusive right thereunto has been acknowledged and acquiesced in by the trade and consumers of shoes generally, and that the right to use the same is now an integral part of your Orator's good-will, and of the value of more than Ten Thousand ($10,000.00) Dollars.

That your Orator and its predecessor, Wolf Brothers & Company, the co-partnership, have, since the 11th day of May, A. D. 1898, made and sold a large number of shoes, to which the said trade-mark "The American Girl" and the said portrait trade-mark were applied; the gross amount of sales being approximately in the sum of Two Million ($2,000,000.00) Dollars; and that your Orator and its immediate predecessor have expended upwards of Fifty Thousand ($50,000.00) Dol-

lars, in and about advertising the said two trade-marks, and the said catch-phrase, "A shoe as good as its name."

That in and by the use of the said trade-marks and catch-phrase, and the said expenditures for advertising, and by diligent, constant and vigorous attention to the business of making and vending the said shoes under the said trade-marks and by the maintenance of a high standard in the selection of materials from which the said shoes have been manufactured, and by reason of the superior excellence and workmanship employed in the manufacture of the said shoes, by itself and its aforesaid predecessors, your Orator has acquired, maintained and established a good-will of great value, whose value is in excess of the sum of One Hundred Thousand ($100,000.00) Dollars.

That your Orator and its said predecessors established the said good-will and business by constant and vigorous, but fair, competition with the older shoe manufacturers of the United States, and particularly the respondent, Hamilton–Brown Shoe Company.

That the said good-will of your Orator is established throughout all of the States and territories of the United States, with the exception of Nevada and Arizona, your Orator having sold the said shoes designated by the said trade-mark throughout the entire territory designated.

That your Orator's right to be subjected to none but fair competition is of the value of One Hundred Thousand ($100,000.00) Dollars and upwards.

That the amount in controversy herein is in excess of the sum of Two Thousand ($2,000.00) Dollars, exclusive of interest and costs.

That at the time of the commission of the acts of unfair competition hereinafter complained of, the respondent, Hamilton–Brown Shoe Company, was and it now is, a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri; and that the said acts of unfair competition first began in the year A. D. 1901, at which time the said

respondent already had an extremely large and established business in the manufacture and sale of shoes under its own trade-marks, of which there were quite a number.

That in the year A. D. 1901, the business of your Orator's immediate predecessor, Wolf Brothers & Company, the co-partnership, had gradually extended over a constantly increasing territory, and its shoes, designated by the said trade-marks had come into active competition with the earlier established trade of the respondent, Hamilton–Brown Shoe Company, and the said Wolf Brothers & Company, the co-partnership was steadily acquiring an increasing trade in the said shoes designated by the said trade-mark, in active and diligent, but fair and honest competition with the Hamilton–Brown Shoe Company, and other manufacturers.

That the said trade of said Wolf Brothers & Company, the co-partnership, had acquired a considerable volume of the State of Illinois, and that the said shoes designated by the trade-marks and catch-phrase aforesaid, had become well known and advertised throughout the shoe trade of the State of Illinois, and that the said shoes were sold throughout said State by a very desirable class of retail dealers in shoes.

That well knowing the premises, and well knowing the rights of said Wolf Brothers & Company in and to the said trade-marks and catch-phrase, and with the wrongful, fraudulent, dishonest and malicious intent of destroying the trade of the said Wolf Brothers & Company, and of diverting to itself and profiting by the established trade and reputation of the said shoes of Wolf Brothers & Company, the co-partnership, and in order to divert to itself the benefits of the advertising of the said shoes designated by the trade-mark "The American Girl", the portrait aforesaid, and the catch-phrase "A shoe as good as its name", the respondent, Hamilton–Brown Shoe Company, during the year A. D. 1901, put upon the market a shoe under the mark "The American Lady", accompanied by the portrait of a young woman, and has continuously ever since, from

day to day, made and sold shoes to which the said name "The American Lady" has been affixed, and has continuously ever since used advertising matter, including the said portrait of a young woman, in unfair competition with your Orator, and in infringement of your Orator's trade-mark rights acquired and established in the manner and in the territory hereinbefore set forth.

That subsequent to the institution of the said unfair competition by the respondent, and at a date which your Orator is unable to definitely fix, but which your Orator is informed and believes, and therefore avers to be, some time during the year 1903, the respondent added to its said infringing mark "The American Lady", when the same was used in its advertising matter, the phrase "The shoe deserves its name", which phrase was and is merely a paraphrase of your Orator's advertising catch-phrase, "A shoe as good as its name". That ever since the said date, the respondent has continued to use in its advertising matter of every description, either the said phrase "The shoe deserves its name", or the phrase "With the character of the woman".

That for purposes of cataloguing and identification of the said "The American Girl" shoe, Wolf Brothers & Company, the co-partnership, did, in the year 1900, adopt a series of arbitrary numbers to designate the various styles of shoe to which said trade-mark "The American Girl" was affixed. That the said numbers ranged from 400 upwards; none of the said numbers being over 500; and that among the most popular and extensively sold of the said styles of shoes designated by the name "The American Girl" were the styles numbered 403, 404, 407, and 408; and that your Orator has continuously ever since made and sold the said "The American Girl" shoes in the said styles numbered 403, 404, 407 and 408. That the said numbers 403, 404, 407 and 408 were independently adopted and appropriated for use in designating the said four several styles of your Orator's shoes, and to the best knowl-

edge, information and belief of your Orator, the said numbers 403, 404, 407 and 408 had never been used to designate ladies' shoes prior to the time that your Orator first so adopted and used them. That the said designation of the said four several styles of your Orator's shoes by the numbers 403, 404, 407 and 408 was for the purpose of distinguishing the said several styles of shoes made and sold under the trade-mark "The American Girl", and that they indicated four several styles of the said shoes, and that the said numbers 403, 404, 407 and 408 were used in your Orator's catalogues and price list, and were used in billing your Orator's shoes to the trade, although the said numbers were not affixed upon the shoes themselves, but were used for the convenience of distinguishing the said styles of shoes to which they related, to the trade, and upon your Orator's books, and in making out bills and invoices relating to the same.

That your Orator herewith exhibits as a part of this bill, page 92 of the issue of the "Boot and Shoe Recorder" of April 17, 1901, containing the advertisement of the said style numbered 408, the said "Boot and Shoe Recorder" being one of the leading trade journals of the boot and shoe trade in the United States, and the said exhibit being marked "Exhibit No. 1, accompanying the bill".

Your Orator further exhibits with this bill as a part hereof, the catalogue of Wolf Brothers & Company, the copartnership, issued for the Spring of 1901, in which was displayed pictures of the said styles numbered 407 and 408; the said catalogue being marked "Exhibit No. 2, accompanying the bill".

Your Orator exhibits herewith said Wolf Brothers & Company's catalogue for the Fall of 1904, containing at page 5 a reproduction of its said style 407 of "The American Girl" shoe; said catalogue being marked "Exhibit No. 3, accompanying the bill".

That your Orator exhibits herewith the catalogue of Wolf Brothers & Company, for the Spring of 1905, containing at page 30 thereof, a picture of the said

style No. 404 of "The American Girl" shoe, and at page 31, a picture of the said style No. 403 of the said "The American Girl" shoe; said catalogue being marked "Exhibit No. 4, accompanying the bill."

That your Orator exhibits herewith its catalogue issued for the Fall of 1905, containing at page 24 a picture of the style No. 403 of "The American Girl" shoe, and at page 29 a picture of style No. 404 of "The American Girl" shoe; the said catalogue being marked "Exhibit No. 5, accompanying the bill."

That as to each and all of these styles of your Orator's said shoes designated by its trade-mark "The American Girl", the respondent has recently issued a catalogue of its said shoes made and sold under the infringing mark "American Lady", in which will be found pictorial reproductions of styles of the said "American Lady" shoe, numbered 403, 404, 407 and 408, respectively.

That the said adoption of your Orator's distinguishing numbers by the respondent has been done with the intent and for the purpose of passing off respondent's shoes as and for your Orator's shoes, and by associating your Orator's said distinguishing numbers with the name "American Lady", to deceive and mislead the trade into the belief that the said shoes so designated are your Orator's shoes; and by the combination of the said numbers with the said mark "American Lady", the respondent has been and now is infringing upon your Orator's trade rights. That the said imitation of your Orator's catalogue and numbers by the respondent began on or about the first day of October, 1905, and has continued from day to day until the time of the filing of this bill.

That some time in the year 1904, the said Wolf Brothers & Company, the co-partnership, adopted a style numbered 397 of the said shoes sold under the mark "American Girl", and that the respondent has similarly infringed upon your Orator's use of the said number in connection with the trade-mark "American Girl"

by advertising for sale a style numbered 397 of the said shoe marked with the words "American Lady".

That your Orator exhibits herewith said catalogue of the respondent, issued on or about the first day of October, 1905, as aforesaid, said catalogue being marked "Exhibit No. 6, accompanying the bill".

That the said infringing words "American Lady" have been stamped, marked, or branded upon the shoes themselves made and sold by the respondent at all of the times hereinbefore set forth.

That all of the said infringing shoes so made and sold by the respondent have been manufactured in the City of St. Louis, in the State of Missouri, and in the Eastern Division of the Eastern Federal Judicial District of Missouri.

That thereafter, and until the time of the filing of this bill of complaint, the said Hamilton-Brown Shoe Company has persistently sold or endeavored to sell said shoes under the said fraudulent dress and devices, as and for the shoes of your Orator and its immediate predecessor.

And that the respondent has succeeded, by the said fraudulent and imitative dress and devices, in diverting to itself trade which lawfully belongs and belonged to your Orator and its said immediate predecessor. And that in furtherance of its said scheme of fraud, the said Hamilton-Brown Shoe Company did, during the year A. D. 1901, make repeated offers to secure the services of the traveling salesman, who was employed in the years 1900 and 1901 by said Wolf Brothers & Company, in the State of Illinois, the said attempts at the employment of the said salesman by the Hamilton-Brown Shoe Company being with the intent and for the purpose of transferring and appropriating to itself the trade of Wolf Brothers & Company in the State of Illinois, for its said shoes, designated by the trade-mark "The American Girl", and the trade-mark consisting of the portrait aforesaid.

That finally, at a date which your Orator can not fix with precision, but some time prior to the first day of

February, 1902, and while the said salesman was still in the employ of the said Wolf Brothers & Company, the respondent did succeed in employing him. Whereupon he left the employ of Wolf Brothers & Company, the co-partnership, and immediately began to assist the respondent in substituting the said shoes, bearing the mark "The American Lady", for the shoes which he had theretofore sold for Wolf Brothers & Company, in the State of Illinois, under the trade-mark, "The American Girl" and the accompanying devices aforesaid.

That by reason of the said imitative devices employed by respondent, it has succeeded in diverting to itself a large portion of that trade which had been established in the State of Illinois by Wolf Brothers & Company, the co-partnership, as aforesaid, and that the respondent has also diverted to itself large trade in other States, which had been built up and established by the said Wolf Brothers & Company, the co-partnership, and by your Orator, the said diversion of trade being accomplished by said imitative devices employed by respondent, as above described.

That each and all of the said acts of the respondent were in unfair competition with your Orator and its said immediate predecessor, and that they have resulted in much and constantly increasing loss and damage to your Orator.

That the said acts have been performed without the privity, connivance, procurement or consent of your Orator, or its said immediate predecessor, and against their protests often repeated.

That in and by its said infringement of your Orator's trade-marks, and its said acts of unfair competition, the respondent has caused and occasioned unto your Orator great loss and damage, for the ascertainment whereof an accounting is necessary; inasmuch as the amount of the damage so occasioned is unknown to your Orator. But your Orator verily believes that the said loss and damage is in excess of the sum of One Hundred Thousand ($100,000.00) Dollars.

That in and by its said acts of trade-mark infringement and unfair competition, the respondent has appropriated and acquired large gains and profits, which otherwise would have accrued unto your Orator, and for whose ascertainment an accounting is necessary; inasmuch as the amount of the said gains and profits is not known unto your Orator and cannot be otherwise ascertained. But your Orator verily believes the same to be in excess of the sum of One Hundred Thousand ($100,000.00) Dollars.

That the said wrongful and fraudulent acts of the respondent are now continuing, and have placed your Orator's said trade-marks and trade-mark rights, and other trade rights in jeopardy, and if continued, and unless restrained by the injunctive power of this Honorable Court, will utterly destroy your Orator's trade-mark and other trade rights, and inflict upon your Orator irreparable injury and damage.

Forasmuch therefore, as your Orator can have no adequate relief except in this Court, and to the end, therefore, that the respondent may, if it can, show why your Orator should not have the relief hereby, prayed, but make a full disclosure, discovery and answer, of each and all of the matters aforesaid (but not under oath, an answer under oath being hereby expressly waived, except as to the following interrogatories), and may, in addition thereto, under its corporate seal, and the oath of its proper officer, to the best and utmost of its knowledge, remembrance, information and belief, full, true and perfect answer make to each of the several interrogatories hereinafter set forth; that is to say:

FIRST. Whether at any time prior to the year A. D. 1901, the respondent had made or sold any shoes designated by the mark "The American Lady"?

SECOND. Whether or not the managing officers of the respondent, or either of them, was not fully aware at the time when the respondent first began to make and sell shoes under the mark "The American Lady", that the complainant and its predecessors had established a trade in shoes, bearing the mark "The American Girl"?

THIRD. At whose order, or direction or suggestion did the respondent first begin to manufacture and sell shoes under the mark "The American Lady"?

FOURTH. What firm, manufacturer or person, first designed the mark "The American Lady" and the portrait of a lady, for the respondent?

FIFTH. How many pair of shoes have been made and sold by the respondent under the mark "The American Lady"?

SIXTH. What was the date of the first sale of shoes by the respondent under the mark "The American Lady"?

SEVENTH. What was the date of the last sale of shoes by the respondent under the mark "The American Lady"?

EIGHTH. Has the respondent employed one or more of the traveling salesmen, having an established trade for shoes marked "The American Girl", and retained the same salesmen in the same territory for the end and purpose of selling shoes marked "The American Lady" to the same trade to which he or they had theretofore sold the shoes marked "The American Girl"? If so, how many of the said salesmen have been employed and retained by the respondent under such circumstances, and in what territory, and when were they employed?

NINTH. What person, firm or manufacturer has made for the respondent the cartons in which its shoes marked "The American Lady" are placed for transportation and sale?

TENTH. Is there any State or territory of the United States in which the respondent is not now in actual business competition with the complainant, except Nevada and Arizona?

ELEVENTH. At whose suggestion, and when did the respondent adopt the catch-phrase "The shoe deserves its name"?

TWELFTH. At whose suggestion, and when did the respondent adopt the catch-phrase "With the character of the Woman"?

THIRTEENTH. At the time of its adoption and commencement of the use of the mark "The American Lady" for shoes, was the respondent, or its managing officers, not aware of the continuous and uninterrupted use of the mark "The American Girl" for shoes, since the year A. D. 1895, by George F. Dana & Company, The Dana-Lytle Shoe Company, Wolf Brothers & Company, the co-partnership, and the complainant.

FOURTEENTH. To what extent, if at all, since the year A. D. 1895, has the respondent advertised its shoes for sale in the advertising mediums in which shoes known and named as "The American Girl" were advertised for sale?

Your Orator prays that the said respondent, its officers, agents, and employees, and each of them be restrained by writ of injunction issuing out of and under the seal of this Honorable Court, from further infringing upon the rights of your Orator in the premises, and from employing or using the aforesaid trade-mark, consisting of the words "The American Girl", or the infringement thereof, consisting of the words "The American Lady", and from using the portrait aforesaid, or any colorable imitation thereof; and from using the catch-phrase, "A shoe as good as its name", or any colorable imitation thereof, or variation thereof; either alone or in connection with other words, figures, symbols or accompaniments upon or in connection with the shoes, or in any way connected with the sale or offering for sale, on any label, cartons, circular, card, engraving, hanger, sign, letter-head, or in any other way whatsoever, tending and calculating to deceive the public; and

That your Orator may have its costs and charges in this behalf, and such other and further relief as to the court may seem meet, just and proper, and to equity belongs.

That upon granting the injunctive relief as hereinabove prayed, your Honors may appoint a Master in Chancery, and to him refer the matter of taking and stating and reporting a true, just and complete account

of the profits and damages to which your Orator is entitled by reason of the unlawful sale by the respondent of shoes, marked as hereinabove recited, and unlawfully labeled and advertised and otherwise sold in unfair competition with your Orator.

May it please your Honors, the premises considered, to grant unto your Orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena *ad respondendum*, issuing out of and under the seal of this Honorable Court, directed to the said Hamilton-Brown Shoe Company, commanding it on a certain day and under a certain penalty to be therein expressed, to appear and abide by such orders and decrees herein, as to your Honors shall seem meet and proper and agreeable to equity and good conscience.

And your Orator as of duty bound will ever pray.

THE WOLF BROTHERS AND COMPANY,

[SEAL] By SAMUEL B. WOLF,
President.

HOPKINS AND EICKS,
Solicitors for Complainant.

JAMES L. HOPKINS,
Of Counsel for Complainant.

ANSWER.

[Filed April 12, 1906.]

CIRCUIT COURT OF THE UNITED STATES, EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

The Wolf Brothers and Company, Complainant,
vs.
Hamilton, Brown Shoe Company, Respondent.
In Equity, No. 5262.

ANSWER OF HAMILTON, BROWN SHOE COMPANY, RESPONDENT, TO THE BILL OF COMPLAINT HEREIN.

This respondent, Hamilton, Brown Shoe Company, now, and at all times, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties or other imperfections in said bill of complaint contained, for answer thereto, or to so much or such parts thereof as this respondent is advised it is material for it to answer unto, says as follows:

Respondent denies that The Wolf Brothers and Company, the complainant, is now, or was at the dates mentioned in the bill of complaint herein, a corporation existing and doing business under and by virtue of the laws of the State of Ohio and having its principal office, or any office, in the City of Cincinnati, County of Hamilton, State of Ohio. In regard to all these allegations of the bill of complaint, respondent enters its denial and requires strict proof on the part of complainant.

Respondent admits that it is a corporation existing and doing business under the laws of the State of Missouri and having its chief office and place of business at the City of St. Louis, State of Missouri, respondent stating that it was incorporated under the laws of the

State of Missouri, in the year 1888, and that it has been engaged in the business of manufacturing and selling shoes since its incorporation.

Respondent denies that on or before the first day of January, 1896, or at any other time, a co-partnership existed or did business in the City of Cincinnati, County of Hamilton, State of Ohio, or anywhere else, under the firm name and style of George F. Dana & Company; denies that on or before the first day of January, 1896, or at any other time, said alleged co-partnership of George F. Dana & Company did adopt as a trade-mark for shoes, or as a trade-mark for any purpose, a mark consisting of the words "The American Girl"; denies that said name, if the same was ever adopted by said alleged co-partnership of George F. Dana & Company, now, or ever, constituted a trade-mark or trade-name for shoes or for any other article; denies that said name "The American Girl" was neither descriptive nor deceptive; denies that said name or mark "The American Girl" had never been applied to shoes by any other person, firm or corporation prior to its alleged adoption by said co-partnership of George F. Dana & Company; denies that said alleged name or mark "The American Girl", if the same was ever used by said George F. Dana & Company, was ever susceptible of appropriation as a trade-mark or trade-name for shoes or for any purpose; and denies that said alleged mark or name "The American Girl" was open to appropriation as a trade-mark or trade-name at any time by the said co-partnership of George F. Dana & Company, and denies that the said alleged name or mark "The American Girl" was ever applied to shoes or to any article, as an arbitrary and fanciful mark or name, or otherwise, by said alleged co-partnership of George F. Dana & Company. As to all of these allegations in the bill of complaint herein, respondent requires strict proof on the part of the complainant.

Further answering, respondent denies that said alleged co-partnership of George F. Dana & Company, on or before the first day of January, 1896, or there-

after, or at any time, applied the said alleged trade-name or mark "The American Girl" to shoes manufactured by said George F. Dana & Company, or by anyone else; denies that said George F. Dana & Company ever, at any time, imprinted said alleged trade-name or trade-mark upon the soles, or upon any part, of any shoes, by means of a die or otherwise; denies that said George F. Dana & Company ever, at any time, sold any shoes put up in paste-board boxes or cartons, or packages of any kind, having imprinted thereon, or on any part thereof, the said alleged trade-mark or trade-name "The American Girl". Respondent denies that said alleged co-partnership of George F. Dana & Company, at any time, made or sold shoes, which shoes were marked with the said alleged trade-mark "The American Girl", or which shoes were sold in boxes or cartons, which boxes or cartons were marked with said alleged trade-mark "The American Girl", and denies that said George F. Dana & Company sold shoes so marked, or sold shoes in boxes or cartons so marked, until on or about the 6th day of November, 1896, or at any time. Respondent denies that on or about the 6th day of November, 1896, or at any time, the said alleged co-partnership George F. Dana & Company was succeeded in business by the Dana-Lytle Shoe Company or by any person, firm or corporation; denies that said Dana-Lytle Shoe Company ever had any existence; denies that said Dana-Lytle Shoe Company, if it ever existed, was a corporation of the State of Ohio or elsewhere, and denies that said Dana-Lytle Shoe Company, if it ever existed, had its principal office and place of business, or any office or place of business, in the City of Cincinnati, County of Hamilton, in the State of Ohio, or anywhere else. As to all these allegations in the bill of complaint herein, respondent requires strict proof on the part of complainant.

Further answering, respondent denies that, from and after the 6th day of November, 1896, or at any time, the said alleged Dana-Lytle Shoe Company continued to manufacture or sell, or ever did manufacture and sell,

or manufacture or sell, shoes marked or branded or labeled with the words "The American Girl". Respondent denies that on the 6th day of November, 1896, or at any other time, the said alleged Dana–Lytle Shoe Company acquired all of the assets and effects, or any of the assets and effects, of said alleged co-partnership of George F. Dana & Company; denies that on the 6th day of November, 1896, or at any other time, the said Dana–Lytle Shoe Company acquired the good-will of the said alleged co-partnership of George F. Dana & Company; and denies that the said Dana–Lytle Shoe Company, on the 6th day of November, 1896, or at any other time, ever acquired the said alleged trade-mark for shoes consisting of the words "The American Girl" from said alleged co-partnership, George F. Dana & Company, or from anyone else. As to all these allegations in the bill of complaint herein, respondent requires strict proof on the part of complainant.

Further answering, respondent denies that the said alleged corporation, The Dana–Lytle Shoe Company, ever did make or vend shoes marked or branded with the said alleged trade-mark "The American Girl", and respondent denies that continuously until the 11th day of May, 1898, or at any time, either continuously or spasmodically, the said alleged corporation, The Dana–Lytle Shoe Company, ever made or vended any shoes marked or branded with the said alleged trade-mark "The American Girl". Respondent denies that on the 11th day of May, 1898, or at any other time, the said alleged corporation, the Dana–Lytle Shoe Company, did convey to a co-partnership known and styled as Wolf Brothers & Company, or to anyone, the entire, or any, assets of the said The Dana–Lytle Shoe Company in its alleged shoe manufacturing business, or that at the date aforesaid, or at any other time, said alleged corporation, The Dana–Lytle Shoe Company, did convey to a co-partnership known or styled as Wolf Brothers & Company the good-will of a business in the manufacture of shoes marked with the said alleged trade-mark "The American Girl" or with any trade-mark or trade-name whatsoever; or

that on the aforesaid date, or at any time, there was conveyed by the said alleged corporation, The Dana-Lytle Shoe Company, to a co-partnership known or styled as Wolf Brothers & Company, or to anyone, the said alleged trade-mark. Respondent denies that there ever existed a co-partnership known or styled as Wolf Brothers & Company and denies that said alleged co-partnership, Wolf Brothers & Company, if the same ever existed, ever acquired, in any way, the said assets, good-will, or alleged trade-mark "The American Girl". As to all these allegations in the bill of complaint herein, respondent requires strict proof on the part of complainant.

Further answering, respondent denies that said alleged co-partnership, Wolf Brothers & Company, ever existed, or that from and after the 11th day of May, 1898, or at any time, or from any date, said alleged co-partnership, Wolf Brothers & Company, did continue to manufacture or sell, or did manufacture or sell at all, shoes marked in any manner, or packed in boxes or cartons which were marked in any manner, with the said alleged trade-mark "The American Girl"; denies the said alleged co-partnership, Wolf Brothers & Company did any of these things at any time, and denies that said alleged co-partnership, Wolf Brothers & Company, did any of these things prior to, or until the 12th day of June, 1905. And respondent denies that the complainant corporation became incorporated under the laws of the State of Ohio on the 12th day of June, 1905, or at any time; and respondent denies that on the 12th day of June, 1905, or at any time prior or subsequent thereto, complainant corporation acquired all or any of the assets of said alleged co-partnership, Wolf Brothers & Company; and denies that the complainant, at any time, acquired from said alleged co-partnership, Wolf Brothers & Company, or from anyone, the good will of said alleged co-partnership, or any good will, in the said alleged trade-mark "The American Girl" for shoes or for any purpose; and respondent denies that since or after the 12th day of June, 1905, or since any date,

complainant has carried on the business of making or vending shoes of any kind under the alleged trade-mark or trade-name "The American Girl", or under any trade-mark or trade-name; and respondent denies that the said alleged trade-mark or trade-name "The American Girl" has ever been applied to boots or shoes, or boxes or packages containing the same, by this complainant or by anyone else, in any manner whatsoever. As to all of these allegations in the bill of complaint, respondent requires strict proof on the part of complainant.

Further answering, respondent denies that the said alleged co-partnership, Wolf Brothers & Company, was ever the predecessor in business of the complainant; denies that said alleged co-partnership, Wolf Brothers & Company, did, during the year 1899, or at any other time, devise or originate for use in connection with the advertising and vending of shoes, a certain phrase consisting of the words "A shoe as good as its name"; denies that said phrase, if ever adopted by said Wolf Brothers & Company, was ever susceptible of appropriation as a title, name or phrase in which any property could be had as applied to shoes; denies that, if said phrase was ever used or adopted by said Wolf Brothers & Company, it had never theretofore been applied to shoes by others; denies that the said phrase, "A shoe as good as its name", was ever applied by said Wolf Brothers & Company to any advertising matter of any description, or in any newspapers, trade journals, letter-heads, bill heads, cards, stationery, or display signs; denies that said phrase was ever imprinted or engraved on glass, metal, leather, wood, show-signs, soap, calendars, mirrors, or any other articles; and denies that said phrase was ever used in any kind of advertising matter in promoting sales of shoes, which shoes were marked or distinguished by the words "The American Girl". As to all of these allegations in the bill of complaint, respondent requires strict proof on the part of complainant.

Further answering, respondent denies that said al-

leged trade-mark "The American Girl" was ever established by the complainant or any of its alleged predecessors in business in any manner, and denies that the said alleged trade-mark or said alleged phrase "A shoe as good as its name", has ever been advertised at all by the complainant or any of its alleged predecessors in business, either in trade-journals, newspapers, or by circulars, booklets, and advertising novelties. As to all these allegations of the bill of complaint, as well as to the allegations of the bill of complaint referring to certain exhibits alleged to be filed with the said bill and marked "Complainant's Exhibits, Specimen Advertisements", respondent enters its denial of the same or of the authenticity of the same and requires strict proof in regard thereto by the complainant.

Further answering, respondent denies that said alleged phrase "A shoe as good as its name" has been used continuously, or at all, by complainant or its said alleged immediate predecessors, the alleged co-partnership, Wolf Brothers & Company, since 1898, or since any time; respondent denies that said alleged phrase immediately, or ever, became, or that since its alleged adoption it ever became, either popular or valuable as a medium of advertising; and respondent denies, not only the use of said phrase and the advertisement thereof by the complainant or its alleged predecessors, but also denies that the same was, or ever became, or is now, of any value whatsoever; and respondent denies that the alleged right to use the said phrase "A shoe as good as its name" is now, or ever became, an asset of great or any value to the complainant, and denies that said phrase is of the value of One Hundred Thousand Dollars ($100,000.00) or of any value to the complainant. In respect to these allegations in the bill of complaint, respondent requires strict proof on the part of complainant.

Further answering respondent denies that said alleged co-partnership, George F. Dana & Company, ever used in connection with the alleged trade-mark "The American Girl" or in the advertisement of shoes marked with

the alleged trade-mark "The American Girl", a portrait of a young woman; denies that said alleged portrait of a young woman has been continuously used, or that the same has been used at all, either by the complainant or by any of its alleged predecessors in business, or that the same was ever used at any time in any way associated with shoes by the complainant or any of its alleged predecessors in business; respondent denies that said alleged portrait was ever at any time varied, denying that the same was ever used by the complainant or its predecessors in business in any way, shape or form. Respondent denies that since the year 1899, or at any time, or since any date, there has been used, continuously or at all, upon or in connection with any labels or cartons, or on or in connection with shoes or cartons or boxes for the same, by the complainant or any of its alleged predecessors in business, the portrait of a head or bust, or of a head and bust, of any woman, young or old, or that any such portrait has, at any time, been used on or in connection with any advertising matter of complainant or any of its alleged predecessors in business. As to all of these allegations in the bill of complaint, respondent requires strict proof on the part of complainant.

As to the next allegation of the bill of complaint, which undertakes to recite and set forth a certain alleged specimen of end labels alleged to have been used by complainant and its said alleged immediate predecessor upon the cartons in which said shoes are alleged to be packed in pairs and offered for sale, which alleged specimen of end label, as recited in the bill, has blank spaces for number, size, width, and style of shoe and designates the price of the pair of shoes contained in the box as $2.50, respondent has no information, except as alleged in the bill of complaint, and therefore, denies the same and requires strict proof on the part of the complainant.

Further answering, respondent denies, as to the next paragraph of the bill of complaint, that the said alleged portrait referred to in said paragraph, had ever become,

or that the same now is, a valid and subsisting trade-mark as applied to shoes; denies that the complainant has any right whatsoever in or to said portrait as a trade-mark or otherwise; denies that the trade or consumers of shoes have ever acknowledged or acquiesced in the alleged claim that complainant has the exclusive right to said portrait as a trade-mark for shoes; denies that the complainant has any right to the said portrait as a trade-mark or otherwise, or that the use of the same is now, or ever was, an integral part, or any part, of complainant's good will; and denies that the value of the said alleged portrait as a trade-mark or as good-will property is of the value of Ten Thousand Dollars ($10,000.00) or of any value whatsoever. As to all these allegations of the bill of complaint, respondent requires strict proof on the part of complainant.

Further answering, respondent denies that either the complainant or said alleged co-partnership, Wolf Brothers & Company, or that this complainant and the said alleged co-partnership, Wolf Brothers & Company, has or have, since the 11th day of May, 1898, or since any date, made or sold a large number of shoes, or any number of shoes whatever, marked with the said alleged trade-mark "The American Girl", or with the said alleged portrait, applied thereto, or with both said name "The American Girl" and said alleged portrait; and respondent denies that the gross amount of sales of shoes marked with the said alleged trade-marks, or either of them, amount to, approximately, Two Million Dollars ($2,000,000,) or to any sum whatever; and respondent denies that this complainant and its mediate predecessor, or that this complainant or its said immediate predecessor, have or has expended Fifty Thousand Dollars ($50,000.00) or any sum of money whatsoever in or about or in connection with or for advertising any or all of the said things named in the paragraph of the bill to which this part of the answer is addressed, *i. e.*, either in advertising the alleged name "The American Girl", or in advertising the alleged portrait of a girl, or in advertising the alleged phrase "A shoe as good

as its name", respondent denying that complainant or its alleged predecessors in business have paid out one cent in advertising any of these things. In regard to all of these allegations in the bill of complaint, respondent requires strict proof on the part of complainant.

Further answering, respondent denies that it is true that either the complainant or any of its alleged predecessors, by the use of said alleged trade-marks, or any of them, or by the use of said phrase "A shoe as good as its name", or by the expenditure of any sum of money whatever in advertising, or by diligent, constant and vigorous attention to business in the making and vending of shoes under said alleged trade-marks, or any of them, or by the maintenance of a high standard in the selection of material in the manufacture of shoes, or by reason of superior excellence and workmanship employed in the manufacture of shoes, complainant or any of its alleged predecessors has acquired, obtained, or established a good-will of great or any value, respondent denying that the complainant has any good-will whatever in the manufacture and sale of shoes under any of said alleged trade-marks or phrase, and respondent denies that complainant's good-will in the manufacture and sale of shoes under said catch-phrase "A shoe as good as its name", or under any of complainant's alleged trade-marks is of the value of One Hundred Thousand Dollars ($100,000.00) or of any value whatever. As to all of these allegations in the bill of complaint respondent requires strict proof on the part of complainant.

Further answering, respondent says that it has no information, except as alleged in the bill of complaint, as to whether or not the complainant or its said alleged predecessors, or any of them, established any good-will in business by constant, or any vigorous, fair competition with older shoe manufacturers in the United States or with this respondent; and as to such allegations in the bill of complaint respondent requires strict proof on the part of complainant.

Further answering, respondent says that it is not in-

formed, except as alleged in the bill of complaint, as to whether or not the complainant established throughout all or any of the States or territories of the United States any good-will whatever, or that said good-will if ever estabilsed by the complainant, was estalished in any of the States or territories in the United States, or that complainant has sold any shoes designated by any alleged trade-mark mentioned in the bill of complaint herein throughout all, or any part of, the United States; and as to all these allegations in the bill of complaint respondent requires strict proof on the part of complainant.

Further answering, respondent denies that complainant's right "to be subjected to none but fair competition" is of the value of One Hundred Thousand Dollars ($100,000.00) or upwards, or that it is of any value whatsoever; and as to these allegations in the bill of complaint respondent requires strict proof.

Further answering, respondent denies that the amount in controversy herein is in excess of the sum of Two Thousand Dollars ($2,000.00) exclusive of interest and cost; and as to this allegation in the bill of complaint respondent requires strict proof.

Further answering, respondent admits that in the year 1888 it was incorporated under the laws of the State of Missouri, since which time it has had its plant and establishment at the City of St. Louis, State of Missouri, and been engaged in the manufacture and sale of boots and shoes throughout the United States and the territories thereof. Respondent denies that in the year 1901, or at any other time, it committed any act of unfair competition with respect to the alleged business or trade-marks or trade-names of the complainant by simulating any trade-mark, trade-name, advertisement, or catch-phrase of the complainant or of any of the alleged predecessors in business of the complainant; but, on the contrary, respondent says that in the use of names, marks, or advertisements of shoes made and sold by the respondent, it has always used, and does now use, distinct trade-marks, trade-names, and advertisements,

with the sole purpose of identifying its shoes and distinguishing the shoes of respondent's manufacture from shoes made and sold by any other shoe manufacturer, and that it has invariably associated with its distinct trade-marks and trade-names its own name with such shoes or advertisements.

Further answering, respondent denies that in the year 1901, or at any other time, the business of complainant's alleged immediate predecessor, the copartnership of Wolf Brothers & Company, had gradually, or in any way, extended over a constantly increasing territory, or that the shoes of said Wolf Brothers & Company, designated by any of the alleged trade-marks mentioned in the bill of complaint, had come into competition with the earlier established trade of this respondent, or that said Wolf Brothers & Company, in 1901 or at any other time, was steadily acquiring an increasing trade in said shoes designated by said alleged trade-marks, or any of them, either in active, diligent, or fair competition with this respondent or with other shoe manufacturers. Respondent denies these allegations in the bill of complaint, says that they are utterly immaterial, if true, and requires strict proof thereof by the complainant.

Further answering, respondent denies that the alleged trade of said Wolf Brothers & Company ever acquired a considerable volume, or any volume, in the State of Illinois, or elsewhere; denies that said shoes designated by the alleged trade-marks and catchphrase, or any of them mentioned in the bill of complaint, ever became well known or advertised throughout the shoe trade in the State of Illinois, or elsewhere; and denies that shoes made by said Wolf Brothers & Company were sold in the State of Illinois by a very desirable class of retail dealers in shoes or by anyone. As to all of these allegations in the bill of complaint respondent requires strict proof by the complainant.

Further answering, respondent denies that complainant has established, throughout all or any of the States or territories of the United States, any good-will

whatsoever in connection with the manufacture or sale of boots or shoes, or that complainant now has any good-will whatsoever in all or any of the States or territories of the United States, in connection with the manufacture or sale of boots or shoes, either under any trade-marks, trade-names, catch-phrases, or otherwise; and respondent denies that complainant has sold any boots or shoes designated by any of the alleged trade-marks, trade-names, or catch-phrases set forth in the bill of complaint herein in any State or Territory of the United States, and as to all such allegations in the bill of complaint herein respondent requires strict proof on the part of complainant.

Further answering, respondent says that it is not true that this respondent, heretofore or at any time, and with either a wrongful, fraudulent, dishonest, or malicious intent, or with any intent of destroying the alleged trade of the said Wolf Brothers & Company, or of this complainant, or with any intent or desire of unlawfully diverting to the respondent any of the alleged trade, good-will, or reputation of said Wolf Brothers & Company, or of this complainant, or with any desire to divert to the respondent the alleged benefits of any advertising done by the complainant or any of its alleged predecessors in respect to any shoes made or sold by the complainant or any of its alleged predecessors, or in respect to any alleged trade-name, trade-mark, or catch-phrase ever used or adopted by the complainant or any of its alleged predecessors, ever did any of the things alleged in the bill of complaint herein. Respondent says that since its incorporation and since before the year 1900 respondent has had a large and extensive business in the manufacture and sale of boots and shoes, conducting its manufactory in the City of St. Louis, State of Missouri, and selling its products chiefly throughout the United States and the territories thereof; that since the year 1900 and before that time, in the manufacture and sale of its boots and shoes, the respondent has and had established a valuable good-will for itself as a manufacturer of high-class boots and

shoes, always marking boots and shoes manufactured by respondent with a mark, on the boot or shoe itself, as well as on the boxes or packages containing the shoes made and sold by respondent, designating in plain words that the boots and shoes manufactured and sold by respondent actually emanated from the factory of the respondent, the respondent's name, "Hamilton, Brown Shoe Company", being plainly marked on all boots and shoes manufactured and sold by respondent, as well as on the packages or boxes containing the same, so that the user or consumer who might buy respondent's boots or shoes from the retailer, as well as the retailer himself, would know, and does know, that the boot or shoe is the product of the respondent company; that heretofore, to-wit, in the year 1900, without any knowledge of the existence of said Wolf Brothers & Company, and without any knowledge of the fact, if it be a fact, that said George F. Dana & Company ever existed, and without any knowledge of the alleged rights of this complainant or of any of its alleged predecessors, and without any knowledge that this complainant or any of its alleged predecessors in business had ever adopted any of the alleged trade-names, trade-marks, or catch-phrases referred to in the bill of complaint herein, this respondent, in absolute good faith, adopted as a name for a superior quality of ladies' shoes manufactured and sold by the respondent the name "The American Lady", and at about the same time adopted, in good faith, for a superior quality of shoes manufactured and sold by respondent the name "The American Gentleman", and at the same time, to-wit, about the year 1900, respondent placed upon the cover of its boxes containing certain of its high-class ladies' shoes the picture of a woman, being the picture of a certain actress, to-wit, Miss Grayce Scott; that in connection with the said ladies' shoes and the said picture imprinted on the outside of the cover of the boxes or packages containing the aforesaid ladies' shoes, the respondent printed in bold type the name "The American Lady", together with the name "Hamilton,

Brown Shoe Company", and also printed on the ends of the said boxes, in bold type, the name "The American Lady"; that, to-wit, since 1900, on the aforesaid shoes themselves, on the soles of said shoes as well as on the inner lining thereof, respondent caused to be distinctly marked the name "The American Lady" on ladies' shoes, and the name "The American Gentleman" on gentlemen's shoes, also marking on the ladies' shoes aforesaid, as well as on the gentlemen's shoes aforesaid, both on the soles of said shoes and on the inside lining of the same, the respondent's name in bold letters, to-wit, "Hamilton, Brown Shoe Co."; that, in the latter part of the year 1905, on some of the said boxes or cartons containing the said ladies' shoes marked as aforesaid, in the utmost good faith and without the slightest knowledge of the pretended rights of this complainant or of any of its alleged predecessors in business, respondent caused to be printed on the ends of said boxes containing said American ladies' shoes, the words "With the Character of the Woman". Respondent says and repeats that what it did in this respect was done in the utmost good faith, without any knowledge of the alleged rights of the complainant or any of its alleged predecessors, and respondent states that there are no rights in the complainant or in any of its alleged predecessors whatsoever which, in any way, conflict with the right of the respondent to mark and brand its shoes, as well as the cartons or boxes containing the same, with the name "The American Lady" or with the phrase "With the Character of the Woman" placed on the ends of the boxes or cartons containing said shoes made by this respondent for the American lady, not only because the name "American" is *publici juris* and not only because the name "Lady" does not look like or sound like the name "Girl", but also because, in every instance, both as to the boxes or packages containing respondent's shoes, as well as in respect to the shoes themselves, each box and each shoe is prominently and distinctly marked, so as to arrest the attention of the dealer or user, with the name of

the respondent corporation as the manufacturer of the said shoe.

Respondent further says that it is true that since the year 1900 when it first adopted the names "The American Gentleman" and "The American Lady" for certain high-class shoes made by the respondent and sold for use by American gentlemen and American ladies, it has also in certain trade journals caused to be advertised, but always in connection with the name of Hamilton, Brown Shoe Company, certain of respondent's shoes as "The American Gentleman" shoe and "The American Lady" shoe, advertising in connection with "The American Gentleman" shoe, in some instances, the phrase "With the Character of the Man", and in connection with the said "The American Lady" shoe the phrase "With the Character of the Woman", sometimes also advertising said shoes in connection with the pictures of Martha and George Washington and with such expressions as the following, for instance, "The Shoes have the Character of the Woman and the Man"; but respondent says that all this was done in the utmost good faith.

Further answering, respondent says that heretofore, to-wit, about October 22, 1903, in connection with an advertisement of respondent's "The American Lady" shoes published in the "Shoe & Leather Gazette", a trade journal published at the City of St. Louis, State of Missouri, respondent caused to be printed, in the utmost good faith, a reproduction of the same picture of the said actress, Miss Grayce Scott, which appears on the covers of the boxes of respondent's "The American Lady" shoes, the following: "The prettiest woman in America", and also "She wears the American Lady shoe and says the shoe deserves its name"; but respondent says that the aforesaid advertisement containing the aforesaid statements or phrases was published as an advertisement by this respondent in connection with the name of the respondent company in bold type and that said advertisement was made without any knowledge that the complainant or any of its alleged

predecessors in business ever claimed a monopoly in the right to the phrase "A shoe as good as its name", and respondent says that it never used the phrase "The shoe deserves its name" on any boxes, cartons, or shoes made or sold by respondent, and only on one occasion in connection with the said advertisement in the said "Shoe & Leather Gazette" of October 22, 1903, and in the manner above stated, to-wit, in connection with the statement and phrases hereinbefore recited.

Respondent further states that its shoes manufactured and sold under the name "The American Lady" and prominently branded with the name of the respondent company as the manufacturer of the said shoes, as aforesaid, have always been of very high quality and have always been identified by the trade and public and purchasers of such shoes as shoes emanating from the factory of the Hamilton, Brown Shoe Company, and that, in every instance, in sales of respondent's said "The American Lady" shoes made by respondent or any of its agents, such shoes have always been represented as shoes emanating from the factory of the respondent.

Respondent further says that its said shoes marked with the name "The American Lady" are sold to people of intelligence who can readily see, on examining the boxes containing said shoes, or on examining any of these particular shoes, that each of said shoes and boxes is marked distinctly with the name of the respondent company, so that, in every instance, the name and fame of the respondent has been associated with the shoes made and sold by respondent bearing the name "The American Lady", so that it is impossible for any one, unless he or she be a fool or idiot, to buy re-respondent's shoes marked with the name "The American Lady" under the supposition that the said shoe is a shoe made by or emanating from the factory of the complainant.

Respondent further says, on information and belief, that all of its shoes manufactured and sold under the

name "The American Lady" are superior in quality to shoes of the complainant company and marked with the name "The American Girl"; that respondent is informed and believes, on information that it has received since the filing of the bill of complaint herein, that the complainant is putting upon the market a shoe marked with the name "The American Girl" which does not bear either upon the shoe itself or upon the box or carton containing the said shoe the name of complainant or the name of any person or company as the manufacturer of said shoe, and that the said shoe is not only inferior in quality to shoes manufactured and sold by the respondent under the name "The American Lady", but that said shoe is put up in boxes or cartons upon which the price of said shoe is marked at the fixed price of $2.50, which is a lower price than the price at which respondent's shoes marked with the name "The American Lady" and with the respondent's name are sold to the user or consumer.

Further answering, respondent says that in every instance where it has caused its said "The American Lady" shoe to be advertised in any trade journals or otherwise, it has invariably associated the advertisement of said shoe with the name of respondent, so that any one reading the said advertisement may at once see that the shoe in question is a high-class shoe manufactured and sold by the Hamilton, Brown Shoe Company, of St. Louis, Missouri.

Further answering, respondent says that it has no knowledge or information whatsoever, except as alleged in the bill of complaint herein, and had no knowledge whatever in respect to said matters prior to the filing of the bill of complaint herein, as to the catalogue or catalogues issued by Wolf Brothers & Company or by the complainant corporation in which shoes manufactured by the complainant and marked with the name "The American Girl" are listed in connection with certain numbers, and as to all of these allegations in the bill of complaint respondent requires strict proof on the part of complainant.

Further answering, respondent denies that it has any knowledge, except as contained in the bill of complaint herein, as to certain advertisements in the "Boot and Shoe Recorder" or other trade journals, the said advertisements emanating from the complainant corporation or any of its alleged predecessors in business, and respondent says that it had no knowledge of any of said advertisements on the part of complainant or any of its alleged predecessors in business prior to the filing of the bill of complaint herein. But respondent states that it is not true that the respondent, in bad faith or with any intent to injure the complainant or any of its alleged predecessors in business, ever pirated or copied all or any part of the alleged advertisements of the complainant in respect to shoes advertised or marked with the alleged trade-mark "The American Girl". Respondent denies that it has heretofore, at any time, in connection with any of said advertisements or in any of its catalogues, copied any numbers or marks used by the complainant or any of its alleged predecessors in business in connection with any shoes manufactured or sold by the complainant or any of its alleged predecessors in business.

Further answering, respondent says that it has been the practice of the respondent, as well as of other large shoe manufacturing concerns, to give certain numbers to shoes in the catalogues issued in respect to shoes, and that in every catalogue ever issued by this respondent, the name of the respondent corporation appears prominently, so that any person ordering shoes from said catalogue knows beforehand that the shoes are to be ordered from the concern issuing such catalogue; for instance, every one receiving a catalogue issued by the respondent corporation knows that it is the catalogue of the Hamilton, Brown Shoe Company, as it is issued and represented to be the catalogue of the Hamilton-Brown Shoe Company, so that any one ordering shoes from said catalogue will not be deceived as to the manufacturer of the shoes, and the same is true in respect to any and all advertisements of any shoes which have

been advertised by respondent under the name "The American Lady", that is to say, that in every instance the advertisement of the shoe or shoes have been associated prominently with the name and address of the respondent corporation, so that any one seeing such advertisement at once associates the advertisements or the shoes represented in such advertisement with the respondent corporation, and in this way is not, and can not be, misled into ordering respondent's shoes believing or thinking that he or she is ordering the shoe of any other manufacturer.

Further answering, respondent says that from time to time in issuing its catalogues, in which a large number of shoes are listed, it has used various numbers; but respondent denies that it has ever used any number in connection with any shoe which was a number the complainant or any of its alleged predecessors had the exclusive right to use, or any number which the complainant or any of its alleged predecessors in business had ever used in connection with any particular shoes; and respondent says that if it ever happened in any case that a similar number was used by respondent corresponding with a number used by the complainant or any of its alleged predecessors in business in connection with any shoe, in any catalogue or advertisement, the same was a pure accident and could not, and did not, result in deceiving any one, since, in every instance, any numbers which may have been used by respondent in connection with shoes, either in respondent's catalogues or in respondent's advertisements, were always used in connection with statements to the trade and public that the shoe in question was a shoe manufactured and sold by respondent.

Further answering, defendant states that it is absolutely untrue and maliciously false for complainant to charge, as it does in its bill of complaint herein, that this respondent has heretofore, or at any time, used any number in connection with any shoe found in any catalogue or advertisement of this respondent "for the purpose of passing off respondent's shoes as and for" complainant's shoes.

Further answering, respondent says that it is not true that the complainant has the exclusive right to the name "The American Girl" as applied to shoes; that it is not true that the complainant has the exclusive right to any particular number, be it number 403, 404, 407, or 408, or 397, or any other number, in connection with any shoe; that it is not true that the complainant has the exclusive right to the phrase "A shoe as good as its name"; or that the complainant has the exclusive right, in connection with boots or shoes, to any of the things, names, marks, or phrases stated in the bill of complaint herein.

Further answering, respondent says that it is not true that the name "The American Lady", as used by the respondent in connection with shoes that respondent has manufactured and sold and in the manner in which respondent has used the name "The American Lady", has deceived any one, or is calculated to deceive anyone, into buying respondent's shoes as and for a shoe manufactured and sold by the complainant; that it is not true that the complainant has the exclusive right to the representation of a young woman's head on a box of shoes, or on or in connection with shoes; and that it is not true that the picture of Miss Grayce Scott, as used by the respondent in its advertisements or on its boxes of shoes, is in any way calculated to deceive the public or to unlawfully divert the trade of the complainant to respondent.

Further answering, respondent says that it is not true that at the time of the filing of the bill of complaint herein, or at any time, or that now, this respondent has sold, or endeavored to sell, or is now selling, any shoes under any fraudulent dress or devices as and for the shoes of complainant or of complainant's mediate or immediate predecessors in business; but that whatever shoes respondent has sold have been sold on the name and fame which respondent has established for its own shoes and as and for the shoes of this respondent and of this respondent alone, and that the allegations of the complainant's bill to the con-

trary are absolutely false and untrue and without any foundation in law or in fact.

Further answering, respondent says that it is not true that respondent has imitated any dress or devices of complainant; nor is it true that this respondent has diverted to itself any trade which lawfully belongs, or ever belonged, to complainant or to its alleged mediate or immediate predecessors in business.

Further answering, respondent says that it is not true, and does not appear to be true from the allegations of the bill of complaint, that the complainant has acquired any cause of action against this respondent for any alleged infringement of any trade-mark or good-will rights of the alleged mediate or immediate predecessor or predecessors in business of the complainant.

Further answering, respondent denies that it is true that this respondent, in furtherance of any alleged scheme of fraud, or otherwise, during the year 1901, or at any other time, made repeated efforts, or any efforts whatsoever, to secure the services of any traveling salesman employed by the complainant, by Wolf Brothers & Company, or by any of the alleged mediate or immediate predecessors in business of this complainant; and respondent denies that it is true that this respondent, at any time, made any attempt to employ any salesman of this complainant, of Wolf Brothers & Company, or of any alleged predecessor in business of this complainant, with any intent whatsoever, much less with the intent of transferring and appropriating to this respondent the trade of said Wolf Brothers & Company in the State of Illinois or elsewhere in the United States for shoes designated by the alleged trade-name "The American Girl" or marked with the alleged trade-mark alleged to consist of the portrait of a girl or woman; and, furthermore, respondent says that even if it were true (which it is not) that this respondent tried, at any time, to employ any salesman employed by said Wolf Brothers & Company, that fact would be utterly immaterial, peculiarly so in view of the fact that said Wolf Broth-

ers & Company are not parties complainant in this action, and it does not appear from the bill of complaint herein that any alleged cause of action of the said Wolf Brothers & Company against this respondent has been assigned or transferred to the complainant in this action. As to all of these allegations appearing in the bill of complaint herein, respondent requires strict proof on the part of complainant.

Further answering, respondent denies that, prior to the 1st day of February, 1902, or at any other time, this respondent employed any salesman who had been in the employment of Wolf Brothers & Company; and, furthermore, respondent says that even if such allegation in the bill of complaint were true, such a fact would be utterly immaterial in this case. As to all such allegations in the bill of complaint, respondent requires strict proof on the part of complainant.

Further answering, respondent denies that it is true, and says that it would be utterly immaterial if it were true, that any salesman formerly in the employ of Wolf Brothers & Company was employed by this respondent; or that after such salesman was employed by this respondent, such salesman "began to assist", or ever did assist, this respondent in substituting shoes made by this respondent and bearing the name or mark "The American Lady" for shoes which such salesman had theretofore sold for Wolf Brothers & Company in the State of Illinois or elsewhere under the alleged trademark "The American Girl", or under "the accompanying devices aforesaid". These allegations in the bill of complaint respondent says are utterly untrue and without foundation in fact, and as to all such allegations in the bill of complaint this respondent requires strict proof on the part of complainant.

Further answering, this respondent says that it is not true that this respondent has imitated any devices employed by the complainant in connection with any shoes made or sold by the complainant or its alleged predecessors in business, or that, by reason of any such devices, or the use of any such alleged devices, this re-

spondent has diverted, intended to divert, or succeeded in diverting, to itself a large portion, or any portion whatsoever, of any trade which has or had been established in the State of Illinois or elsewhere by Wolf Brothers & Company or by any one else, respondent also stating that even if such allegations were true, they would be utterly immaterial in this case, since Wolf Brothers & Company are not parties to this suit, and it does not appear from the bill of complaint that said firm of Wolf Brothers & Company has assigned any cause of action, at law or in equity, which it might have had against this respondent to the complainant herein. As to all these allegations in the bill of complaint, the respondent requires strict proof on the part of complainant.

Further answering, respondent says that it is not true that this respondent has diverted to itself any trade whatsoever in any State of the Union which had ever been established by the said co-partnership, Wolf Brothers & Company, or by the complainant; nor is it true that this respondent has unlawfully diverted any trade of the complainant to itself by the use of the said alleged "imitative devices" alleged to have been employed by this respondent. As to all of these allegations in the bill of complaint respondent requires strict proof on the part of complainant.

Further answering, respondent says that it is not true that this respondent has committed any acts of unfair competition with respect to complainant or with respect to complainant's mediate or immediate predecessor in business in relation to the manufacture and sale of shoes by this respondent, or that any acts committed by this respondent have resulted in large, or in any, loss or damage whatsoever to complainant. As to all these allegations in the bill of complaint respondent requires strict proof on the part of complainant.

Further answering, respondent says that it is not true that this respondent has at any time performed any unlawful act with respect to the alleged rights of the complainant and against complainant's protest often repeated or ever stated.

Further answering, respondent says that it is not true that it has ever infringed any lawful rights of the complainant in any manner whatsoever, or that thereby, or in any manner, it has caused complainant great loss or damage, or any loss or damage whatsoever; and this respondent says that it is not true that the complainant has been damaged by any acts of respondent in the sum of $100,000.00 or in any sum whatsoever, and that such allegations in the bill of complaint are utterly without foundation in fact. As to all of these allegations in the bill of complaint respondent requires strict proof on the part of complainant.

Further answering, respondent says that it is not true that respondent has appropriated or acquired large gains or profits, or any gains or profits whatsoever, which would otherwise have accrued to complainant; respondent says that it is not true that, but for the alleged action of respondent, complainant would have made gains or profits in the sum of $100,000.00, or in any sum whatever, which alleged gains or profits complainant has been deprived of by any unlawful act of this respondent. In regard to all these allegations in the bill of complaint respondent requires strict proof on the part of complainant.

Further answering, respondent says that it is not true that respondent has committed any wrongful or fraudulent act in respect to any lawful right of the complainant in this action; that it is not true that respondent has placed any of complainant's alleged trade-marks or trade-mark rights in jeopardy; that it is not true that the respondent is now doing, or intends to do, or has in the past done, any act or thing which has injured, or is likely to injure, this complainant in respect to any alleged trade-mark or good-will rights of this complainant; or that this respondent has inflicted, intends to inflict, is inflicting, or is likely to inflict, upon complainant any injury or damage whatsoever, much less any injury or damage of an irreparable nature.

Further answering, respondent denies that it is true

that the complainant or any of its alleged predecessors in business has or have ever advertised shoes under the name "The American Girl" in the leading newspapers throughout the United States, or in any newspapers or in any manner whatsoever, or that the complainant or any of its alleged predecessors has or have ever, at any time, advertised its or their shoes under the name "The American Girl" or under any other name in any newspapers of the United States or in any manner whatsoever; and as to all such allegations in the bill of complaint herein respondent requires strict proof on the part of complainant.

Further answering, respondent says, upon information and belief, that complainant has full and adequate relief at law, if it is entitled to any relief at all, and that this Court, as a court of equity, has no jurisdiction in the premises.

Further answering, respondent says that it declines to answer, except in the manner that it has already answered the general allegations of the bill of complaint herein, the fourteen interrogatories found in the bill of complaint herein, for the following reasons:

1. That the bill in respect to the said interrogatories fails to comply with equity rule 41, in this, that the interrogatories which respondent is required to answer are not specified in a note at the foot of the bill in the form and to the effect provided by rule 41 of the rules of practice for the Courts of Equity of the United States.

2. That the said interrogatories are scandalous and impertinent, are without foundation in the bill, and many of them inquire in respect to matters which cannot be inquired about at this stage of the proceeding, and can only be inquired into in the event the complainant should prevail in this action and this Court should find the equities in favor of the complainant and refer the cause to a Master for the purpose of taking an account as to damages or profits.

Wherefore, respondent, availing itself of equity rule 44 of the Rules of Practice for the Courts of Equity

of the United States, respectfully declines to answer the said interrogatories or to make further answer to the bill of complaint in this cause.

Wherefore, this respondent, having fully answered to the said bill of complaint, insofar as it is advised the same is material or necessary to be answered unto, denies that the complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, or to any relief whatsoever; and respondent prays the same advantage of its aforesaid answer as if it had pleaded and demurred to the said bill of complaint and prays to be hence dismissed with its reasonable charges in this behalf most wrongfully sustained.

HAMILTON-BROWN SHOE CO.,
By W. F. MCELROY, *V. Pres't.*,
Respondent.

BAKEWELL & CORNWALL,
Solicitors and Counsel for Respondent.

St. Louis, Mo.,
April 12, 1906.

REPLICATION.

[Filed May 7, 1906.]

IN THE CIRCUIT COURT OF THE UNITED STATES
EASTERN DIVISION OF THE EASTERN
DISTRICT OF MISSOURI.

The Wolf Brothers & Company, Complainant.	In Equity No. 5262.
vs.	
Hamilton–Brown Shoe Company, Respondent.	

REPLICATION OF COMPLAINANT, THE WOLF BROTHERS & COMPANY, IN ABOVE CAUSE TO THE ANSWER OF HAMILTON–BROWN SHOE COMPANY, RESPONDENT.

This repliant, saving and reserving all advantage of exception to the manifold insufficiencies of said answer for replication thereto saith that it will aver and prove its said bill to be true and sufficient, and that the said answer is untrue and insufficient;

Wherefore it prays relief as in said bill set forth.

JAMES L. HOPKINS,
Solicitor and of Counsel for Complainant.

STIPULATION AS TO TIME FOR TAKING DEFENDANT'S PROOFS.

[Filed February 5th, 1907.]

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

The Wolf Bros. & Company,
vs.
Hamilton-Brown Shoe Co.
} In Equity No. 5262.

It is stipulated by and between counsel for complainant and counsel for defendant in the above entitled cause, that defendant shall have until the 31st day of May, 1907, within which to take testimony in answer to complainant's proofs in chief.

Dated at St. Louis, Missouri, February 5, 1907.

(Signed) HOPKINS & EICKS,
Solicitors and Counsel for Complainant.
BAKEWELL & CORNWALL,
Solicitors and Counsel for Defendant.

STIPULATION AS TO DEFENDANT'S TESTIMONY BEING TAKEN BEFORE ANY NOTARY PUBLIC TO ACT BY CONSENT AS SPECIAL EXAMINER, UNDER 67th RULE IN EQUITY AS AMENDED.

[Filed March 22, 1907.]

IN THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

The Wolf Bros. & Co., Complainant,
vs.
Hamilton–Brown Shoe Co. Defendant.
In Equity No. 5262.

STIPULATION.

It is stipulated by and between counsel for complainant and counsel for defendant in the above entitled cause, that in the matter of taking testimony on behalf of the defendant, wherever the testimony is taken, the testimony may be taken before any Notary Public, with the understanding that in the matter of taking such testimony said Notary Public shall act, by the consent of parties, as Special Examiner, under 67th Rule in Equity, as amended.

St. Louis, March 21, 1907.

JAMES L. HOPKINS and
ALFRED A. EICKS,
Solicitors for Complainant.

BAKEWELL & CORNWALL,
Solicitors for Defendant.

IN THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

The Wolf Bros. & Co.,
Complainant,
vs.
Hamilton-Brown Shoe Co.,
Defendant.
In Equity No. 5262.

ST. LOUIS, Missouri, April 8, 1907. 11 a. m.

The testimony taken on behalf of the defendant, at the office of Messrs. Bakewell & Cornwall, 806 Chemical Building, St. Louis, Missouri, on April 8, 1907, in pursuance of the following stipulation signed by the solicitors for the complainant and the defendant, the original of which is attached hereto, said stipulation being in the following words and being entitled in this cause:

"STIPULATION FOR TAKING TESTIMONY.

It is stipulated by and between counsel for complainant and counsel for defendant in the above entitled cause, that defendant may begin the taking the testimony of witnesses on behalf of the defendant, at the office of Bakewell & Cornwall, 806 Chemical Building, St. Louis, Missouri, on April 8, 1907, beginning at 11 o'clock in the forenoon, and continuing from day to day until completed; said testimony to be taken before George Bakewell, a Notary Public, acting, by consent of the parties, as Special Examiner under the 67th Rule in Equity, as amended.

It is also stipulated that the depositions of the witnesses shall be taken on the typewriter by an operator, and a carbon copy of the said depositions, as taken, shall be supplied to the complainant's counsel.

St. Louis, Mo., March 22, 1907.

(Signed) JAMES L. HOPKINS & ALFRED A. EICKS,
Solicitors for Complainant.
BAKEWELL & CORNWALL,
Solicitors for Defendant."

Present: Paul Bakewell and Luke E. Hart, on behalf of Defendant.

As Mr. Alfred A. Eicks, one of the solicitors for the complainant telephoned that Mr. Hopkins cannot be present at the opening of these depositions, and as Mr. Eicks does not care to be present at the opening of the depositions, as the witnesses called to testify on behalf of the defendant are here from a distance, the depositions will proceed under this notice with the understanding that there will be an adjourned session at 2:30 p. m. on this 8th day of April, 1907, at which session the solicitors for the complainant or either of them, who may choose then to be present, will have an opportunity of cross-examining such witnesses whose direct examination may be closed at that time.

HOMER TANNER,

a witness produced on behalf of defendant, being first duly sworn, testifies as follows:

Q. 1. What is your name, age, residence and occupation? A. Homer Tanner, age 22, 1108 N. Montgomery avenue, Litchfield, Ill.; my present occupation is with the Whitehall Orphan Home Society, at Whitehall, Ill. Up to the first of April 1907, I was with Mr. D. W. Taylor, Litchfield, Ill. Mr. Taylor's business is and was during the time of my employment, shoes, clothing, carpets, millinery and dry goods, at his store at Litchfield, Ill. I was employed by Mr. Taylor one year and eleven months, ending my employment with him on March 31, 1907.

Q. 2. What were your duties during your term of employment with Mr. Taylor at Litchfield, Ill.? A. I was a salesman all over the store.

Q. 3. While in the employment of Mr. Taylor in his store at Litchfield, Ill., did you know of a certain shoe made by Hamilton-Brown Shoe Co. of St. Louis, the defendant in this case, which shoe was marked and sold under the name "American Lady"? A. Yes, sir.

Q. 4. Do you know from whom Mr. Taylor bought

those shoes referred to in my last question? A. Bought from the factory through the agent of the Hamilton-Brown Shoe Co.

Q. 5. Do you recognize this box of shoes which has been put in evidence in this case by complainant's counsel and marked Complainant's Exhibit No. 106 as a box of American Lady shoes manufactured by Hamilton-Brown Shoe Co. at St. Louis? A. I recognize the shoes as being a pair of Hamilton-Brown shoes, as well as the box containing them.

Q. 6. Look at the pair of shoes in this box and state where, if at all, on each of these shoes you find plainly marked the name Hamilton-Brown Shoe Co. together with the name American Lady.

A. On the inside of each shoe as well as on the sole of each shoe I find the words: On the sole of each shoe are plainly marked the words Hamilton-Brown Shoe Company with the words American Lady. On the inside of the shoe for the right foot I find in white letters the words American Lady and the words Hamilton-Brown Shoe Company, Makers. On a label attached to the shoe for the left foot I find the words Hamilton-Brown Shoe Company and on a red mark in the center the words "Largest in the world". On the lid of the box I find the picture of a young lady and the words Hamilton-Brown Shoe Co. in large white letters on a black back-ground, and also the words American Lady on a black background. On the end of the box I find the words American Lady and the words Hamilton-Brown Shoe Company, Makers.

Q. 7. How does the marking that you have described in your last answer on this particular box of shoes as well as on the shoes themselves, correspond with the marking on other American Lady shoes and on boxes of other American Lady shoes made by the Hamilton-Brown Shoe Co. that you have seen on the market during your employment by Mr. Taylor? A. It is the same with the exception of the little label with the red center on the end of this box. Some of the boxes had a plain label bearing the name Hamilton-Brown Shoe Company

on the end of the box like the label on complainant's exhibit 104, instead of the label with the red center which appears on Complainant's Exhibit, 106.

Q. 8. During the term of your employment by Mr. Taylor at Litchfield do you know the price at which these American Lady Shoes were sold to the customers? A. $3.00 and $3.50.

Q. 9. During the term of your employment by Mr. Taylor at Litchfield was your attention called to the fact as to whether or not the Hamilton–Brown Shoe Company of St. Louis advertised its American Lady shoe as the product of the Hamilton–Brown Shoe Co.? A. Yes, sir. It was advertised and advertised quite extensively with cards to hang in the windows and to hang in the store, and I have also seen it advertised in the magazine and always in connection with the name Hamilton–Brown Shoe Co.

Q. 10. Is this American Lady shoe sold by the Hamilton–Brown Shoe Co. a shoe of good reputation and of good quality? A. Yes, sir.

Q. 11. The bill in equity in this case was filed about Jan. 29, 1906. I will ask you if prior to Jan., 1906, you had ever heard of a shoe made by anyone marked with the name American Girl? A. No I had never heard of that shoe.

Q. 12. A person who gives her name as Victoria B. Ryan and who says she was employed as detective, has given her testimony in this case on behalf of complainant. Referring to this box of shoes marked Complainant's Exhibit, No. 106 (a box of American Lady shoes stamped with the words Hamilton–Brown Shoe Co.) she says at page 192 of her typewritten deposition, in answer to question 12, as follows:

"On August 31st, 1906, I went to the New York store, D. W. Taylor, Proprietor, Litchfield, Illinois, I asked the man for the American Girl shoe. He showed me the American Lady and said that he didn't know very much about the American Girl shoe, but he knew it was made in St. Louis by the Hamilton–Brown Shoe Company. He said the only difference in the two

shoes was the price, the American Girl $2.50 and the American Lady $3.00. Mrs. E. J. Swink was with me. I purchased the shoe for $3.00, which I identify by the mark in the shoe and the box, on the sole of the shoe 'Mrs. D. W. R.' and 'Mrs. E. J. S., August 31st, 1906'. The carton is also marked with the same initials".

Also a person who gives her name as Ella J. Swink called as a witness by the complainant, and who was employed by the Thiel's Detective Agency, in answer to question 2 put to her, at page 203 of her deposition in this case, and referring to this same box of shoes marked Complainant's Exhibit, 106, says:

"I saw them at the New York store on State Street, Litchfield, Ill., August 31st, 1906. Mrs. Ryan asked for the 'American Girl' shoes, the clerk brought us a pair of shoes with the 'American Lady' stamped on them, and told us they were the same as the 'American Girl'. He knew that the American Girl was made by the Hamilton-Brown Shoe Company, St. Louis, Missouri. We bought a pair of shoes for $3.00. This is the shoe (indicating shoes handed her by attorney). The clerk's name was Homer Tanner, Clerk No. 5. This was the box I got them in."

Referring you now to the testimony of Victoria B. Ryan quoted above I call your attention to Complainant's Exhibit, No. 107, found at page 234 of the record, which I presume is a bill, on a printed form, entitled: "The New York Store, D. W. Taylor, Dry Goods, Millinery, Clothing, Carpets, Hats and Shoes, Litchfield, Ill." That bill or receipt seems to bear date the 31st day of the 8th month of the year 1906, which would be August 31, 1906. This seems to call for one pair of shoes at the price of $3.00, "Sold by 5". Is the pencil memoranda on that bill in your handwriting? A. Yes, sir.

Q. 13. What does "No. 5" mean? A. That is simply my number. I was clerk No. 5.

Q. 14. And does that bill refer to this pair of Hamilton-Brown Company's American Lady shoes marked

Complainant's Exhibit No. 106? A. I presume it does. It refers to a sale of shoes made by me on the date referred to for the price of $3.00.

Q. 15. Now referring to the testimony of Victoria B. Ryan which I have quoted on this record, did you tell Mrs. Victoria B. Ryan, or Mrs. Swink, or anyone else on the 31st day of August, 1906, or at any other time, that a shoe, called the American Girl shoe, was made at St. Louis by the Hamilton-Brown Shoe Co.? A. I never did. I am positive that I never did.

Q. 16. Did you ever, at any time, while in the employment of Mr. Taylor or elsewhere, ever deal in or sell any shoes marked with the name American Girl? A. No.

Q. 17. Mrs. Victoria B. Ryan also says in her answer which I quoted above "He said" (meaning you) "the only difference in the two shoes was the price. The American Girl $2.50 and the American Lady $3.00". Did you ever make any such statement to Mrs. Ryan or to anyone else? A. No positively, I never knew a thing about the American Girl shoe and that would imply that I never knew the price of it. I don't know what the price is of the American Girl shoe now.

Q. Do you remember on August 31, 1906, or at any other time that Mrs. Ryan or anyone else asked you to sell her a pair of "American Girl" shoes? A. No, sir.

Q. 19. Ella J. Swink in her testimony, which I have quoted on the record, undertakes to say that on August 31, 1906, you said in her presence that the American Lady shoes were the same as the American Girl shoes. Is that statement true? In other words, did you make any such statement on August 31, 1906, or at any other time, to any one? A. No, sir, I never made any such statement to any one at any time.

Direct examination closed.

(Signed) HOMER TANNER.

Cross-Examination, by Mr. Hopkins.

XQ. 20. At the time of the conversation you refer to in your direct examination, was any one present, except your self and the two ladies, to whom you sold the shoes? A. I did not refer to any conversation, and didn't have any conversation.

XQ. 21. You were clerk No. 5 in Mr. Taylor's store at that time? A. Yes, sir.

XQ. 22. You had no conversation whatever with the persons making the purchase and mentioned in the bill in your handwriting which is Complainant's Exhibit, No. 107? A. Nothing more than I remember that they asked me for my number or name, I don't remember which, when they left.

Cross-Examination closed, and signature waived.

MISS SYLVIA BANKS,

being called as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Q. 1. What is your name, age, residence and occupation? A. Sylvia Banks; age 17; I live in Oran, Missouri; I am in the store of my father, Jacob Banks, at Oran, Missouri.

Q. 2. How long have you been in your father's store? A. About 5 or 6 years.

Q. 3. What is the nature of your father's business? A. Dry goods, shoes, clothes, groceries, saddlery, and a general merchandise.

Q. 4. Do you handle or deal in, in your father's store, the American Lady shoe made by the Hamilton-Brown Shoe Co. of St. Louis? A. Yes, sir.

Q. 5. How long have you handled or dealt in the American Lady shoes? A. About 7 years.

Q. 6. Do you know where your father buys these shoes? A. He buys them from the Hamilton-Brown Shoe Co. at St. Louis.

Q. 7. Have you always found these shoes marked with the name American Lady, as well on the shoes

themselves, as on the boxes containing them? A. Yes, sir.

Q. 8. During the time that you have handled American Lady shoes made by Hamilton–Brown Shoe Co. at your father's store, do you know whether or not that shoe has been advertised by the Hamilton–Brown Shoe Co. under the name American Lady in connection with the name Hamilton–Brown Shoe Co.? A. Yes.

Q. 9. What have you to say as to whether or not the American Lady shoe made by the Hamilton–Brown Shoe Co. is a popular shoe? A. It is a very popular shoe.

Q. 10. Have you found it to give satisfaction with your customers? A. Yes, it always has.

Q. 11. Can you tell us at what prices the American Lady Shoe has been sold by you? A. Yes, sir, $3.00 and $3.50.

Q. 12. Please state what causes the difference between the price of the $3.00 and $3.50 American Lady shoe. A. The vici kid American Lady shoes sell at $3.00 and the patent leather American Lady shoes sell at $3.50. Sometimes my father has bought joblots of odd sizes from the Hamilton–Brown Shoe Co. and some of those shoes bought at joblots have been sold at $2.50 and $2.75.

Q. 13. The regular price, however, of the Hamilton–Brown Shoe Co's American Lady shoes to the consumer or user, in the absence of these joblots, is $3.00 and $3.50, is it not? A. Yes.

Q. 14. Did you ever hear of or see a pair of shoes marked with the name American Girl? A. I never did.

Q. 15. Victoria B. Ryan who seems to have been employed as a detective in this case, says at page 188 of her deposition as follows:

"I went in and asked for the 'American Girl' shoes and the man sent a young lady clerk to me, his daughter, Miss Banks, and I told her again I wanted 'American Girl' shoes. She handed me a pair of 'American Lady' shoes, this pair (indicating) I asked her if this was 'The Girl' shoe: she said 'Yes'. I said I 'see the

American Lady stamped on it'. She said 'That is all right, it is the same thing. It is made by the same people, the Hamilton–Brown Co., St. Louis'. She said there was not any such a thing as the American Girl shoes made by other firms, it was made by the Hamilton–Brown, the Lady and the Girl was the same shoe, the one shoe. So I purchased the shoe for $2.75, in this box".

Did you ever have any such conversation with Victoria B. Ryan or with any one else, at any time? A. No, I never had.

Q. 16. Does the matter of reading over the answer of Victoria B. Ryan quoted in my last preceding question (question 15) refresh your memory about any transaction on August 11, 1906, or at any other time, when you might have sold Victoria B. Ryan a pair of American Lady shoes? A. Yes I remember a woman coming in to buy a pair of shoes about August 11, 1906. I never told her the American Girl shoe was the American Lady shoe, and never had any such conversation with her. I never could have said this because I never heard of the American Girl shoe.

Q. 17. Please state what took place at the time you remember having had a conversation with the woman referred to in your last answer. A. If I had any conversation it is that I asked her what she wanted and I started to wait on her, so she called for a pair of shoes so I showed her a pair of American Lady shoes and told her it was the best shoe we handled. I showed her that the shoe was branded and the box was branded. I also told her it was the best shoe we handled. She asked me if it was the American Girl shoe and I told her no, it was the American Lady. Then I called father when she asked for the American Girl shoe, for the simple reason that I didn't know anything about the American Girl shoe. I told my father that she wanted the American Girl shoe and he said he did not handle the American Girl shoe but handled the American Lady shoe, which he said is the best shoe he handled. My

father went away then, and I sold her a pair of American Lady shoes. I told her it was the American Lady shoe made by the Hamilton–Brown Shoe Co.

Direct examination closed.

(Signed) SYLVIA BANKS.

Cross-Examination, by Mr. Hopkins.

XQ. 17. At the time of the conversation about which you have testified, after you called your father, and told him that the customer wanted the American Girl shoe, did your father have any conversation with the customer, and if so what was said. A. He had a little conversation. She asked him if he had the American Girl shoe and he told her no, that we handle the American Lady. Then I think that was all he said, he went away.

Cross-examination closed.

Signature waived.

JACOB BANKS,

a witness produced on behalf of the defendant, being first duly sworn, testifies as follows:

Q. 1. What is your name, age, residence and occupation? A. Jacob Banks, age 40 years, residence, Oran, Missouri; general merchandise.

Q. 2. Do you deal in shoes marked American Lady made by Hamilton–Brown Shoe Co. and represented as an example by the box of shoes marked Complainant's Exhibit No. 101? A. Yes, sir. I have dealt in this American Lady shoes for the last eight years.

Q. 3. Who is the maker of those shoes? A. Hamilton–Brown Shoe Co. of St. Louis.

Q. 4. Are all these shoes that you have dealt in marked with the name American Lady and also with the name Hamilton–Brown Shoe Co. plainly stamped on the shoes themselves as well as on the lid of the box, and on the end of the box containing the shoes? A. Yes, sir, always.

Q. 5. State whether or not during the eight years that you have dealt in that shoe (American Lady shoe made by Hamilton–Brown Shoe Co.) you have noticed whether or not that shoe has been advertised in connection with the name of the Hamilton–Brown Shoe Co. A. Yes it has been advertised by the Hamilton–Brown Shoe Co. and we advertise it ourselves locally as a shoe made by the Hamilton–Brown Shoe Co. of St. Louis.

Q. 6. What have you to say as to the popularity and quality of the American Lady shoe made by the Hamilton–Brown Co. A. It is always a good seller, and is well known in that part of the country. We always have calls for the American Lady shoe. It is one of the most popular shoes in our section of the country, and we are leaders in our town of the American Lady shoe, and American Gentleman shoe, both of which are manufactured by the Hamilton–Brown Shoe Co. We are the exclusive agents for that shoe in our town.

Q. 7. Did you ever deal in or see in the market a shoe made by any one marked with the name American Girl? A. No, I never seen or heard of it.

Q. 8. A person giving her name as Victoria B. Ryan employed as a detective by the complainants in this case, speaking of a circumstance which she claims occurred at your store on Aug. 11, 1906, says, at page 188 of the record in this case, as follows:

"I went in and asked for the 'American Girl' shoes and the man sent a young lady clerk to me, his daughter, Miss Banks, and I told her again I wanted 'American Girl' shoes. She handed me a pair of 'American Lady' shoes, this pair here (indicating). I I asked her if this was 'The Girl' shoe; she said 'Yes'. I said 'I see the American Lady stamped on it.' She said 'That is all right, it is the same thing, it is made by the same people, the Hamilton–Brown Co. St. Louis.' She said there was not any such thing as the 'American Girl' shoes made by other firms, it was made by the Hamilton–Brown, the Lady and the Girl was the same shoe, the one shoe. So I purchased the shoe for $2.75 in this box."

What truth, if any, is there in the statements of Victoria B. Ryan which I have just read into the record. A. Generally I always meet the people in front of the store, inside, and there was a young lady come in and I was asking what I could do for her. She told me she would like to see some shoes, and generally in ladies' shoes I always call my daughter. She has charge of the ladies' shoes and waits on the ladies. I called my daughter Sylvia to wait on this young lady, and then I left them. After while my daughter called me over and she told me the lady called for American Girl shoe, and I told her, we handled American Lady shoe made by the Hamilton–Brown people, and I told this young lady that really this is the best shoe made in the Union. I told her also that I did not handle the American Girl shoe, in fact, I had never heard of the American Girl shoe, and I did tell her that the American Lady shoe was made by the Hamilton–Brown Shoe Co. During the time when I spoke to that young lady I picked up the box, it was on the show case, and I showed her myself that the shoe is branded and the box was branded with the name American Lady and the Hamilton–Brown Shoe Co., and said it was the best shoe made. Then I left her. I noticed as I left that my daughter wrapped up a box of shoes and sold the shoes to this young lady, and I made the change myself.

Direct examination closed.

(Signed) JACOB BANKS.

No cross examination.

ROBERT D. KELLY,

a witness produced on behalf of the defendant, being first duly sworn, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation. A. Robert D. Kelly, 61 years, Danville, Ill. Formerly in the shoe business.

Q. 2. What was your occupation in September, 1906?

A. I was running the Bargain Shoe Store at 204 E. Washington St., Clinton, Ill.

Q. 3. How long had you been engaged in that business? A. I started in business there on May 26, 1906.

Q. 4. Did you handle a shoe manufactured by Hamilton-Brown Shoe Co. and marked under the name American Lady at that store? A. Yes, sir.

Q. 5. From whom did you purchase the American Lady shoe handled by you? A. I purchased them I think from Ries & Guttell of Chicago.

Q. 6. What is the business of Ries & Guttell? A. They buy up shoes at bankrupt sales and then sell them to dealers.

Q. 7. Did you ever handle American Lady shoes which you bought from Hamilton-Brown Shoe Co.? A. No, not direct from the factory.

Q. 8. Were all of the American Lady shoes handled by you bought from dealers in bankruptcy sale shoes? A. Yes, sir.

Q. 9. I will now call your attention to a pair of shoes stamped on the sole Hamilton-Brown Shoe Company, American Lady, and, on the inside, with the name Hamilton-Brown Shoe Company, which shoes, with a carton, have been offered in evidence by the complainant in this suit, as "Complainant's Exhibit No. 109". The carton is marked on the end thereof, with the words "The Boston". I will ask you to state whether or not you recognize these shoes and carton as having been sold by you? A. Yes, sir, I do. They were sold at my store. The pencil mark on the sole is in my handwriting or figures.

Q. 10. A person giving her name of Victoria B. Ryan testified as a witness on behalf of the complainant in this suit. She testified at page 194 and 195 of her typewritten deposition in answer to Q. 16, as follows with reference to this pair of shoes shown her by complainant's counsel:

"At Clinton, Ill., September 4th, 1906, in the Bargain Shoe Store. I told the lady I wanted a pair of American Girl shoes. She said 'All right', and she

brought me this pair. I noticed the American Lady mark on it and spoke to her about it. She said that that didn't make any difference, that they were both the same, that and the American Girl. She said the shoe sold for $2.50, but I could have it for $2.25, so I purchased the shoes from her for $2.25".

A party giving her name as Ella J. Swink also testified as a witness on behalf of the complainant in this suit with reference to this pair of shoes as follows, in answer to Q. 7 at page 205 of her typewritten deposition in this suit:

"I first saw this pair of shoes at the Bargain Shoe Store, 204 East Washington Street, Clinton, Ill., September 4, 1906. Mrs. Ryan asked for the 'American Girl' shoe, the lady said yes, we have it, what size do you wear? Mrs. Ryan said 'Three'. She brought a pair of shoes stamped American Lady and said this is what you want. Mrs. Ryan said the shoe I wear is stamped the American Girl. The lady said 'Well it is the same thing made by the same company, Hamilton-Brown Company, St. Louis'. Mrs. Ryan bought this pair at $2.25 in this carton or box."

Do you recall this transaction? A. Yes.

Q. 11. Please state what took place at that time. A. They came in and said "I see you have the Hamilton-Brown shoe". I said, "Yes, I have," and at that time my wife was next door and she came in the store during the conversation. They wanted to know if I handled the American Lady and I told them yes. My wife took up the conversation at that point and I remained near enough to hear all that was said, while my wife was fitting on a pair of American Lady shoes something was said by one of the women about the American Girl shoe, and I stepped up and said "No, this is not the American Girl, you mean the American Lady". When my wife told them that the shoe sold for $2.25 they expressed surprise and said that the shoe sold for $3.00 and $3.50 in St. Louis. My wife then told them that the shoes were not bought from Hamilton-Brown Shoe Co. but at a sale of bankrupt shoes in Chicago, and that

that was the reason we were able to sell the shoes for $2.25. She told them that if it was bought from Hamilton-Brown Shoe Co. it could not be sold at that price, and Hamilton-Brown would not sell to a dealer that would cut the price.

Q. 12. After you stated during the conversation between your wife and those two women that the shoe being shown them was not the American Girl, was anything further said about the American Girl shoe? A. Nothing except that they asked me if I carried the American Girl and I told them I never heard of it.

Q. 13. Did you state to those women that the American Girl shoe is made by Hamilton-Brown Shoe Co. A. I did not.

Q. 14. Was any statement made with reference to the place where or by whom the shoe then shown to these women was manufactured? A. The remark was made that the shoes were made by Hamilton-Brown Shoe Co. at St. Louis, and one of them remarked that it was strange that they should be from St. Louis and would come out here (meaning Clinton, Ill.) and buy a pair of shoes made in St. Louis.

Q. 15. Did you know at that time that there was a shoe on the market called the American Girl shoe? A. I did not, and never heard of it.

Q. 16. I call your attention to the fact that the carton offered in evidence as having been sold by you with the pair of American Lady shoes does not bear the name American Lady or the name Hamilton-Brown Shoe Co., and ask you to state the reason for this.

A. In buying at bankrupt sales we do not get the original cartons. They are liable to come in any kind of a box, and in selling a pair of shoes we are liable to put them in any kind of a box. This box was picked up as an odd box. That is the reason why these shoes are not in the original carton of the Hamilton-Brown Shoe Co. The lady was asked if it made any difference what kind of a box the shoes were put in, and she said it made no difference.

Q. 17. Do you know whether the American Lady Shoe

made by Hamilton–Brown Shoe Co. is a shoe of good repute and good quality? A. Yes, sir, and a very salable shoe. In selling these shoes which I had bought at a bankrupt sale I had a card attached to the shoe and the shoes were put in the window, the card bearing the name Hamilton–Brown Shoe Co.

Direct examination closed.

(Signed) ROBERT D. KELLY.

Cross-Examination, by Mr. Hopkins.

XQ. 18. In response to question 12 in your direct examination you have stated "They asked me if I carried the American Girl and I told them I never heard of it." Is it the fact that at that time you did not know of the American Girl brand of shoes? A. I never heard of it. I handled most all the brands and never heard of that.

XQ. 19. You did not know at that time of the American Girl shoes being sold by any other shoe dealer in your city? A. No, sir.

Cross-examination closed, and signature waived.

MRS. ROSE KELLY,

being called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

Q. 1. What is your name, age, residence and occupation? A. Mrs. Rose Kelly, age 50 years, Danville, Ill. I am the wife of Robert D. Kelly.

Q. 2. What is the business of your husband? A. He has no business at present.

Q. 3. What was Mr. Robert D. Kelly's business, your husband's business, in September, 1906. A. We were in the shoe business, running the Bargain Shoe Store at 204 E. Washington St., Clinton, Ill.

Q. 4. Did you handle a shoe manufactured by Hamilton–Brown Shoe Co. in September, 1906? A. We did, yes.

Q. 5. What part of your husband's business in his Bargain shoe store did you attend to? A. I attended

to the ladies and the children and my husband attended to the men and boys.

Q. 6. Did you ever sell at your husband's store any shoes made by Hamilton-Brown Shoe Co. marked with the name Hamilton-Brown Shoe Co. and also with the name American Lady? A. Yes, sir.

Q. 7. Where were the shoes referred to in your last answer bought and from whom? A. They were bought in Chicago at a bankrupt sale.

Q. 8. I now call your attention to a pair of shoes stamped on the sole of each shoe with the name Hamilton-Brown Shoe Co., American Lady; on the inside of the shoe they are stamped with the name Hamilton-Brown Shoe Co., which pair of shoes together with a carton have been offered in evidence by the complainant in this suit, as Complainant's Exhibit No. 109. The carton is marked, on the end thereof, with the words "The Boston". Do you recognize this pair of shoes and carton as having been sold at your husband's store at Clinton, Ill.? A. I do.

Q. 9. A person giving her name as Victoria B. Ryan testified as a witness on behalf of the complainant in this suit, at pages 194-195 of her typewritten deposition, with reference to this pair of shoes and carton, in answer to Q. 16, as follows:

"At Clinton, Ill., September 4th, 1906, in the Bargain Shoe Store. I told the lady I wanted a pair of American Girl shoes. She said all right, and she brought me this pair. I noticed the American Lady mark on it and spoke to her about it. She said that didn't make any difference, that they were both the same, that and the American Girl. She said the shoe sold for $2.50, but I could have it for $2.25, so I purchased the shoes from her for $2.25".

A party giving her name as Ella J. Swink also testified as a witness on behalf of the complainant in this suit with reference to this pair of shoes, and carton, in answer to Q. 7, at page 205 of her typewritten deposition, as follows:

"I first saw this pair of shoes at the Bargain Shoe

Store, 204 East Washington street, Clinton, Ill., September 4, 1906. Mrs. Ryan asked for the American Girl shoe, the lady said, yes, we have it, what size do you wear? Mrs. Ryan said, three. She brought a pair of shoes stamped American Lady and said this is what you want. Mrs. Ryan said the shoe I wear is stamped the American Girl. The lady said 'Well it is the same thing made by the same company, Hamilton–Brown Company. St. Louis'. Mrs. Ryan bought this pair at $2.25 in this carton or box."

Do you recall this transaction? A. I do.

Q. 9. Please state what occurred at that time? A. I was out and came in and there were two ladies sitting there. My husband was waiting on them, so I took the shoes and commenced to wait on the ladies myself. They asked me if I carried the American Girl, and I told her I never heard of the American Girl. My husband stepped up and said "You mean the American Lady". She said what is the price of the shoe, I told her it was $2.50 but she could have it for $2.25. She said how can you sell that shoe for $2.25 when it sells in St. Louis for $3.00 and $3.50? I said my husband buys his goods at bankrupt sales and I told her we did not buy our goods from Hamilton–Brown. I told her if we bought our goods from the factory we couldn't sell them at that price. She said I'll try the shoe on and it was a good fit and she bought it. She knew she was buying the Hamilton–Brown shoe the American Lady. She said how strange it is that I come from St. Louis to buy St. Louis shoes.

Q. 10. Did you tell the women at the time that the American Girl shoe was made by the Hamilton–Brown Shoe Co.? A. I never told her anything of the kind for I had never heard of the American Girl shoe.

Q. 11. Can you explain to the Court how it came about that that pair of American Lady shoes that you sold on that occasion to these women was not in a box of the Hamilton–Brown Shoe Co. but in a box marked "The Boston"? A. As my husband bought these shoes at a bankrupt sale they were not in the original boxes,

and in selling them although we sold them as American Lady shoes, as each shoe is plainly marked, we wrapped them in any old box that we had in the store. At the time I asked her to excuse the box and she said it was all right.

Direct examination closed.

(Signed) ROSE KELLY.

No cross-examination.

JOHN W. GALLAGHER,

produced as a witness on behalf of defendant and being first duly sworn testifies as follows:

Q. 1. What is your name, age, residence and occupation? A. John W. Gallagher, 16 Brook street, Battle Creek, Michigan, 36 years of age, and my occupation is clerking for Sterling Bros. Company, 8 East Main street, Battle Creek, Mich.

Q. 2. What is the business of Sterling Bros. & Company? A. General merchandise, including boots and shoes.

Q. 3. Do you know of a shoe made by Hamilton–Brown Shoe Company and marked on the shoe itself as well as the boxes or cartons containing the same with the name Hamilton–Brown Shoe Company and with the name American Lady? A. I do.

Q. 4. How long have you known of such a shoe? A. About fourteen years.

Q. 5. Do you know whether or not the shoe marked American Lady made by the Hamilton–Brown Shoe Company of St. Louis and also marked with the name Hamilton–Brown Shoe Company has been extensively advertised by the Hamilton–Brown Shoe Company in your section of the country? A. Yes, sir, it has.

Q. 6. For how long have you known that shoe to be advertised by the Hamilton–Brown Shoe Company under the name American Lady? A. Eight years. I have known of shoes manufactured by the Hamilton–Brown Shoe Company for about 14 years, but have only known of American Lady shoes made and adver-

tised by Hamilton–Brown Shoe Company for about 8 years.

Q. 7. Do you know the price at which the Hamilton–Brown Shoe Company American Lady Shoe is usually retailed to the wearer? A. All the American Lady shoes that we have sold made by Hamilton–Brown Shoe Company are generally sold at $3.00 a pair, excepting samples and odds and ends and shoes that are out of date, which are sometimes sold at a cheaper price; but except for these special cases our regular retail price of Hamilton–Brown Shoe Company's American Lady shoes has been $3.00.

Q. 8. Did you ever see any shoes or deal in any shoes marked with the name of American Girl? A. I did not.

Q. 8½. A party who gave her name as Beatrice Geary testified on behalf of complainant in this suit at page 213 of her type-written deposition in answer to Q. 2 with reference to a pair of shoes handed her by complainant's counsel as follows:

"I first saw them on October 16, 1906, at Battle Creek, Michigan, on October 16th, 1906. They were bought from the Sterling Cash Store on Main near Jefferson. Miss Mabel Neustadt and I called at this store and asked for a pair of American Girl shoes. The clerk brought a pair of American Lady shoes. The young lady asked if they were the American Girl shoe. The clerk said they were. She asked the price and he said $3.00. She said she hadn't been in the habit of paying but $2.50. Then she asked if he was sure that they were the American Girl shoes and he said it was, made by Hamilton–Brown Shoe Company of St. Louis. He then said that the American Girl and the American Lady were one and the same. I asked this clerk to give me his name that I would call in the morning and get a pair for myself. He said he would write his name on the wrapper of the box and it was 'Gallagher', and the check inside of the box bears 'No. 8'. This is the pair of shoes that I purchased and this is the carton."

A party who gave her name as Mabel Neustadt also testified as a witness on behalf of complainant in this suit with reference to a pair of shoes handed her by complainant's counsel in answer to Q. 4 at page 227 of her type-written deposition in which she made the following statements:

"On the 16th of October, Mrs. J. W. Geary and myself were in Battle Creek, Michigan, we went into the Sterling Cash Store which is located on Main Street near Jefferson. Mrs. Geary asked the clerk who came to wait on us to show her a pair of American Girl shoes for this young lady, referring to me. He did not hesitate but brought out a pair of American Lady shoes. After looking at these I remarked that I did not want these but a pair of American Girl shoes. He said that the American Girl shoes and the American Lady shoes were the same thing and that they were manufactured by Hamilton-Brown Shoe Company which is located in St. Louis and at this time he went forward in the store to bring back different sizes and different styles of the shoe." * * * "The clerk came back with the different styles of shoes and again I asked him if the American Girl shoe and the American Lady were the same thing, and he said 'Oh, yes'. Then I asked him the price of the shoe and he said $3.00." * * * "I selected a pair of shoes and Mrs. Geary paid for them, the amount was $3.00. Mrs. Geary said that she would probably return in the morning and purchase a pair of the same kind shoes for herself and asked the clerk if he would give his card and he said that he would write his name and number on the outside of the cover and took the shoes away and had them wrapped up and returned them wrapped and wrote his name which was 'Gallagher' No. 8."

Please state whether or not you recall this transaction testified to by these witnesses? A. I do not.

Q. 9. What was your number at the time testified to by these witnesses, as salesman? A. No. 8.

Q. 10. Did you state to the witnesses referred to in

my previous question, or to any other person, at any time, that the American Girl and the American Lady shoes were the same thing, and that the American Girl shoe was or is manufactured by Hamilton–Brown Shoe Co.? A. I never told them or anyone that the American Girl shoe was the same thing as the American Lady shoe; nor did I ever tell them or anyone that the American Girl shoe was made by the Hamilton–Brown Shoe Co.

Q. 11. The box of shoes which was put in evidence by complainant's counsel as purchased on that occasion from you as salesman is marked Complainant's Exhibit No. 112. I call your attention to the shoes in that box and ask you if those shoes are not each plainly marked on the sole with the name Hamilton–Brown Shoe Co., American Lady? A. Yes, sir.

Q. 12. Is not the box containing those shoes both on the lid and on the end, marked with the name Hamilton–Brown Shoe Co. and with the name American Lady, this box being Complainant's Exhibit No. 112? A. Yes, sir, it is.

Direct examination closed.

(Signed) JOHN W. GALLAGHER.

No cross-examination.

H. W. SMITH,

a witness produced on behalf of the defendant, being first duly sworn, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation? A. H. W. Smith; age 47; Norris City, Ill.; general merchant.

Q. 2. Are you connected with the firm of Smith Brothers of Norris City, Ill.? A. Yes, sir.

Q. 3. Does that firm handle a shoe manufactured by Hamilton–Brown Shoe Co. and marketed under the name American Lady? A. Yes.

Q. 4. How long has it been engaged in selling those shoes? A. Five or six years I suppose.

Q. 5. Were you connected with the firm of Smith Brothers on August 27, 1906? A. Yes, sir.

Q. 6. A person giving her name as Victoria B. Ryan testified as a witness on behalf of complainant in this suit, with reference to a pair of shoes handed her by complainant's counsel and which were offered in evidence as Complainant's Exhibit No. 104, at page 190 and 191 of her typewritten deposition in answer to Q. 9, as follows:

"August 27th, 1906, I went into Smith Brothers Clothing and Shoe Store at Norris City, Illinois. I asked for the American Girl shoe. Miss Florine E. Ives was with me. I asked for the American Girl shoe. He said 'Yes, I have them'. He handed us a pair of American Lady shoes. I told him that the shoe was stamped American Lady and asked him if it was the same thing. He said 'Yes, it was, the same thing made by the same firm', and I purchased the shoe for $3.00 and got a receipt for same. I identify this by the mark 'Mrs. D. W. R.' and 'Miss F. E. I. August 27th, 1906'. These are the shoes I bought at that time, the box they were packed in and the receipt given me by the clerk."

A party giving her name as Florine E. Ives testified as a witness on behalf of the complainant in this suit, with reference to a pair of shoes handed her by complainant's counsel, at page 201 of her typewritten deposition, in answer to Q. 11, as follows:

"I went with Mrs. Ryan to get some shoes. She asked for the American Girl shoe, this was at Norris City, Illinois, at Smith Brothers Store, they handed her the American Lady. Mrs. Ryan said 'This is not the American Lady'. The gentleman said 'It is the same shoe as the American Girl made by the same firm'. She bought the shoes and paid $3.00 for them. She got a receipt for same. I recognize this receipt (referring to Complainant's Exhibit No. 105), as the receipt she received."

The receipt which the witnesses stated they received when this pair of shoes was purchased was offered in evidence as Complainant's Exhibit 105. I will ask you to state whether or not that receipt is in your handwriting?

(While the last question was being put to the witness Mr. James L. Hopkins appeared to represent the complainant.)

A. It is.

Q. 7. I will ask you to state whether or not you recall the transaction referred to in my former question? A. I remember the transaction of those ladies coming in.

Q. 8. Please state what occurred at that time and what was said. A. They called for American Girl shoe I stated that we didn't handle the American Girl shoe. We handled the American Lady shoe, which were made by the Hamilton-Brown Shoe Co. I then proceeded to get the shoes, showed it to them, and they said they would take it. I don't remember of anything else they said. I said this, that all the American Girls were American Ladies.

Q. 9. Did you state to those women or to any other persons at that time or at any time, that the American Girl shoe and the American Lady shoe were the same thing and made by the same firm? A. I don't remember of saying that.

Q. 10. Did you say it? A. I am not in the habit of saying things that way and I don't think I did. I confine myself to the truth.

Q. 11. Please look at the exhibit Complainant's Exhibit No. 104, which consists of a pair of shoes as well as a box or carton containing the same, and state whether or not each of the shoes contained in that box as well as the box itself is distinctly marked with the name of the maker, Hamilton-Brown Shoe Co., together with the name American Lady? A. It is.

Q. 12. Is not the shoe for the right foot of this pair of shoes also distinctly marked on the inside with yellow silk or thread "Hamilton-Brown Shoe Company, Makers," and with the words "American Lady"? A. It is.

Direct examination closed.

Cross-Examination, by Mr. James L. Hopkins.

XQ. 13. Please describe the appearance of each of the ladies with whom you had the transaction referred to in your direct examination. A. I didn't pay very much attention to them; they were not very large, but rather small. If I remember right one had a little lighter hair than the other; that was the one I had to deal with.

XQ. 14. What was the date of that transaction? A. It was some time the latter part of the summer. The exact date I don't know except from the receipt, that would show it.

XQ. 15. How many other sales of shoes did you make on that same day? A. I couldn't tell.

XQ. 16. What other houses in your city deal in ladies' shoes?

Objected to as utterly irrelevant to any issue in this case and not drawn from anything inquired into in the direct examination.

A. Three others.

XQ. 17. Please name them.

Last objection repeated.

A. T. S. Barnes, Frank DeBoard & Son, and DeBoard & Hewitt.

XQ. 18. When you stated to these customers "That all the American Girls were American ladies" were you aware of the fact that DeBoard & Son were dealers in the American Girl shoes?

Objected to as absolutely incompetent and as involving a gratutious statement of complainant's counsel, since the witness has not said what complainant's counsel assumes he did say and the witness has not testified to any such statement. Therefore, the question is without foundation, either in fact or in the testimony of this witness.

A. I didn't know there was any such shoes.

XQ. 19. Please state which of the ladies referred to in your direct examination first addressed you when this transaction occurred, and as nearly as you can re-

collect just what you said and what your answer was. A. She wanted to know—she wanted to buy shoes and she asked if we handled the American Girl shoe. I answered we handled the American Lady shoe. That was the one that asked for the shoes and the one I talked to.

XQ. 20. Was it the one that had the lighter hair? A. I think it was.

XQ. 21. Please state what conversation you had after the statements you have referred to. A. The statement I made is about all we said, the statement I made in my first testimony.

XQ. 22. If I understand your answer to XQ. 18 correctly, at the time of this transaction you claim that you did not not know that there was such a brand of shoes as the American Girl shoe, is that correct? A. That is correct.

XQ. 23. How long after that transaction did you next hear of the American Girl shoe?

Objected to as utterly irrelevant to any issue in this case, as all the acts tending to show any of the alleged infringement referred to in the bill of complaint, or in any way relating thereto or as to the manufacture of complainant's shoes, must relate to a time anterior to the filing of the bill of complaint herein.

A. Never hear the shoe mentioned after that until Hamilton–Brown's man came to see me.

XQ. 24. Did you refer to Hamilton–Brown's salesman. A. No, I refer to Mr. Hart of Mr. Bakewell's office.

Cross-examination closed.

Redirect Examination, by Mr. Bakewell.

RDQ. 25. On the occasion of the purchase of this box of shoes marked Complainant's Exhibit 104, you were asked to give a receipt, which receipt is in evidence marked Complainant's Exhibit 105, and is a receipt for $3.00, and bears date August 27, 1906, were

you not? I hand you the receipt which was put in evidence by complainant. A. Yes.

RDQ. 26. Was it customary for you to give receipts when selling a pair of shoes for cash to customers? A. That was the first and last time in my history, that I was asked to give a receipt on a transaction of that kind.

RDQ. 27. Did the fact that you did give a receipt on that occasion tend to fix the transaction in your mind? A. It did.

Signature waived.

CERTIFICATE.

State of Missouri, }
City of St. Louis. } ss.

I, George Bakewell, a Notary Public within and for the above-named city and State, do hereby certify that, in pursuance of the annexed stipulation, the foregoing depositions in the case in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, entitled The Wolf Brothers & Company v. Hamilton–Brown Shoe Company, In Equity, No. 5262, were taken before me acting as Special Examiner, under the 67th Rule in Equity, as amended, at the offices of Bakewell & Cornwall, 806 Chemical building, St. Louis, Missouri, beginning at 11 a. m., Monday, April 8, 1907, and ending at about 4:30 p. m., the same day. That both parties were represented by counsel, as therein noted; that the witnesses, Homer Tanner, Sylvia Banks, Jacob Banks, Robert D. Kelly, Rose Kelly, John W. Gallagher, and H. W. Smith, were each duly sworn and cautioned by me to tell the truth, the whole truth and nothing but the truth concerning the matter in controversy; that the testimony of each of the witnesses was reduced to writing on a typewriting machine by a skilled operator; that each of the witnesses read over his or her testimony, and afterwards signed the same in my presence; except witness H. W. Smith, whose signature was waived by consent.

The signatures of several of the other witnesses was also waived as to their cross-examination, as therein noted.

I further certify that I am not attorney, nor of counsel for, nor related by blood or marriage to either of the parties to this controversy, nor in any way interested in the result thereof.

IN TESTIMONY WHEREOF, I hereunto attach my hand and seal of office at St. Louis, Missouri, this eighth day of April, 1907.

[SEAL] GEORGE BAKEWELL,

Notary Public Acting as Special Examiner.

My term expires February 14th, 1909.

The costs and expenses of taking said depositions, are as follows, all paid by defendant:

Commissioner's fee including typewriter's charges		$ 37.90
Witnesses:		
Attendance, seven	at $1.50	10.50
Homer Tanner,	Mileage	4.65
Jacob Banks,	"	10.00
Sylvia Banks,	"	10.00
Robert D. Kelly,	"	10.00
Rose Kelly,	"	10.00
John W. Gallagher,	"	10.00
H. W. Smith,	"	9.42
		$112.47

The said depositions are now herewith returned.

GEORGE BAKEWELL,

Notary Public acting as Special Examiner.

St. Louis, April 23, 1907.

ORDER APPOINTING SPECIAL EXAMINER.

[Filed April 12, 1907.]

CIRCUIT COURT OF THE UNITED STATES, EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

The Wolf Brothers & Co., Complainant,
vs.
Hamilton-Brown Shoe Co., Defendant.
In Equity, No. 5262.

Upon reading the stipulation for the taking of depositions in this cause, dated March 21st, 1907, and on motion of Bakewell & Cornwall, solicitors for defendant, it is ordered that Jackson Boyd, Esq., be and he is hereby appointed special examiner under the 67th rule in equity as amended, to take the deposition of Ernest Seres, a witness on behalf of defendant in this cause, in the State of Indiana.

DAVID P. DYER,
Judge.

CIRCUIT COURT OF THE UNITED STATES, EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

The Wolf Bros. & Co., Complainant,
vs.
Hamilton–Brown Shoe Co., Defendant.
In Equity No. 5262.

GREENCASTLE, Ind., April 17th, 1907, 10 a. m.

Testimony taken on behalf of defendant, at the office of Jackson Boyd on the corner of Washington and Indiana streets, Greencastle, Indiana, by consent of counsel and in pursuance of the order of Court dated April 12th, 1907, appointing the said Jackson Boyd, Esq., special examiner to take this deposition.

Present:

Colgate Scudder, representing Hopkins and Eicks, Solicitors for Complainant.

Luke E. Hart, representing Bakewell and Cornwall, Solicitors for Defendant.

EARNEST SEARS,

a witness produced on behalf of defendant, being first duly sworn, testified in answer to interrogatories propounded to him as follows:

Q. 1. State your name, age, residence and occupation? A. Earnest Sears, 26, Greencastle, Ind., farming.

Q. 2. What was your occupation Sept. 17th, 1906? A. Clerking in Enterprise Store of H. Goldberg, Greencastle, Ind.

Q. 3. In performing your duties as a clerk in that store were you required to sell shoes? A. That was not my regular place at all unless the other clerks were all busy or were out, but I did sell shoes at times.

Q. 4. Did Mr. Goldberg handle a shoe manfactured

by Hamilton-Brown Shoe Co. of St. Louis, Mo., and marketed under the name "American Lady?" A. Yes, sir; he did.

Q. 5. I will now call your attention to a paper introduced in evidence in this case as being Complainant's Exhibit No. 111 and will ask you to state whether or not the pencil memoranda on this paper is in your handwriting? A. Yes, sir; that is my writing.

Q. 6. A person who gave her name as Victoria B. Ryan and who stated that she was in the employ of the Thiel Detective Service Company testified at page 196 of her typewritten deposition in this suit, in answer to Q. 18, with reference to a pair of shoes handed her by complainant's counsel, as follows:

"I purchased them at Greencastle, Indiana, September 17th, 1906, at the Enterprise Dry Good and Shoe Store. I asked the clerk for the American Girl shoe, he showed us, Mrs. E. J. Swink and me, the American Lady shoe. Mrs. E. J. Swink spoke up and said 'The shoe I wanted has the American Girl stamped on the sole of the shoe'. He says 'It is the same thing any way, the Girl sells for $2.50 and the Lady sells for $3.50'. He said it was the same thing only they stamped one The American Girl and one The American Lady, but they were both made by Hamilton-Brown Shoe Company of St. Louis, Missouri. Mrs. Swink told him if he was sure that they were both made by the same company she would get a pair for herself. He said 'Yes, I am sure. I know they are made by the Hamilton-Brown Shoe Company.' Mrs. Swink tried on a pair and purchased them for $3.50. I gave him the money. I paid for them myself and got a receipt for same. I identify these shoes by the mark on the sole 'Mrs. D. W. R. Mrs. E. J. S. September 17th, 1906', and the carton by the same marks. This is the receipt I got for the purchase. The name of the salesman was Mr. Sears."

A party who gave her name as Ella J. Swink also testified as a witness on behalf of complainant in this suit with reference to this same pair of shoes, carton

and receipt, which were later offered in evidence as Complainant's Exhibits Nos. 110 and 111, at page 206 of her typewritten deposition, in answer to question 8, as follows:

"I saw them at Greencastle, Indiana, September 17th, 1906. Mrs. Ryan asked for the 'American Girl shoe', the clerk said 'Yes, he had them, what size do you wear?' She said 'three'. He looked but couldn't find the No. 3. I said I would take a pair if they had one to fit me. They said they didn't have only $3.00. We said we would look at the shoe and we told him the shoe we wore had 'The American Girl' stamped on it, and asked him the price of the shoe. He said $3.50. We told him we only paid $2.50 for the 'American Girl' shoe. He said, 'Oh, yes, that is the "American Girl" shoe. It is just a different brand made by the same company, the Hamilton–Brown Shoe Co. The American Lady always sold for $3.50, and the American Girl $2.50. That was the only difference', and then said 'if you are sure they are the same shoe and made by the same company I will take a pair'. I then bought this pair of shoes for $3.50 in this carton."

I will ask you to state whether or not you recall this transaction? A. There is part of it I do and part of it I don't.

Q. 7. Please state as nearly as you recall it at this time just what occurred and what was said at the time this transaction took place? A. Well at the first, I remember now, they called for a pair of shoes called the American, but I don't remember what kind. And after that I told them on the spot that we had the American Lady shoe, then they said they wanted the American Girl shoe. I told them that we did not have it. So I showed them a pair of the American Lady and sold them one pair, then they asked me if we would have the others in any way soon. I told them that I did not know, but we might. They then asked me my name, the name of the store.

Q. 8. You gave them your name and the name of the store, did you not? A. Yes, sir.

Q. 9. When they asked for the American Girl shoe what did you tell them in regard to your handling the American Girl shoe? A. I told that we did not handle that shoe.

Q. 10. Did you make any statement to them in regard to the manufacture of the American Lady shoe, if so, what was it? A. I told them that I thought this shoe was made by the Hamilton–Brown Shoe Company.

Q. 11. Did you make any statement with reference to the place where the American Girl shoe was manufactured or by whom? A. I did not.

Q. 12. Did you know at that time where the American Girl shoe was manufactured? A. No, sir.

Q. 13. Did you know at that time the price at which the American Girl shoe was sold? A. No, sir.

Q. 14. Did you tell those women that the price of the American Girl shoe was $2.50? A. No, sir.

Q. 15. Did you know at that time that there was such a shoe on the market? A. I did not.

Q. 16. Did you make any statement in regard to the American Girl shoe after you had told those women that you did not have it? A. No, sir.

Q. 17. I now hand you the carton and shoes offered in evidence by complainant as Complainant's Exhibit No. 110 and which those women testified that they purchased from you on that occasion. Does not the name Hamilton–Brown Shoe Co's. and the name American Lady appear on the lid of this carton in large white type on a black background? A. Yes, it does.

Q. 18. Does not the name American Lady appear on the front end of this carton, accompanied by the name Hamilton–Brown Shoe Company makers? A. Yes, sir.

Q. 19. Does not the name Hamilton–Brown Shoe Co. and the name American Lady appear upon the sole of each of those shoes in plain type? A. Yes, sir.

Q. 20. Does not the name American Lady accompanied by the name Hamilton–Brown Shoe Company makers appear on the inside lining of the shoe for the right foot in plain type? A. It does.

Q. 21. Is there not a tag attached to the shoe for the left foot, which bears the statement and name, "Largest in the world, Hamilton–Brown Shoe Company"? A. There is.

Q. 22. Basing your answer on your experience in the shoe business I will ask you to state if the name American Lady as applied to shoes does not indicate and is understood by the purchasers of shoes at retail to indicate that the shoe to which it is applied is the product of Hamilton–Brown Shoe Company of St. Louis, Missouri? A. Yes, sir, it does.

Direct examination closed.

Cross-Examination by Mr. Scudder.

Ex-Q. 1. Mr. Sears how long have you been a resident of Greencastle, Indiana? A. I have lived here twelve years in the town.

Ex-Q. 2. Then you are pretty well acquainted with the local trade here are you not? A. I am.

Ex-Q. 3. During the twelve years of your residence how long have you been engaged in a mercantile pursuit, that is, how long have you been in business? A. Well, I have worked at it for about seven or eight years.

Ex-Q. 4. Is it a fact that you have been handling shoes for that length of time? A. No, sir, I haven't handled shoes that length of time.

Ex-Q. 5. How long have you been selling shoes to purchasers at retail? A. Between two or three years.

Ex-Q. 6. Are you acquainted with the different brands of shoes? A. Not all of them I am not.

Ex-Q. 7. Can you state some of those with which you are acquainted? A. Well, I am acquainted with some of the Hamilton–Brown shoes. There's one called the American Gentleman, another called the American Lady; that's about all I can call to mind right now.

Ex-Q. 8. Can you mention any brands made by other concerns than the Hamilton–Brown Company, if so, please state some? A. There is a shoe called Success,

one called Hope, another called Mud, another called Leader, but I don't know who makes them.

Ex-Q. 9. When did you first hear of the American Girl shoe? A. The first that I remember was September 1906 some time.

Ex-Q. 10. Do you know by whom this shoe is made, the American Girl? A. I do not.

Ex-Q. 11. In your experience in the selling shoes at retail did you ever hear of the Wolf Brothers and Company of Cincinnati Ohio as being the makers of the American Girl shoe? A. No, sir.

Ex-Q. 12. Mr. Sears, are you acquainted with dry goods and shoe stores of Greencastle, Indiana? A. Yes, sir.

Ex-Q. 13. Will you be kind enough to state some of them? A. Sutherlin Shoe store, Cristie's, Hays and Hirst, Allen Brothers, Kelley's, Goldberg.

Ex-Q. 14. Can you name any brands of shoes carried by one or more of the above concerns? A. Well, Sutherlin carries the Walkover. I don't believe I can name any of the brands that the others carry—outside of Goldberg's. I've named some of them he carries.

Ex-Q. 15. In your experience in selling shoes at retail you do some advertising in the way of display cards do you not? A. Well, I never did but very little of that.

Ex-Q. 17. Do you recall seeing the advertisements of the shoes carried by the various concerns here in Greencastle? A. I don't believe I do now.

Ex-Q. 18. You mean to say that during the two or three years that you have been selling shoes at retail that you can not recall some of the advertising done by your competitors of the competing brands of shoes?

Objection to the question is made on the ground that it is entirely without the scope of proper cross-examination—more so even than the questions that have preceded it—that it is not confined to any matter developed on the direct examination of this witness, also that the question assumes that to be a fact which does not appear from the record since it does not appear that there has ever been any ad-

vertising of shoes done by the supposed competitors of the witness. Attention is also called to the fact that the witness has not stated that he is or was particularly interested in the sale of shoes, his testimony showing that he merely attended to this branch of the business when the persons ordinarily in charge of it were absent from the store.

A. I can not.

Ex-Q. 19. Have never seen any advertising displays by any of the above concerns here in Greencastle of the American Girl shoe?

Same objection.

A. I do not remember of seeing any.

Ex-Q. 20. Mr. Sears, was anyone present with you during your interview of September 17th, 1906, when you sold the shoes referred to in Complainant's Exhibit No. 110 and No. 111? A. There was no one except the sale ladies in the front of the store. We were in the back. The sale ladies and the cashier were in the front. They were where they could not hear our conversation at all.

Ex-Q. 21. Can you describe their appearance, that is, the appearance of the purchasers to whom you made the sale? A. Well, the only difference that I can recall one of them was fleshy, heavyset like, the other small and not so tall as the other one.

Ex-Q. 22. Please state which of the ladies above referred to first addressed you when this transaction occurred and state as nearly as you can recollect just what you said and what your answer was. A. Well, I don't remember which one first addressed me at all. Well, I told them that we did not have the American Girl shoe. I told them that we had the American Lady and showed them the American Lady shoe and sold them one pair.

Ex-Q. 23. Was this the first time that you ever heard of the American Girl shoe? A. This is the first time that I remember.

Ex-Q. 24. Did you ever hear of it afterwards? A. No I did not.

Ex-Q. 25. Was the American Girl shoe ever brought to your attention subsequent to this transaction? A. No, I don't remember of it.

Ex-Q. 26. Did you ever have any conversation subsequent to this in regard to the American Girl shoe? A. No, sir.

Redirect Examination, by Mr. Hart.

RDQ. 1. In what department of Mr. Goldberg's store were you employed? A. I was employed in the grocery department.

RDQ. 2. It was not your business then to pay particular attention to the shoe department or to the manner in which the competitors of Mr. Goldberg may have sold their shoes, or the means they may have adopted in selling them, is that a fact? A. Yes, sir.

RDQ. 3. Did you ever hear of the shoe called the Dorothy Dodd? A. Not that I remember of.

RDQ. 4. In answering the questions put to you on your cross-examination you did not understand the questions to relate to a conversation which you had with me in regard to the transaction testified to by you on your direct examination, did you? I refer to the questions relating to whether or not you had ever heard of the American Girl shoe at any time except during that transaction. A. I did not understand it that way.

EARNEST SEARS.

State of Indiana, } ss.
County of Putnam. }

I, Jackson Boyd, a notary public in and for said county and state, and special examiner for the purpose of taking the foregoing deposition by the appointment of the Court dated April 12th, 1907, a certified copy of the order so appointing me special examiner being hereto annexed, hereby certify that the witness Earnest Sears was by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that his deposition was reduced to typewriting by myself in the presence of the witness and that it was subscribed by him in my presence and in the presence of such of the parties and counsel as attended; that said deposition was taken by consent of counsel at my office on the corner of Washington and Indiana streets in the City of Greencastle, and the State of Indiana, beginning at 10 o'clock in the forenoon Wednesday, April 17th, 1907, and closing at twelve fifteen p. m. on said day; that the parties were represented at the taking of said deposition by their respective counsel as set forth and that I am not of counsel or related to either party, or otherwise interested in the event of this suit.

I hereby further certify that the fee for the taking and transcribing of these depositions, amounting to $9.90, and the expense of this witness including subpoena and service $1.60 and attendance $1.50 and mileage of said witness, five miles at 5c each, 25c, $13.25, was paid by the defendant and are proper charges therefor.

In testimony whereof I hereto set my hand and official seal this 17th day of April, 1907.

My commission expires Nov. 8th, 1910.

[SEAL] JACKSON BOYD,

Notary Public and Special Examiner.

IN THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

The Wolf Bros. & Co. Complainants,
vs.
Hamilton–Brown Shoe Company, Defendants.
In Equity, No. 5262.

ST. LOUIS, Missouri, May 3, 1907, 10:30 a. m.

Depositions taken in behalf of defendant at the offices of Bakewell & Cornwall, Chemical Building, St. Louis, Missouri, beginning this third day of May, 1907, at 10:30 a. m., these depositions being taken by consent before George Bakewell, Notary Public, said George Bakewell acting also, by consent of parties, as Special Examiner, under the 67th Rule in Equity, as amended,

Present: James L. Hopkins, solicitor for complainant;
Paul Bakewell, solicitor for defendant.

WALTER H. SPAHR,

produced as a witness on behalf of defendant, being first duly sworn testifies as follows:

Q. 1. What is your name, age, residence and occupation? A. Walter H. Spahr, 43 years old, manager St. Louis branch Forbes Lithograph Mfg. Company of Boston, residence, St. Louis.

Q. 2. What is the business of the Forbes Lithograph Company? A. Making all kinds of Lithographic and Printing work.

Q. 3. Where is the main office and place of business of the Forbes Lithograph Mfg. Company? A. The main office is at Boston, Massachusetts, and the works at Chelsea, Massachusetts.

Q. 4. Please state so as the Court may form some idea, the extent of the business of the Forbes Lithographic Company? A. We are one of the largest, if

not the largest lithographic concern in the United States.

Q. 5. How many branch establishments has the Forbes Lithograph Company? A. I think about eight, that is eight offices similar to mine.

Q. 6. Where are they located? A. New York, Philadelphia, Chicago, St. Louis, there is a seperate office maintained at Boston, Providence, Rhode Island, and in San Francisco, and also a branch at London.

Q. 7. How long have you been connected with the Forbes Lithograph Company? A. About 13 years.

Q. 8. Do you know the Hamilton–Brown Shoe Company of St. Louis, the defendant in this case? A. I do, sir.

Q. 9. Have you had any business relations on behalf of the Forbes Lithograph Company with the Hamilton–Brown Shoe Company? A. I have.

Q. 10. For how long and what has been the nature of that business? A. Since the fall of 1898, I have ever since, in fact every year handled the Hamilton–Brown Advertising account, that is the Lithographic end, with the exception of two or three years when this account was given to the Gray Lithograph Company and to the American Lithographic Company at New York, but for the last two years I have had their account again.

Q. 11. Please look at this picture of a woman in a gilt frame, on the top of which picture the words "Largest Shoe House in the World"; at the right hand upper corner of this picture appear the words, "Compliments of Hamilton–Brown Shoe Company, St. Louis, U. S. A.", and below at the foot of the picture appearing the words "Our Women's 'Own Make' $2.50 Shoe has been a favorite for 15 years". What, if any thing, do you know of that picture? A. The picture you speak of, is a reproduction made from a photograph of Edna May; Edna May who created the role of the Salvation Army Girl, and in January or February of 1899 I showed the photograph of this lady to Mr. J. H. Murphy, who then had charge of the Advertising Department at the Hamilton–Brown Shoe Company and

suggested making a hanger for the Hamilton–Brown Company from this photograph, as I thought it would be a decided improvement on the picture they had been getting out yearly, pictures of women, for at that time Edna May was a great celebrity. Mr. Murphy after consulting with Mr. Brown, gave me orders to print up this picture to the size you have before me. At the same time, telling me to spare no expense in the matter, so we could furnish them the best thing possible.

Q. 12. Did you furnish copies of this picture in the way of display advertisement hangers to the Hamilton–Brown Shoe Company, and by you, I mean the Forbes Lithographic Company, and if so, when did you first furnish such pictures to the Hamilton–Brown Shoe Company and to what extent did you manufacture those pictures for the Hamilton–Brown Shoe Company? A. We made 20,000 copies of the Edna May picture for the Hamilton–Brown Shoe Company, to size 22x28—that is 22x28 inches. Copies of the pictures referred to. And they were delivered, I think, in the fall of 1899.

Q. 13. What is your best recollection? A. They must have been delivered prior to January of 1900.

Q. 14. How long did it take the Forbes Lithograph Company to get up this original picture from which these 20,000 copies were made? A. About 15 days to make the original sketch from the photograph I submitted to Mr. Murphy.

Q. 15. How long did it take to get up these 20,000 copies of this picture which you say were delivered to Hamilton–Brown Shoe Company in December, 1899? A. About four months.

Q. 16. Do you know what the purpose of the Hamilton–Brown Shoe Company was in ordering these hanger pictures of Edna May of which your Company delivered 20,000 to the Hamilton–Brown Shoe Company not later than the month of December, 1899? A. It was to advertise the Hamilton–Brown Shoe Company.

Q. 17. Do you know what the Hamilton–Brown Shoe Company did with these hangers consisting of Edna May's picture? A. Yes sir, they sent these pictures

rolled in a tube, out by mail to their customers and prospective customers throughout the United States and also to Cuba.

Q. 18. Were these pictures to be hung in shoe stores as display advertisements? A. Yes sir, and in hotels and other places.

Q. 19. I now call your attention to the picture of another young woman also in a gilt frame. In the white margin at the top of this picture appear the words "Largest Shoe House in the World". On the background of this picture in the top right-hand corner appear the words "Compliments of Hamilton–Brown Shoe Company, St. Louis, U. S. A."; at the foot of this picture, on the white margin, appear the words, "The prettiest woman in America. She wears the 'American Lady' shoe made by Hamilton–Brown Shoe Company". What if anything do you know of the history of that picture?

(Counsel for defendant here offers in evidence the picture referred to in questions and answers 11, 12, 13, 14, 15, 16, 17 and 18, being the picture of Edna May, and asks that the same be marked "Defendant's Exhibit, Edna May picture".)

A. In, I think, January or February, 1900, the Edna May picture proving such a successful piece of advertising, the Hamilton–Brown Company instructed me to get up something in the way of a hanger that would beat the Edna May, saying they would not limit us to price or anything else. I remember submitting quite a number of original sketches to their advertising manager, Mr. Murphy, which were not acceptable, and in February, I think it was, Mr. Murphy showed me a newspaper print of a woman that the papers termed, the prettiest woman in America, and I thought the picture so good that I immediately tried to get permission to use it, learning that it was the picture of an actress whose stage name was Gracie Scott, who is Mrs. R. L. Giffen, in private life. I found I knew her husband, who was then treasurer at Hagen's Theater in St. Louis; calling on him, I learned that his wife

was then playing with the Hagen Stock Company, in St. Louis and to secure her permission to use this picture, was then an easy matter. I said nothing to Mr. Murphy at the time, but went on East to my house, and had our best artist there, paint the original of this picture to the size that is before me now, painting it under my direction. As soon as completed I brought it back with me to St. Louis, and instantly on submission to Mr. A. D. Brown and Mr. Murphy, they bought same and gave me an order for 20,000 copies of the picture to size 21½x29 inches. The date of the closing of this order, as taken from my books, was August 20th, 1900. This picture proved a big success, for on December 27th, 1901, they gave me a re-order, amounting to $840.00, that would be about 10,000 copies. The demand for this picture was so great that on March 5th, 1902, they gave me an additional order for 100,000 copies amounting to $4,549.00, and I might say here that they have since tried to buy subsequent editions of that same picture, which we were unable to furnish as we had taken same off the stone.

Q. 20. What is your best recollection as to when the matter of getting up Gracie Scott's picture was first taken up between you and any representative of the Hamilton-Brown Shoe Company? A. In February, 1900.

Q. 21. I notice in small print at the left hand bottom corner of this picture that you have been referring to, that it is marked "Copyright, 1901, by Hamilton-Brown Shoe Company, St. Louis". How do you explain that marking of copyright date of 1901 on that picture, if that picture was gotten out in August 1900? A. The pictures were not printed in August, 1900; that was the date, I think, on which I submitted the proof, and it usually takes about two to three months to print pictures after the proofs are accepted, and we have to send to the department at Washington, as I understand it, two copies of a print before you can obtain a copyright.

Q. 22. In that memorandum which you consulted, and

which I shall ask you about particularly later on, I find under date August 20th. 1900, the item "$2,184.00 American Lady picture No. 1". If that relates to copies of the Gracie Scott picture which I have been asking you about, copies of that Gracie Scott picture must have been delivered to Hamilton-Brown Shoe Company, August 20th, 1900. If not, please explain what would appear on the face, to be a discrepancy of dates? A. Those figures are taken from my order book, not from the date of invoices from the house.

Q. 23. Well, does that date, August 20th, 1900, refer to this identical Gracie Scott picture in the frame that I have referred to or to photo-lithographic copies of it, or merely to an order for copies of that picture to be produced? A. That date refers to an order to reproduce that picture.

Q. 24. Then as I understand it, the first interview in regard to this Gracie Scott picture—the matter of getting it out—took place about February, 1900; it took some time to get up the picture, to paint it, &c., and finally after the picture had been gotten up and on August 20th, 1900, before the publication of that picture, you received an order from Hamilton-Brown Shoe Company to produce lithographic copies of that picture, the cost of these copies, getting them up, &c., amounting to $2,184.00, is that right? A. Yes sir.

Q. 25. Can you recall when that first lot of those lithographic pictures, copies of this Gracie Scott picture, 21½ inches by 29, were delivered to Hamilton-Brown Shoe Company? A. I think in December of 1900.

Q. 26. And I presume they were not issued by the Hamilton-Brown Shoe Company until 1901, in which year, as appears from the marking of this picture, it was copyrighted. What is your best recollection as to that? A. I think the pictures were sent out the forepart of 1901.

Q. 27. I call your attention to the lid of a carton of Hamilton-Brown Shoe Company's American Lady shoe which is a lid of one of the well known American Lady Shoe, which is marked "Complainants Exhibit No.

110'' and I notice that there on the lid of that carton is reproduced, but without colors, a smaller picture of this same Gracie Scott, that picture being marked on that carton as ''Copyright 1900, Hamilton–Brown Shoe Company''. I intend to produce the copyright of this picture in evidence at a later stage, but now I ask you if you know how it was that this uncolored smaller picture of Gracie Scott on the lid of all Hamilton–Brown Shoe Company's American Lady shoes is marked as copyrighted 1900, while this larger colored hanger advertisement picture of Gracie Scott is marked copyrighted 1901? A. These are two different copyrights, the shoe box label order was given me at the time I submitted the sketch, which was about June, 1900, and it does not take as long to make a label in black and white, as this shoe box label is made, as it does to make a colored hanger and as soon as two copies of this label was finished, we had copyright taken out for the Hamilton–Brown people on this shoe box label, which was prior to the copyrighting of the big picture.

Q. 29. What is your best recollection as to the time when your Company first furnished Hamilton–Brown Shoe Company with these shoe box labels for the lid of Hamilton–Brown Shoe Company's American Lady shoe? A. The order for these labels was given me, according to my books, October 15th, 1900, and delivery was made the latter part of November, 1900, because in December we received a re-order for these same box-top shoe labels.

(The large colored lithograph of Gracie Scott which the witness has referred to and which has heretofore been identified and which is marked copyright, 1901, by Hamilton–Brown Shoe Company, St. Louis, is offered in evidence, and the same is marked ''Defendant's Exhibit, Gracie Scott picture''.)

Q. 29. Can you state approximately, how many of these Gracie Scott colored lithographs, each of which is plainly marked with the name Hamilton–Brown Shoe Company, were furnished by your company to Hamilton–Brown Shoe Company altogether, and how they

were used by the Hamilton–Brown Shoe Company? A. About 160,000 copies, these were sent out by mail—no, a good many were sent out by mail, as it was their custom with previous pictures issued by this company, quite a few were given with orders for shoes and quite a number were sold by the Hamilton–Brown Shoe Company, people liking the picture so much, that they would send in 25 cents and 50 cents for copies of this picture.

Q. 30. These labels on the lid of Hamilton–Brown Shoe Company's American Lady shoe on which label we find a smaller picture of Gracie Scott, the only colors on the label being black and white, as furnished by your company, are all and were all plainly marked on the upper part of the label with the name Hamilton, Brown Shoe Company and on the foot of the label, with the words American Lady, is that not true? A. Yes, sir. They have not changed the shoe box lid label since the first one was made.

At this point an adjournment was taken until 1:30.

Met pursuant to adjournment; same parties present.

Q. 31. What are these lists which you have handed to me, and which by consent of counsel I here read into the record:

ADVERTISING MATTER FOR AMERICAN LADY SHOES.

Aug.	20, 1900	$2,184.00	American	Lady	Picture No. 1
Oct.	15, 1900	48.87	"	"	Labels
Dec.	18, 1900	73.15	"	"	"
June	15, 1901	131.25	"	"	"
Oct.	30, 1901	1,155.00	"	"	Catalogue
Nov.	9, 1901	210.00	"	"	Labels
Dec.	27, 1901	840.00	"	"	Picture
March	5, 1902	4,549.65	"	"	"
March	15, 1902	220.00	"	"	Labels
May	21, 1902	1,575.00	"	"	Catalogue
July	1, 1902	2,835.00	"	"	Picture No. 2
Mar.	17, 1903	2,625.00	"	"	" " "

July	7, 1903	200.00	"	" Labels
April	7, 1904	330.00	"	" "
Jan.	27, 1905	500.00	"	" Cards
April	30, 1905	375.00	"	" Labels
		$17,851.92		

ADVERTISING MATTER FOR AMERICAN LADY SHOES.

March	17, 1906,	$450.00	American Lady	Labels
May	16, 1906,	672.62	"	" Car Cards, Show Cards and Env.
May	18, 1906,	1,711.25	"	" Booklet
Oct.	23, 1906,	3,795.00	"	" Booklet
"	23, 1906,	210.00	"	" Envelopes
"	23, 1906,	2,530.00	"	" Posters
Nov.	28, 1906,	761.25	"	" Labels
Oct.	23, 1906,	243.00	"	" Shoe Sketches
		$10,375.12		

A. The lists are taken from my order book of the Forbes Lithograph Mfg. Co. of orders given me by the Hamilton, Brown Shoe Co. for advertising matter for the American Lady shoes. The first list is from Aug. 20, 1900, to April 30, 1905, and the second list from March 17, 1906, to Oct. 23, 1906.

Q. 32. These lists, I take it, refer to orders given your company by Hamilton, Brown Shoe Co. in respect to advertising matter prepared by the Forbes Lithograph Mfg. Co. for Hamilton, Brown Shoe Co. in respect to its American Lady shoes, and includes not only the cover labels for the cartons or boxes of American Lady shoes that you have already testified about, as well as the Gracie Scott colored pictures which you have already testified about, but also other advertising matter prepared by your company for Hamilton, Brown Shoe Co. in respect to American Lady shoes, does it not? A. Yes, sir.

Q. 33. These lists are taken from the books of your company? A. No, sir; from my own memorandum,

but they must have been shipped; otherwise I would have been notified of it.

Q. 34. Are these lists made from your original memorandum made at the time these orders were placed with you? A. Yes.

Q. 35. Have you been able to find out since the lunch hour the date when the first lot of these Gracie Scott labels for the lids of Hamilton, Brown Shoe Co.'s boxes of American Lady shoes were first supplied by your company to Hamilton, Brown Shoe Co.? A. In the short time I was not able to find it, but my records show the second order which was taken Dec. 18, 1900, for American Lady labels, reads to be identically the same as before and ship inside of one week.

Q. 36. Has your attention been called to the fact as to whether or not the Hamilton Brown Shoe Co's shoe marked with the name Hamilton–Brown Shoe Co. and also with the words American Lady has been advertised by having advertising work done by concerns other than the Forbes Lithograph Mfg. Co., for instance, the trade journals, newspapers, magazines, etc? A. Yes, sir, for they often consulted with me about it.

Q. 37. Has that advertising been done extensively and continuously since 1900? A. Yes, sir.

Q. 38. You say that you are the manager of the Forbes Lithograph Mfg. Co. at St. Louis, by which I understand that your agency for that company is located at St. Louis. Is the City of Cincinnati within your agency? A. I am with the Forbes Lithograph Mfg. Co. as a sort of a free lance. I can in a measure go anywhere in the United States, but I have confined myself chiefly to St. Louis and surrounding territory.

Q. 39. Is Cincinnati within your territory? A. Yes, sir.

Q. 40. The business of the Forbes Lithograph Mfg. Co. is to do as much work as it can in the line of getting up attractive labels, pictures and advertisements for the different concerns of the United States, or elsewhere, that desire to advertise their wares and establish

a name and a fame for the same, is it not? A. As far as high class work is concerned, yes.

Q. 41. Is it a part of your business as the paid agent and employee of the Forbes Lithograph Mfg. Co. to keep posted as to the different concerns that do advertising, and to get that business wherever it is possible? A. It is one of the principal parts of my business not only to secure the trade in my territory but to keep the house thoroughly posted on all rumors even that I should hear of other concerns outside of my territory who contemplate getting out any advertising. We have a separate department at our plant that handles this information, which comes in from the different offices, and that in turn is at once either communicated by wire, long distance telephone or by letter to its different branches, so, in fact, when one of our men gets on to a good thing all of the salesmen whom it would affect are posted on the matter.

Q. 42. What salary do you get from Forbes Lithograph Mfg. Co. for this work? A. Approximately $12,000 a year.

Q. 43. In view of your business and your experience in these matters, how does the extent of advertising done by Hamilton-Brown Shoe Co. in respect to its American Lady shoes compare with the advertising of any other shoe house in the U. S. that you know of in respect to any particular brand of shoes? A. Their American Lady shoe is advertised in my opinion second only to the Plant shoe, Queen Quality.

Q. 44. About the time that the Hamilton, Brown Shoe Co. got out its brand of shoes known as American Lady shoe, did it get out, and has it kept up, as a companion brand, a shoe advertised and labeled American Gentleman shoe? A. It did, and has.

Q. 45. Did your company do anything in the way of getting up labels, pictures or other articles for this brand of American Gentleman shoe put out by the Hamilton-Brown Shoe Co. A. Yes, sir.

Q. 46. When did your company first do any work for the Hamilton-Brown Shoe Co. in respect to the

American Gentleman shoe, and what was that work? A. In January or February of 1901 Mr. McElroy of the Hamilton-Brown Shoe Co. told me that they were about to put on the market the American Gentleman shoe and wanted us to get up a suitable design. I submitted to him several which were not satisfactory, and finally submitted one which on May 11, 1901, he gave me an order to reproduce in label form in a 100,000 lot. This label we have made continuously for them ever since, and in enormous quantities. This label goes onto the top of the American Gentleman shoe boxes.

Q. 47. Please give the Court some idea of the expense involved in getting up such a label as that picture of Gracie Scott which appears on the lid of the boxes of Hamilton, Brown Shoe Co.'s American Lady shoes, as well as the exact requirements of Hamilton, Brown Shoe Co. that the said label shall be nice and exact and fine in detail. A. It cost usually to prepare a design for the shoe trade from Five Hundred to Twelve Hundred and Fifty Dollars. These box-top labels which you have referred to, the Hamilton, Brown Shoe Co. has always insisted that they must be the best possible label we could make in one printing, they paying us far more per thousand for this label than we get for similar work from other concerns owing to the fact that we have to deliver labels as near perfect as can be produced, which of course requires a good deal of culling of labels that are slightly misprinted, which in other instances would easily pass through. I remember one time when the box maker here tried to make the American Lady box-top at about half the price they were paying us. Mr. McElroy gave them an order to see what they could do, and when they made their first delivery the entire lot was rejected and I received a rush order for American Lady labels.

Q. 48. What oportunities have you had during your connection with the Forbes Lithograph Mfg. Co. to become familiar with the names of shoes and the names of manufacturers where any particular brand of shoe

has been advertised to any extent by any particular manufacturer? A. As good as anybody could possibly have for the reason, as I stated before, that my house through one of its departments keeps all of its salesmen posted and should one of us in a territory miss out on a thing some one else connected with the house would catch it. This is part of our business that we pay the strictest attention to, as it is really the ginger part of keeping up the sales force.

Q. 49. In other words, you are always looking after the advertisers of the country with a view of getting their business, is it not? A. We are, that is, the high grade part.

Q. 50. I call your attention now to a box or carton of shoes, the shoes themselves having been put in evidence marked "Complainant's Exhibit, American Girl Shoe", and those shoes being contained in a carton, this carton, having marked on the lid thereof in script type the words "The American Girl", at one end of said lid appearing the name "Cincinnati", and on the end of the box proper, at one end appearing the words "The American Girl" with the head of a girl, but nowhere on the carton appearing the name of the manufacturer. I believe I showed you that box about a week ago when you were at my office. Before I showed you that box a week or ten days ago at my office had you ever known, seen or heard of in the market or in any advertisements the name "American Girl" or the name "The American Girl" in connection with any shoe made by ony one? A. No, sir.

Q. 51. If such a shoe had been extensively advertised in the market; if prior to January 29, 1906, a shoe had been advertised in the market extensively to the extent of five, ten, twenty-five or fifty thousand dollars worth of advertisements, would you have been likely to have heard of it? A. A shoe advertised only 5 or 10 thousand per annum, no; but if advertised up to $50,000 per annum, I would have heard of it, for if I had never heard of it the firm would have called my attention to it.

Q. 52. Leaving the per annum out, nowhere in the testimony of complainant in this case does it appear that prior to the filing of the bill of complaint herein $1,000 had been spent in advertising this so-called American Girl shoe. But if it were true that this American Girl shoe was manufactured in Cincinnati and that prior to Jan., 1906, it had been extensively advertised in and about Cincinnati, what are the probabilities as to whether or not the advertisement of that shoe would have been called to your attention? A. The probabilities are that it would have been called to my attention.

Q. 53. Compare this box which I have referred to marked with the name The American Girl Shoe with the box of the Hamilton, Brown Shoe Co. American Lady shoe, and then tell us, based on your experience in matters of that character, what the expense of getting up such a box would be so far as getting up the advertisement on the lid is concerned, as compared with the advertisement on the lid of Hamilton, Brown Shoe Co's. American Lady shoe?

Mr. Hopkins: Objected to as immaterial.

A. The quantities being equal, the Hamilton–Brown label would cost about double the price of the American Girl label.

Q. 54. In view of your experience with the trade in the matter of getting up labels and designs for different articles of manufacture, and considering that these shoes are retailed at about three or more dollars a pair, more or less, considering the fact of the difference apparent in the marks on the shoes, as well as the fact that the Hamilton, Brown Shoe Co's shoes are labeled with the name American Lady, and the name Hamilton, Brown Shoe Co., and that the boxes of Hamilton, Brown Shoe Co's American Lady shoes are plainly marked with the name Hamilton, Brown Shoe Co., I will ask you to state whether any one short of a fool or an idiot (I use those terms because Sir George Jessel, Master of the Rolls, in the well known case of Singer Mfg. Co. v. Wilson, 2 Chancery Division, 434, laid down the

proposition which has been repeatedly followed by the Courts that the Courts do not sit to protect fools and idiots in respect to alleged deceptions in regard to trademarks) would be likely to be deceived into buying the extensively advertised Hamilton, Brown Shoe Co's American Lady shoe, made in St. Louis, for the American Girl shoe, made by a concern at Cincinnati, which does not seem proud enough of its name to put it on the box?

Mr. Hopkins: Objected to by counsel for complainant on the following grounds: First, because the witnesss has not qualified as an expert in the matter which the question raises; second, because the proper test of resemblance in the application of the respective marks by both parties is inspection by the Court; third, because the question falsely assumes that the cartons themselves are the subject of sale to the ultimate consumer of the shoes; fourth, because the question falsely assumes that it is the custom or practice of the retail trade to exhibit the carton to prospective customers; fifth, because the question falsely assumes that there is a difference in price between the retail selling price of compiainant's American Girl shoe and of the defendant's American Lady shoe; and, finally, because the hypothesis contains other unwarranted assumptions of facts not founded upon the testimony thus far adduced in the case.

A. Nobody would take it that had common sense. They would certainly have to be as you say, insane or a fool.

Defendant's counsel requests the notary to mark the carton of the American Girl Shoe, which carton contains "Complainant's Exhibit, American Girl shoes", with the words, "Carton referred to in connection with questions 50 to 54 of the witness W. H. Spahr", said carton forming the wrapper or box in connection with which complainant's counsel introduced in evidence "Complainant's Exhibit, American Girl shoes."

Q. 55. Has it come within your experience in preparing labels and other display or advertising matter

for manufacturers to have submitted to you samples of boxes of other manufacturers' labels, etc., with a view to obtaining your opinion as to whether or not the labels or marks on any certain label or package might be so similar to another as to be calculated to deceive? A. That has often been asked me on account of my experience in these matters. People here that know me usually think that I know something about it.

Q. 56. Based upon your experience in buying shoes yourself, or on any knowledge that you may have as to how the shoe trade is conducted, is it true, as a matter of fact, as indicated by the objection of complainant's counsel, to my recent question on the record that people who go into retail stores to buy pairs of shoes such for instance as the American Lady shoe, do not see the box or carton in which the shoes are packed?

Mr. Hopkins: Objected to by counsel for complainant as the question is falsely predicated upon the witness having experience as a shoe buyer, for which no foundations are laid.

Mr. Bakewell: Defendant's counsel submit that it is a conclusive presumption of law that every civilized human being, especially in America, is a buyer of shoes.

A. In different retail stores that I have been in methods of handling shoes vary; some of the retail salesmen will bring the carton to you and open it and take out the shoes; others simply bring the shoes to you.

Q. 57. If you were looking for a particular brand of shoes that had been called to your attention through extensive advertising or by word of mouth from your friends or acquaintances on account of its good repute, and if that shoe were sold to the retailer as the American Lady shoes are sold, in a box or carton, is or is it not true that you would have an opportunity in any retail store that you have ever been into to examine the box or carton containing such shoes?

Mr. Hopkins: The question is objected to on the ground that it is immaterial and irrelevant to

any issue in this cause, and because the witness is not shown to have any experience qualifying him to testify concerning the practice of the retail shoe trade.

A. I would ask to see it, so as to make certain of the shoe I was buying.

Q. 58. The Hamilton, Brown Shoe Co. is a shoe-manufacturing concern, is it not? A. Yes, sir, the largest in St. Louis.

Q. 59. It sells its shoes at wholesale, does it not? A. Yes, sir.

Q. 60. It sells directly to the jobber or retailer, does it not? A. Yes, sir.

Q. 61. If the Hamilton, Brown Shoe Co. wanted to establish a name and fame of its own for a particular brand of shoes, and marked those shoes so that the jobber or dealer would know that shoe by a particular name and also that that shoe was made by a particular manufacturer, to-wit, by the Hamilton, Brown Shoe Co., I will ask you to state if you can conceive of any way that it could do so better than by extensively advertising that shoe under the name of the Hamilton, Brown Shoe Co. in posters, newspapers and magazine advertisements, and in addition thereto marking every box in large letters with the name of Hamilton, Brown Shoe Co., with the particular name which it had adopted for its shoe, and in addition thereto marking on the sole of every shoe as well as on the lining of at least one shoe of each pair, with the name Hamilton, Brown Shoe Co. in distinct type and also with the name which it had adopted for the shoes?

Mr. Hopkins: Objected to as irrelevant and immaterial and more specifically because the addition of the defendant's name to the infringing mark is no matter of defense.

Mr. Bakewell: Defendant's counsel calls the attention of the Court to the fact that it has been repeatedly decided, and recently by the U. S. Circuit Court of Appeals for this very circuit, that under a state of facts peculiarly applicable to the

facts in this case the distinct marking of defendant's name on the articles themselves, and on the packages containing the same is unquestionably a defense.

Mr. Hopkins: Counsel for complainant announces that he will reserve his argument of the questions of law involved in this case until the proper time and place.

A. I know of no way that it could be done better.

Q. 62. In view of the fact that the Hamilton, Brown Shoe Co. has pursued the course indicated in my last question by marking its shoes plainly on the sole of each shoe with the name Hamilton, Brown Shoe Co. and the name American Lady, and has marked plainly on the inside "Hamilton, Brown Shoe Co. makers", together with the name American Lady, this inside marking being on one of each pair of shoes, and has also marked every box plainly with the name Hamilton, Brown Shoe Co. and with the name American Lady, and has also extensively advertised these shoes as made by the Hamilton, Brown Shoe Co., thus calling the attention of the public to the name American Lady as applied to shoes, and to the fact that the Hamilton, Brown Shoe Co. of St. Louis is the manufacturer of that shoe, and in view of the fact that the jobbers and retailers get the said shoes in these boxes so marked, if some poor fool or idiot were to come into a store and ask a salesman for a pair of American Girl shoes, and such salesman in answer to such a request were to give that poor fool or idiot a pair of Hamilton, Brown Shoe Co's American Lady shoes, marked as the said American Lady shoes are each plainly marked, if such a transaction resulted in the purchaser taking this pair of American Lady shoes under the impression that he or she was getting a pair of American Girl shoes, and if that transaction involved a fraud, who, in your opinion, would be guilty of the fraud, on that poor fool or idiot in the given case, the Hamilton, Brown Shoe Co. that had stamped all over its boxes and shoes the fact that the name of that shoe was American Lady,

and that Hamilton, Brown Shoe Co. of St. Louis was the manufacturer, or that clerk or salesman who thus succeeded in getting this poor fool or idiot to take a pair of Hamilton, Brown Shoe Co's American Lady shoes, when he had asked for the American Girl shoe?

Mr. Hopkins: Objected to as containing several unwarranted hypotheses, as calling for a conclusion of law, and because the witness did not qualify as an expert in the matter to which the question relates.

A. The salesman undoubtedly.

Q. 63. In your former testimony you have referred to a companion brand of shoes gotten up by Hamilton, Brown Shoe Co. entitled American Gentleman shoe, being a companion brand for Hamilton, Brown Shoe Co's American Lady shoes, and you have testified that your company got up the labels for that American Gentleman Shoe for the Hamilton, Brown Shoe Co., that those labels were gotten up in 1901, etc. I hand you a box containing a pair of shoes marked on the shank or sole of the shoe "American Gentleman", each shoe being marked on the inside with the name "American Gentleman", and with the words "Hamilton, Brown Shoe Co. Makers", and marked on the lid with the label containing in the center a picture of a gentleman with his companions riding out to a hunt with hounds, on the upper part of said lid being in large letters the name "Hamilton, Brown Shoe Co." and below the name "American Gentleman". Are those shoes in that box that I have just referred to Hamilton, Brown Shoe Co's American Gentleman shoes which you have testified about, and is the label on that box of American Gentleman shoes the label of American Gentleman shoes that your concern got up in 1901 for the Hamilton, Brown Shoe Co. as a companion shoe for American Lady shoes and the same label that Hamilton, Brown Shoe Co. has used for American Gentleman shoes since your company got up that label in 1901? A. Yes, sir, it is the same label.

Q. 64. Do you know, as a matter of fact, whether or not this American Gentleman shoe has been widely and extensively advertised by the Hamilton, Brown Shoe Co. ever since you got up that label for American Gentleman shoes in 1901? A. I do not know that such is the case.

Q. 65. Had you ever heard of the complainant in this suit, as a shoe manufacturing concern, I mean The Wolf Brothers & Co. of Cincinnati, before I talked to you about this case at my office about a week or ten days ago? A. No, sir, I had not.

Direct examination closed.

Cross-Examination by Mr. Hopkins.

XQ. 66. Did the Forbes Lithograph Mfg. Co. make the price tickets such as I show you for the Hamilton, Brown Shoe Co.? A. No, they were made by some local concern. There are times when our concern does not do their work.

XQ. 67. Have you printed price tickets for the American Lady shoe for the Hamilton, Brown Shoe Co.? A. I have just completed a price ticket for them and I could not say whether it was for the American Lady or American Gentleman, or whether it was split up between them.

XQ. 68. Have you formerly made any price tickets for the American Lady shoes? A. No, sir, not until just lately.

XQ. 69. In such price tickets as you have printed for the American Lady shoe do you recollect how the prices ran and what they were?

Mr. Bakewell: Objected to as incompetent as the price tickets themselves would be the best evidence.

A. I do not remember it.

XQ. 70. Referring to the list entitled Advertising Matter ror American Lady Shoes which Mr. Bakewell has read into the record, I will ask you to state to what the various items enumerated as "Labels" refer? A.

Wherever the word "labels" is mentioned in this list it refers to the top labels for the shoe cartons.

XQ. 71. From your knowledge of the price at which those top labels for the shoe cartons for the American Lady shoes were sold, can you state approximately the number of the labels represented by the entries in this memorandum? A. I think the first one was for 10,000; the second order was for 20,000; the third would undoubtedly be 100,000; the fourth in the neighborhood of 200,000; the fifth was in conjunction with a lot of other labels and I think was for nearly 300,000; the next order (April 30, 1905) was a little over 500,000; March 17, 1906, about 350,000; and Nov. 28, 1906, runs between 500,000 and 700,000.

XQ. 72. Referring to the item of Jan. 27, 1905, indicated in your memorandum as "Cards", to what does that item relate? A. That refers to show cards.

Defendant's counsel having overlooked to introduce in evidence the box of American Gentleman shoes identified by the witness in his direct examination, with the consent of complainant's counsel, the same is here introduced in evidence and marked "Defendant's Exhibit, Box of American Gentleman Shoes".

Cross-Examination closed.

Signature waived.

CIRCUIT COURT OF THE UNITED STATES.
EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

The Wolf Brothers & Company, Complainant,
vs.
Hamilton, Brown Shoe Company, Defendant.
IN EQUITY. No. 5262.

It is hereby stipulated by and between the parties to this cause, represented by their respective counsel, that the copies of periodical publications which may be offered in evidence by defendant are copies of the regular editions of the publications of which they purport to be copies, and of the date appearing on such copies.

HOPKINS & EICKS,
Solicitors and of Counsel for Complainant.
BAKEWELL & CORNWALL,
Solicitors and of Counsel for Defendant.

ST. LOUIS, Mo., May 10, 1907.

IN THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

The Wolf Brothers & Company, Complainant,
vs.
Hamilton, Brown Shoe Company, Defendant.
In Equity No. 5262.

ST. LOUIS, Missouri, May 13, 1907, 10:30 a. m.

Depositions taken in behalf of defendant at the offices of Bakewell & Cornwall, Chemical Building, St. Louis, Missouri, beginning this thirteenth day of May, 1907, at 10:30 a. m.; these depositions being taken by consent before George Bakewell, Notary Public, said

George Bakewell acting also, by consent of parties, as Special Examiner, under the 67th Rule in Equity, as amended.

Present:

James L. Hopkins, Solicitor for Complainant;
Paul Bakewell, Solicitor for Defendant.

JOHN F. HUDSON,

a witness produced on behalf of the defendant, being first duly sworn, testifies as follows:

Q. 1. What is your name, age, residence and occupation? A. John F. Hudson, 65 years, Millersburg, Ohio, boot and shoe dealer.

Q. 2. How long have you been dealing in boots and shoes at Millersburg, O.? A. Twenty-three years.

Q. 3. Do you know a shoe manufactured by Wolf Brothers & Co. of Cincinnati, O. which is marked "American Girl shoe", not only on the shoe itself but on the boxes containing the same? A. Yes, sir, I do.

Q. 4. Have you dealt in that shoe? A. I have.

Q. 5. For how long? A. 3 or 4 years.

Q. 6. I hand you two boxes, each of which on the lid is marked with the words "The American Girl", and on one end with the words "Cincinnati" and the words "The American Girl". The end of the carton also contains the head or bust of a girl, and each carton on the end being marked with the figures "$2.50."

I also ask you to examine each pair of shoes in these boxes and state whether or not you can identify them as fair samples of shoes made by The Wolf Bros. & Co., such as have been dealt in by you. A. They are.

The boxes of shoes thus identified by the witness one of which pairs of shoes is a high cut, vici kid pair of shoes, and the other of which is a pair of low quarter button tan shoes, are offered in evidence by defendant and it is asked that the Examiner mark the same respectively "Defendant's Exhibit, American Girl Shoe, Hudson A" and "De-

fendant's Exhibit, American Girl Shoe, Hudson B".

Q. 7. During the time that you have dealt in "The American Girl" shoes, purchased by you from The Wolf Brothers & Co. of Cincinnati, Ohio, at what price have you sold these "The American Girl" shoes to the users or consumers?

Mr. Hopkins: Objected to as immaterial.

A. $2.50.

Q. 8. Have you sold any of these American Girl shoes at more than $2.50?

Mr. Hopkins: Same objection.

A. No, sir.

Q. 9. Have you ever seen advertised in the magazines or trade journals a shoe made by the Hamilton, Brown Shoe Co. of St. Louis under the name "American Lady"? A. I have.

Q' 10. Did you ever deal in that shoe? A. No, sir.

Q. 11. Do you know a man by the name of Millard F. Thompson? A. I know Mr. Thompson who represents The Wolf Brothers & Co., but as to his given name I do not remember.

Q. 12. Is he a salesman for The Wolf Bros. & Co. and have you had dealings with him in that capacity? A. He is, and I have.

Q. 13. In undertaking to say that there was confusion between the Wolf Bros. & Co.'s American Girl shoe and Hamilton, Brown Shoe Co's American Lady shoe, in giving his testimony for the complainant in this suit, in answer to Q. 6 of his examination, Mr. Thompson says:

"Well, among the many circumstances I can recall some. J. F. Hudson & Son, of Millersburg, Ohio, in selling them my line of American Girl, they said to me, upon my asking if there had been confliction between the two lines, referring to the American Girl and the American Lady, said, that there had been and that they had customers call for the American Lady shoe. Mr. J. F. Hudson of the firm was the one with whom my conversation was had."

I ask you if you ever told Mr. Thompson or anyone else that there had been confusion in the trade or with your customers or with anyone in respect to the American Girl and the American Lady shoes? A. No, sir.

Q. 14. As a matter of fact, has there ever been any confusion to your knowledge between American Girl shoes made by The Wolf Bros. & Co., of Cincinnati, and the American Lady shoe made by the Hamilton, Brown Shoe Co., of St. Louis? A. None to my knowledge.

Q. 15. Do you do business under the name J. F. Hudson & Son, at Millersburg, O.? A. Yes, sir.

Direct Examination closed.

Cross-Examination, by Mr. Hopkins.

XQ. 16. Is your business a partnership? A. Yes, sir.

XQ. 17. Who are the other partners? A. Mr. Jacob C. Hudson, my son.

XQ. 17½. How long has your son been in partnership with you? A. Four years.

XQ. 18. Has he done any of the shoe buying during that time? A. Very little, I generally do the buying.

XQ. 19. Has he done any of it? A. He has done some buying in my absence.

XQ. 20. Have you any competitor in Millersburg who deals in the American Lady shoe?

Mr. Bakewell: Objected to as immaterial and not coming out of the direct examination, this witness having been simply called to flatly contradict the testimony of Millard F. Thompson, in answer to Q. 6 of Thompson's testimony.

A. I don't think the American Lady shoe is sold there at all; I have never heard of it.

Cross examination closed.

Signature waived.

WARREN F. McELROY,

a witness produced on behalf of the defendant, being first duly sworn, testifies as follows:

Q. 1. What is your name, age, residence and occupation? A. Warren F. McElroy, 41, St. Louis; I am the vice-president and superintendent of the Hamilton, Brown Shoe Co.

Q. 2. How long have you been connected with the Hamilton, Brown Shoe Co. at St. Louis? A. 23 years.

Q. 3. Do you know a shoe manufactured and sold by Hamilton, Brown Shoe Co., marked as to the shoe itself and as to the boxes or cartons containing the same with the name of Hamilton, Brown Shoe Co. and the name "American Lady", and if so can you identify the three boxes of shoes which I present to you as American Lady shoes made and sold by Hamilton, Brown Shoe Co. at St. Louis, Mo.? A. Yes, sir, I can and do.

> The three boxes of shoes thus identified by the witness (the shoes as well as the boxes) are here offered in evidence and marked respectively "Defendant's Shoes, McElroy, A, B and C."

Q. 4. Do you know how the Hamilton, Brown Shoe Co. came to adopt the name American Lady for this brand of its shoes? A. Yes. The latter part of August or first of Sept., 1900, we had assembled our salesmen to make a selection of samples for the following season, and a suggestion was made that we adopt some name for this line of women's shoes. I stated that Mr. Carey Teasdale had been insisting on this for some time, and that if there was any one present who had a name we would consider it. Mr. H. S. Bunting who had just been engaged by us to represent us in Texas suggested the name Lady American, and the name was adopted; after thinking the matter over during the night it occurred to me that it did not sound well, and the following morning I assembled the gentlemen again and asked Mr. Bunting if he did not think it would sound better to call the shoe American Lady. He said he thought

probably it did, and the name was changed by unanimous vote. And we decided at this meeting to call it the American Lady.

Q. 5. After you had finally decided to adopt the name American Lady for this line of women's shoes, which was about August or September, 1900, as you have stated, about how soon after this was it that the Hamilton, Brown Shoe Co. actually put on the market this line of shoes branded with the name American Lady, as to the shoes and the boxes thereof, as illustrated by these exhibits which we have put in evidence, and which have been identified by you? A. Our records show that the first case of these goods was sent out of the factory November 7, 1900. The length of time elapsing between the time of selecting the name and delivering the shoes was taken up by getting our cartons and stencils, stamps, etc., made.

Q. 6. At that time, I mean at the time that you decided to adopt the name American Lady for a certain line of shoes made by the Hamilton, Brown Shoe Co., as well as at the time these shoes were put on the market, had you ever known or heard of any shoes made by The Wolf Bros. & Co., of Cincinnati, O., or made or sold by any one anywhere, which were marked with the name The American Girl, or American Girl? A. I positively had not.

Q. 7. Was it suggested by any one at that meeting at which you decided to adopt the name American Lady that any one at any time had ever made or sold any shoes designated by the name The American Girl or American Girl? A. No, it was not.

Direct examination closed.

Cross-Examination, by Mr. Hopkins.

XQ. 8. How many of the defendant's salesmen were present at that meeting? A. I should think there was anywhere from six to twelve. We usually have that many around in making a selection of samples. At this time there was a considerable number of visiting

merchants and the salesmen were called away from this meeting frequently.

XQ. 9. Do you recollect the names of the others who were present besides yourself and Mr. Bunting? A. W. H. Shelby, Mr. Sam Frankel, T. E. Burrow. Those were the only ones whose names I remember.

XQ. 10. What was the territory of each of these gentlemen you have named? A. Shelby and Frankel were in Texas, and the last mentioned was Arkansas.

XQ. 11. Do you know in what territory Mr. Bunting had traveled prior to that meeting? A. He had traveled in Texas for another concern.

XQ. 12. Do you recollect what territory either of the other salesmen present at that meeting were from? A. No, I do not, if I could recollect the territory I could recall the names.

Cross-examination closed.

Signature waived.

CHARLES W. MOORE,

a witness produced on behalf of defendant, being first duly sworn, testifies as follows:

Q. 1. Please state your name, age, residence and occupation. A. Charles W. Moore, 40, St. Louis, Advertising Manager of the Hamilton, Brown Shoe Co.

Q. 2. How long have you been Advertising Manager for the Hamilton, Brown Shoe Co? A. Since September, 1906.

Q. 3. Tell us how long you have been connected with the Hamilton, Brown Shoe Co. in any capacity. A. Since Jan. 19, 1885. From that time on until September, 1906, I was Mr. A. D. Brown's private secretary, and from that on I have been in the advertising department.

Q. 4. Who is Mr. A. D. Brown whom you refer to and what is his relation to the Hamilton, Brown Shoe Co.? A. Mr. A. D. Brown is President of the Hamilton, Brown Shoe Co.

Q. 5. What if any thing, do you know of the origin and adoption by the Hamilton, Brown Shoe Co. of the name American Lady for a brand of shoes manufactured by Hamilton, Brown Shoe Co.? A. I didn't know much about the origin and adoption of it only I have heard it discussed in a general way by different persons with the company outside of the regular meetings; but I did hear it generally discussed and the reasons for and against its adoption about the store.

Q. 6. Do you know the year when the name American Lady was first adopted and actually applied to shoes, in the manner indicated on the shoes and samples of boxes of shoes which are exhibits in this case, and marked respectively "Defendant's Shoes, McElroy A. B. and C." A. Yes, sir I know when it was first gotten up. I know it was in the latter part of 1900, and I drew up papers making application for registration of the trade-mark.

Q. 7. Please look at a copy of American Lady trade-mark registered in the name of the Hamilton, Brown Shoe Co. Nov. 8, 1904, and state if that is the trade-mark that you refer to in your last answer? A. It is.

Q. 8. You do not mean to say that the papers in the matter of the application for the registration of this mark American Lady were drawn up in the year 1900, do you? A. No, sir.

Q. 9. But the name American Lady, as I understand your testimony, was actually first applied to shoes by Hamilton, Brown Shoe Co. in the fall of the year 1900, is this correct? A. Yes, sir.

Q. 10. Is this copy of American Lady U. S. trade-mark registered in the name of the Hamilton, Brown Shoe Co., No. 43640, the registration to which you referred, and for which you drew up the application? A. Yes, sir.

Copy of trade-mark here referred to by the witness is offered in evidence and marked "Defendant's Exhibit, American Lady Trade Mark".

Q. 11. At the time these American Lady shoes were first put upon the market by Hamilton, Brown Shoe Co., in the Fall of 1900, had you ever known or heard of any shoes made or sold by any one marked with the words The American Girl or the words American Girl. A. I never had.

Q. 12. State whether or not it has been the practice with the Hamilton, Brown Shoe Co. since it first put American Lady shoes on the market to put them up in boxes labeled as defendant's exhibits "Defendant's Shoes, McElroy A. B. and C." are labeled? A. To the best of my recollection they have been put up that way ever since they were first made.

Q. 13. Has it also been the practice of the Hamilton, Brown Shoe Co. since the American Lady shoes were first put on the market, in the Fall of 1900, to also mark every pair of shoes of that brand with the name American Lady and also with the name of the Hamilton, Brown Shoe Co.? A. Yes, sir.

Q. 14. Has it also been the practice from the time that Hamilton, Brown Shoe Co. first put American Lady shoes on the market to mark prominently on all of the boxes containing these shoes the name of Hamilton, Brown Shoe Co.? A. Yes, sir.

Q. 15. Generally speaking, what steps, if any, were taken by the Hamilton, Brown Shoe Co. to advertise its American Lady shoes and to create a demand for those shoes and to identify the name American Lady as applied to shoes with the name of the Hamilton, Brown Shoe Co. as the manufacturer of American Lady shoes? A. In all the advertising that I have seen, and I have seen nearly all, wherever the name American Lady has been used the name of Hamilton, Brown Shoe Co. has been used in connection with it, in nearly every kind of advertising we have gotten out.

Q. 16. Please state generally the nature and extent to which Hamilton, Brown Shoe Co. has advertised its American Lady shoes, since the year 1900? A. We have advertised in trade journals and by means of hangers, souvenir hangers, souvenirs of various kinds

such as gold shoe pins, pocketbooks, in magazines extensively, and by advertising in newspapers.

Q. 17. Wherever these advertisements have appeared, so far as you know, especially as to hangers, newspapers, trade journals, and magazines, has the name of the Hamilton, Brown Shoe Co. of St. Louis been associated with the American Lady shoe? A. The name Hamilton, Brown Shoe Co. has been associated with nearly every advertisement we have gotten out for the American Lady shoes. The name of Hamilton, Brown Shoe Co. is so well known that we don't always put "St. Louis" on it, but every one knows where they are.

Q. 18. Were you with the Hamilton, Brown Shoe Co. in the year 1890? A. I was.

Q. 19. Do you know whether or not in the year 1890 the Hamilton, Brown Shoe Co., the defendant in this suit, issued any advertisement of shoes associated with the picture of a young woman? A. Yes, sir, it did.

Q. 20. Please look at this picture in the form of a hanger with a calendar bearing the date 1891, and state if you know what concern caused that picture to be made and when it was gotten up. A. I remember the picture very distinctly and when it was gotten up and selected by the Hamilton, Brown Shoe Co., or rather it was drawn especially for the Hamilton, Brown Shoe Co. by A. W. Elson & Co., of Boston. It was drawn and gotten up in 1890, and issued in 1891. It was sent out as a general advertisement, to go to our customers, and to hotels throughout the country, to advertise ladies' shoes made by the Hamilton, Brown Shoe Co. at St. Louis. This shows that as early as 1890 the Hamilton, Brown Shoe Co. had by its advertisements and hangers tried to identify its ladies' shoes in the mind of the public by the picture of a young woman and the Hamilton, Brown Shoe Co. has kept up that policy ever since. As to that particular picture my recollection is that we issued as many as 10,000 copies.

The picture thus identified by the witness, is offered in evidence by defendant and marked "Hamilton, Brown Shoe Company's First Lady Picture Associated with Shoes".

The witness continuing: I believe this is not the first picture the Hamilton, Brown Shoe Co. got up for advertising ladies' shoes. I believe pictures advertising shoes made by the Hamilton, Brown Shoe Co. representing a woman, a young woman, were issued by the Hamilton, Brown Shoe Co., as advertisements for ladies' shoes even prior to this picture gotten up in 1890.

At this point an adjournment was taken for lunch until 2:00 o'clock.

Met pursuant to adjournment. Same parties present.

Q. 21. After the picture last referred to, which was published to the trade by Hamilton, Brown Shoe Co. in 1891 but gotten up in 1890, did the Hamilton, Brown Shoe Co. publish or cause to be published to the trade, as an advertisement for shoes and to identify Hamilton, Brown Shoe Co.'s shoes with the picture of a young woman, any other pictures? A. Yes, sir; in 1891 they got up a picture which is now before me of a lady standing on the rocks by the sea shore. This was produced by the Stephens Lithograph Co. of St. Louis, and was published in connection with a calendar in 1892. This was sent broadcast to the trade in the same manner that I previously described, to hotels and public places, barber shops, railroad stations (they were largely sent to railroad stations throughout the United States). Not less than ten thousand copies of this picture were thus distributed by the Hamilton, Brown Shoe Co. throughout the United States in 1892. The name of Hamilton, Brown Shoe Co., St. Louis, Missouri, appears prominently printed in connection with this picture of a young woman, and is found in that picture, on the rocks, immediately below the young woman's feet.

The picture or poster referred to by the witness in the last answer is here offered in evidence by defendant's counsel, and the same is marked "Defendant's Exhibit, Hamilton, Brown Young Woman Shoe Picture, No. 2".

Q. 22. What is the picture which I now show you? A. This picture was also produced for us by A. W. Elson & Co., of Boston, and we used it in 1894 in the same manner as the two pictures previously described. We issued in 1894 not less than ten thousand copies of this picture, being duplicates of the same, and I remember distinctly that we sent a large number of them to editors of country newspapers. We got a large number of free writeups. Every merchant on our books received a copy of this picture to hang in their stores, and a large number of prospective customers, and our salesmen were each allotted a number to be put up in railroad stations, barber shops, hotels, and other public places, throughout the United States. As will be noticed, this picture bears prominently on the right hand corner of the top the name Hamilton, Brown Shoe Co. of St. Louis. This picture was actually gotten up and published in 1893, for the year 1894, and carries at the foot of it a calendar for the year 1894. In this way ladies' shoes made by the Hamilton, Brown Shoe Co. were identified to the trade and public in connection with the picture of a young woman.

The picture last referred to by the witness carrying the calendar for 1894 and which also bears at the foot of it the name "The Rose of St. Louis" is here offered in evidence by defendant's counsel and marked "Hamilton, Brown Shoe Co.'s young lady shoe picture, 1894."

Q. 23. What was the next picture of a young woman gotten up by the Hamilton, Brown Shoe Co. to advertise its shoes and identify the same in the mind of the trade and public by the picture of a young woman? A. The next picture was the one I have before me showing a lady with light hair and taken with the back of her head and neck showing, also the side of her

face, and this was sent out by us in the year 1895 in the same manner as the years previously, and ten thousand was the minimum number of copies of pictures we have ever issued. The name Hamilton, Brown Shoe Co. appears prominently in the upper right-hand corner, and at the bottom is an 1895 calender with "Watch Us 5 Millions". This was a phrase we adopted for advertising purposes. This picture, like the others, was sent to our customers to be hung in their stores, as well as prospective customers; were sent to barber shops, railroad and express offices, and other public places all over the United States.

The picture referred to is here offered in evidence by defendant's counsel and is marked "Defendant's Exhibit, Hamilton, Brown Shoe Company's Shoe Picture of a Young Woman of 1895".

Q. 24. What is the picture which I now show you? A. That is the picture which Hamilton, Brown Shoe Co. sent to their customers in 1896 and shows a picture of a lady sitting on a divan with a piece of music or picture in her hand and has "Hamilton, Brown Shoe Co., St. Louis", in the upper right-hand corner and has the 1896 calendar at the bottom with a lock advertising the Security School Shoe. This was also produced by A. W. Elson & Co., of Boston, and was one of our series of lady pictures to represent our lady shoes.

Q. 25. Do you know approximately how many of those pictures were published by the Hamilton, Brown Shoe Co. in 1896? A. As I said before, we never published less than ten thousand. Just what year that number increased to a larger proportion, I can't remember.

Q. 26. Were those pictures also sent out to the trade to be hung in the stores and also sent out to hotels, railroad depots, etc., like the former picture. A. Yes, sir.

The picture referred to by the witness is here offered in evidence and it is marked "Defendant's

Exhibit, Hamilton, Brown Lady Shoe Picture, 1896".

Q. 27. What do you know of this picture? A. This is the picture we sent out in the same manner as previous years, in 1898, entitled "The Flush of Success". It was the year following the year our shipments reached the five million mark. It represents a picture of a lady who appears to be half reclining with a bunch of flowers and two butterflies in front of her.

Q. 28. Was this picture copyrighted before publication for Hamilton, Brown Shoe Co. by Compton & Sons Co. of St. Louis? A. Yes, sir.

Q. 29. Is this the copyright for that picture, which I hand you now under the seal of the Librarian of Congress, and the Register of Copyright? A. That appears to be it.

Q. 29. So that this picture though not published to the trade until 1898 by the Hamilton, Brown Shoe Co., was copyrighted for the Hamilton, Brown Shoe Co. by the lithographer in 1897, is that correct?. A. Yes, sir.

The picture thus identified by the witness is here offered in evidence and the same is marked "Defendant's Exhibit, Hamilton, Brown Shoe Company's Lady Picture of Shoes Published in 1898".

Q. 30. Referring to the certificate of copyright and photograph of that picture and affidavit attached to the photograph, in the Library of Congress, I notice that in the affidavit as well as in the certificate of copyright the title of the picture is given as "Mound City Queen" instead of "The Flush of Success" as printed on this larger picture which Hamilton, Brown Shoe Co. sent to the trade in 1898. How did that discrepancy occur? A. I couldn't say. It may have been the intention first to call it that and afterwards the name was changed. But it is evident that this large picture was the thing really copyrighted and to which the certificate of copyright referred to relates, although in entering the copyright it was entered as "Mound City Queen" instead of "The Flush of Success".

Defendant's counsel offers in evidence the certificate of copyright, affidavit of photographer, and photograph of picture copyrighted, which is a photograph of the identical larger picture introduced in evidence and identified by the witness as the picture published to the trade in advertising Hamilton, Brown Shoe Company's Lady shoes in 1898. [They] are here offered in evidence and marked "Defendant's Exhibit, Certificate of Copyright of Hamilton, Brown Shoe Company's 1898 picture".

Q. 31. Please look at the picture which has already been introduced in evidence in connection with the testimony of W. H. Spahr. What do you know about this picture which is in evidence as "Defendant's Exhibit, Edna May picture"? A. I know it was our regular souvenir picture we sent to our customers and friends in the first of 1900, and the same as we sent in the years as I have previously stated, sending them to our customers to have them hung up in railway stations, express offices, hotels, barber shops, and other public places.

Q. 32. Those pictures were received by the Hamilton, Brown Shoe Co. in the fall of 1899, were they not? A. Yes, sir, we aimed to get them to our customers for the New Year of 1900.

Q. 33. Looking at this picture I notice at the bottom "Our Women's 'Own Make' $2.50 Shoe has Been A Favorite for 15 Years". Was that statement published in connection with all of these pictures of Edna May that were sent out? A. Yes, sir.

Q. 34. Does the name "Hamilton, Brown Shoe Co., St. Louis, U. S. A." appear prominently on this picture? A. Yes, sir, on the upper right-hand corner.

Q. 35. I also refer you to another picture which was introduced in evidence in connection with the testimony of Walter H. Spahr, which picture is marked at the foot as copyrighted in 1901. Having called your attention to that picture I now hand you the certificate of copyright, affidavit and photograph of picture from the Librarian of Congress, and will ask you whether or not

these documents relate to that picture "Defendant's Exhibit, Gracie Scott Picture"? A. Yes.

Q. 36. When was that picture published and distributed to the trade? A. To the best of my recollection it went out in 1901, or some of them went out in the last part of 1900.

Q. 37. Was that Gracie Scott picture in the form of a print or hanger and associated with the name of Hamilton, Brown Shoe Co. of St. Louis widely distributed and published as an advertisement of "American Lady" shoes made by Hamilton Brown Shoe Co.? A. Yes, sir, my recollection is that that was more widely distributed than any of the previous ones.

Q. 38. How does that Gracie Scott picture except as to color and size, compare with the picture on the label of the Hamilton, Brown Shoe Co.'s American Lady shoes in evidence? A. It is the same.

Q. 39. When were these Hamilton, Brown Shoe Co.'s American Lady shoes bearing on each box this picture of Gracie Scott first put on the market by the Hamilton, Brown Shoe Co.? A. In the latter part of 1900.

Q. 40. When these American Lady shoes, marked with the picture of Gracie Scott on the lid of each box and the name of Hamilton, Brown Shoe Co. and with the name American Lady, were advertised and put on the market in 1900 by the Hamilton, Brown Shoe Co., had you ever known or heard of any shoe made or sold by any one marked with the name The American Girl or American Girl? A. No, sir, I never had.

Q. 41. Do you know a man by the name of Julius L. Selig? A. Yes, sir.

Q. 42. Was he ever employed by the Hamilton, Brown Shoe Co. and if so when? A. He is now in the employ of the Hamilton, Brown Shoe Co. and has been, as near as I can remember since 1902.

Q. 43. Were you present when Julius L. Selig was employed by the Hamilton, Brown Shoe Co? A. Yes.

Q. 44. Did Hamilton, Brown Shoe Co. seek to employ Mr. Selig or was the solicitation for his employment altogether on Mr. Selig's part? A. Mr. Selig

sought employment with the Hamilton, Brown Shoe Co. and solicited the services of one of the other salesmen to secure him a position there.

Q. 45. Can you remember the year in which Mr. Selig sought this employment? A. I think it was in 1902, but I am not positive as to that.

Q. 46. Could you ascertain the date of his employment. A. Yes, I could by going over the records up at the store.

Q. 47. Did the Hamilton, Brown Shoe Co. employ Mr. Selig as a salesman? A. Yes, sir.

Q. 48. Did the Hamilton, Brown Shoe Co. employ Mr. Selig as a salesman because Mr. Selig had formerly been in the employment of the complainant in this case? A. No.

Q. 49. Did Mr. Selig solicit his employment with the Hamilton, Brown Shoe Co. on any representations made by him directly or indirectly that he had been selling American Girl shoes for The Wolf Brothers & Co. and therefore was especially qualified to sell Hamilton, Brown Shoe Co's American Lady shoe? A. No, sir.

Q. 50. At the time of Mr. Selig's employment by Hamilton, Brown Shoe Co. was Mr. Selig asked whether or not he had sold American Girl shoes for The Wolf Brothers & Co.? A. No, sir.

Q. 51. In hiring salesmen is it the practice of the Hamilton, Brown Shoe Co. to inquire of the salesmen or the man seeking the position as salesman as to the brands of shoes he has sold? A. No, sir.

Q. 52. It has been attempted to represent on this record by complainant's witnesses that Mr. Selig was employed by the Hamilton, Brown Shoe Co. because Mr. Selig had formerly represented the complainant as a salesman, selling American Girl shoes. State whether or not that representation by the complainant's witnesses is true or false, giving your reasons for any answer you may give? A. To the best of my knowledge it was not true, for the reason that I was present when Mr. Selig made his application and I heard the conversation between him and Mr. A. D. Brown, the President, and other mem-

bers of the Directory and no mention was made of the American Girl shoe.

Q. 53. Since your connection with the Hamilton, Brown Shoe Co., I mean since 1900, when Hamilton, Brown Shoe Co. first put upon the market ladies' shoes marked with the name "American Lady", has it ever come to your attention that any of the Hamilton, Brown Shoe Co.'s American Lady shoes have been sold on a call for "American Girl" shoes? Or that there has been any confusion in the mind of the trade or public between American Lady shoes made by Hamilton, Brown Shoe Co. and the American Girl shoe which the complainant alleges is made by The Wolf Brothers & Co.? A. No, sir, I never heard of it.

Q. 54. Would you have been in a position to have heard of it if such a thing were true? A. Yes. If there had been any such confusion and it came to the attention of any of the company I would have heard of it, as they generally discuss such questions with me.

Direct examination closed.

Cross-Examination, by Mr. Hopkins.

XQ. 55. How long has the Hamilton, Brown Shoe Co. been engaged in the manufacture of shoes other than women's shoes? A. I can't say exactly how long. I can't approximate it. I know it has been a number of years since they began manufacturing men's shoes.

XQ. 56. A certain picture has been offered in evidence by defendant's counsel under the title "Hamilton, Brown Shoe Company's First Lady Picture Associated with Shoes". This is the picture which is connected with a calendar for the year 1891. There appear at the bottom of this exhibit two references to ladies' shoes and two to men's shoes, do there not?. A. Yes, sir.

XQ. 57. After referring to this exhibit can you state whether Hamilton, Brown Shoe Co. was making shoes other than ladies' shoes? A. To the best of my recollection they commenced to make men's shoes somewhere about that time.

XQ. 58. According to the representations on this exhibit the defendant had sold $350,000 of men's $2.50 shoes in 1890 and $125,000 worth of men's $4.00 shoes in 1890. Is it your recollection that Hamilton, Brown Shoe Co. had a trade in men's shoes previous to 1890? A. Yes, sir. They had a trade ever since I have been with them for men's shoes, but they did not always make them.

XQ. 59. When did you first enter the employ of the defendant? A. Jan. 19, 1885.

XQ. 60. With this exhibit before you, you said in response to Q. 20 and referring to this exhibit "This shows that as early as 1890 the Hamilton, Brown Shoe Co. had by its advertisements and hangers tried to identify its **ladies'** shoes in the mind of the public by the picture of a young woman, and the Hamilton, Brown Shoe Co. has kept up that policy ever since". There are two references to ladies' shoes and two to men's shoes in this exhibit, as you have already admitted on my cross-examination. Kindly point out for the information of the Court anything appearing on the face of this exhibit that affords the slightest foundation for the portion of your answer to Q. 20 which I have quoted. A. The ladies' shoes were the first manufactured by the Hamilton, Brown Shoe Co. and were the only shoes made by them when I first went into their employment, and ladies' shoes were the predominant feature of their advertising, and the fact of the lady being there and the further fact of her having a lady's shoe on her head would advertise ladies' shoes more than anything else.

XQ. 61. Then it was the shoe on the head of the woman which you had in mind when you gave this answer? A. That was only one thing, and another thing was that the lady's picture was in the picture. If our men's shoe advertising predominated we would naturally show a man or some picture which would refer to men's shoes.

XQ. 62. Possibly you would have a man's shoe on a woman's head. Do you find any reference in this ex-

hibit to the fact that the ladies' shoes were both manufactured and sold by the defendant while the men's shoes were sold but not manufactured by the defendant?

Mr. Bakewell: Objected to as immaterial, since the purpose of defendant in introducing in evidence this and the other pictures of young women was for the purpose of showing that for a period of years running back to 1890 the defendant corporation in its advertisement of shoes had gone to special pains and expense to identify shoes made by it with the picture of a woman, and therefore it is utterly immaterial whether or not in conducting its business the defendant also either manufactured or sold men's shoes.

A. No, sir.

XQ. 63. It is true of all these picture exhibits up to the time of the so-called Edna May picture that they either refer to no shoes at all or to both men's and women's shoes, is it not?

Mr. Bakewell: Objected to as immaterial, on the ground that the pictures themselves are the best evidence of what they specifically refer to.

A. That is true of them with the exception of one which refers to the Security School Shoe.

XQ. 64. Who employed Mr. Selig at the Hamilton, Brown Shoe Co.? A. Mr. A. D. Brown. I might say the Directory in general. Mr. Brown talked with him, but Mr. Brown seldom employs a man without consulting the Directory, and they all talk with him.

XQ. 65. Do you know whether Mr. A. D. Brown had any correspondence with Mr. Selig relative to his employment by Hamilton, Brown Shoe Co. prior to the conference at which you say you were present? A. My recollection is that there was none.

XQ. 66. In what year was this conversation between Mr. Brown and Mr. Selig? A. As I said before, my memory is not altogether clear, but I feel quite sure it was in 1902.

XQ. 67. What month? A. I could not say.

XQ. 68. Was the entire Board of Directors present

at this conversation? A. I don't think they were. My recollection was that there were not more than two or three present. I can't remember who were the others present besides Mr. Brown.

XQ 69. Did Mr. Brown ask Mr. Selig anything regarding his previous experience and qualifications as a salesman? A. Yes, sir.

XQ. 70. Do you recollect what Selig said in response to that? A. I can't remember all the conversation that occurred; but he asked him how long he traveled, the largest amount of goods he sold in one year, and how much goods he thought he could sell for us in a year.

XQ. 71. Did either of them say anything with reference to Selig being emyloyed at the time by a competing house?

> Mr. Bakewell: Objected to as incompetent inasmuch as it does not appear from the evidence in this case that the complainant was a competing house of the defendant at that or any other time.

A. He was asked how many goods he had sold and the largest year he had had and for whom he had sold them.

XQ. 72. Then what did he say? A. Well, as near as I can remember the quantity of goods he had sold previously was rather against him in getting a position with us, as he didn't measure up with the amount we require of our salesmen. He said he had sold them for Wolf Brothers & Co.

XQ. 73. Was there anything said in that conversation as to what territory Selig was working in for the Wolf Brothers & Co.? A. To the best of my recollection there was not.

XQ. 74. Were you present during the entire conversation? A. I was.

XQ. 75. What were you doing during the progress of that conversation? A. I was making a memorandum of Mr. Selig's answers in shorthand in order to enable the directors and Mr. Brown to decide what to do afterward.

XQ. 76. Did you subsequently transcribe your notes concerning that conversation? A. I did.

XQ. 76½. Have you the notebook in which you took those notes? A. No. sir; it was destroyed a long time ago.

XQ. 77. Who destroyed it? A. The porter. I instructed him to save those things and after a certain length of time destroy them. We have not the room to save such things and they are afterwards destroyed.

XQ. 78. Was this particular notebook destroyed prior to the institution of this suit? A. Yes, sir.

XQ. 79. Was it destroyed prior to the Patent Office proceedings between the same parties? A. Yes, sir.

XQ. 80. In what year was it destroyed? A. I do not keep those things longer than a year or so after they are made. In fact now we do not keep them that long. We have three or four times the stenographers now than we had then, and we have a great deal of such accumulation. Their notebooks are not kept but two or three months and are then burned up.

XQ. 81. Did you undertake to report the entire conversation of questions and answers? A. Yes, sir.

XQ. 82. Have you the transcript? A. No, sir.

XQ. 83. When was that destroyed? A. It was destroyed soon after Mr. Selig's application was accepted. We never thought it necessary to keep them after a man was employed.

XQ. 84. Was it destroyed under the direction of Mr. A. D. Brown? A. No sir. It was destroyed simply because I had no place to keep them except in my own desk, and I didn't have room for them— there was too many of them. I made a hundred of them in a day once I believe.

XQ. 85. And I presume that you can recollect what occurred at each of these conferences with the same degree of particularity that you recollect this one? A. No sir, I cannot. Those who did not secure employment pass out of my mind and those who do secure employment do not pass out of my mind so quickly.

No further cross-examination.

At this point an adjournment was taken until 10.00 o'clock Tuesday, May 14, 1907.

Met pursuant to adjournment at 10.00 o'clock Tuesday morning, May 14, 1907. Same parties present.

Redirect Examination, by Mr. Bakewell.

RDQ. 86. Have you been able to ascertain from the records of the company when Mr. Selig actually entered the employ of the Hamilton, Brown Shoe Co? A. Yes. In March, 1902, and from that I know that the conversation as to his employment which I have referred to in my former testimony must have been shortly previous to that date.

RDQ. 87. I do not quite understand your answer to XQ. 63, where you were asked if all these picture exhibits up to the time of the so-called Edna May picture either refer to no shoes at all or to both men and women's shoes. Your answer is that it is true of them, with the exception of one which refers to the Security School Shoe. I now ask you to look at these pictures, taking them up separately, and ask you if it is true that any of them refer to no shoes at all. A. In the first place all of these pictures were gotten up to advertise the business of the Hamilton, Brown Shoe Co., which was that of making and selling shoes. The weight of our business was ladies' shoes, and at the time these pictures were gotten up the bulk of our manufacturing business was in ladies' shoes. Every one of these pictures bear the name of Hamilton, Brown Shoe Co.

The 1891 picture which refers to the sales for 1890 as for $4,000,000, refers specifically to ladies' shoes, by the lady's shoe which is on the woman's head as a fanciful bonnet, and a ladies' sandal which forms part of the dress of the picture of the young woman in that picture.

I also call your attention to the fact that in marking this picture you call it the first Hamilton, Brown lady picture; you were mistaken because they were adver-

tising pictures of shoes issued by the Hamilton, Brown Shoe Co. before the year 1891, and before this picture was issued.

The next picture of 1892 specifically refers to $500,000.00 worth of ladies' $2.50 shoes sold by Hamilton, Brown Shoe Co. in 1891, and $200,000 worth of ladies' hand-sewed shoes sold by Hamilton, Brown Shoe Co. in 1891. This picture also refers to $400,000.00 worth of men's $2.50 shoes sold in 1891, and $150,000 worth of men's $4.00 shoes sold in 1891.

The 1894 picture in evidence bears specifically the name of Hamilton, Brown Shoe Co. and the fact that Hamilton, Brown Shoe Co. was awarded the premium for shoes at the World's Fair in Chicago, and the expression at the foot of the picture "Watch Us 5 Million" taken in connection with the name of Hamilton, Brown Shoe Co. on the picture itself clearly refers to the ambition of the Hamilton, Brown Shoe Co. to sell Five Million Dollars worth of shoes in a year.

This statement applies to the 1895 picture except that the 1895 picture does not refer to the World's Fair premium but does state distinctly at the head of it that the Hamilton, Brown Shoe Co. whose name appears on the picture, is the largest shoe dealer in the world.

The 1896 picture at the bottom, refers to the Security School Shoe, bears prominently the name Hamilton, Brown Shoe Co., and also states that the Hamilton, Brown Shoe Co. is the largest shoe dealer in the world.

The 1898 picture, "The Flush of Success", specifically states that the Hamilton, Brown Shoe Co. had reached the Five Million mark and bears thereon the name Hamilton, Brown Shoe Co.

Since my testimony of yesterday I have been able to find the advertising picture of a young woman which was copyrighted for Hamilton, Brown Shoe Co. by A. W. Elson & Co. of Boston in 1888, and was distributed by Hamilton, Brown Shoe Co. like the other pictures were distributed, as an advertisement for its shoes, for the year 1889. This picture bears prominently thereon the name Hamilton, Brown Shoe Co. in two places, and

at the bottom specifically refers to "Our $2.50 Ladies' and Gent's Shoes", stating that they have the largest sale of any fixed price shoes in America. This picture also bears a calendar for the year 1889. At the bottom of the young woman's picture appears the word "Evelyn".

I also here produce another advertising picture issued by Hamilton, Brown Shoe Co. to the trade as these other pictures were issued, this picture representing a young girl holding a dog. The name at the bottom of the picture is "Rosamond". This picture was gotten up by A. W. Elson & Co. of Boston for the Hamilton, Brown Shoe Co. in the latter part of 1889, and was issued to the trade, as stated on the picture, by Hamilton, Brown Shoe Co. as a New Year's greeting for the year 1890.

RDQ. 88. How many copies of these pictures which you have last referred to in the year 1889 and 1890 were distributed to the trade, etc. in advertising the shoes of the Hamilton, Brown Shoe Co.? A. As I remember there were ten thousand each year.

Defendant's solicitor offers in evidence the picture bearing the name Evelyn, being the 1889 picture, and the same is marked "Defendant's Exhibit, Evelyn Picture 1889".

Defendant's solicitor offers in evidence the picture issued by Hamilton, Brown Shoe Co. in connection with a calendar for 1890 representing a young girl holding a dog with the word Rosamond at the foot of the picture, and the same is marked "Defendant's Exhibit, Rosamond Picture".

RDQ. 89. There has already been offered in evidence in this case a box of Hamilton, Brown Shoe Co.'s shoes, the box as well as the shoes bearing the name Hamilton, Brown Shoe Co. and the name American Gentleman, this exhibit being marked "Defendant's Exhibit, Box of American Gentleman shoes". That shoe, as I understand it—I mean that brand of shoes—was gotten out by the Hamilton, Brown Shoe Co. as a companion

brand for its American Lady shoes. Am I correct in this? A. Yes, sir.

RDQ. 90. When was that shoe first put on the market according to your best recollection? A. In 1901.

RDQ. 91. Is it still on the market? A. Yes, sir.

RDQ. 92. Do you identify this copy of trade-mark in the name of Hamilton, Brown Shoe Co. for American Gentleman shoes, being registered trade-mark 43,713 dated Nov. 15, 1904, as a trade-mark for this brand of shoes registered in the U. S. Patent Office by Hamilton, Brown Shoe Co.? A. I do.

The trade-mark referred to by the witness is here offered in evidence and marked "Defendant's Exhibit, American Gentleman trade-mark A".

RDQ. 93. Do you recognize the trade-mark which I now hand you as a trade-mark registered by Hamilton, Brown Shoe Co. under the later Act of Congress in relation to trade-marks, on August 15, 1905, as No. 45,381, for American Gentleman shoes? A. Yes, sir.

The said trade-mark is here offered in evidence and marked "Defendant's Exhibit, American Gentleman Trade Mark B".

No re-cross examination.

Signature waived.

JAMES SPENCER,

being duly sworn, called as a witness on behalf of defendant, testifies as follows:

Q. 1. What is your name, age, residence and occupation? A. James Spencer, 36, Sedalia, Mo., retail clerk, for A. Chasnoff, Sedalia, Mo.

Q. 2. Were you ever in the employ of Hamilton, Brown Shoe Co. and if so for how long, during what years, and in what capacity? A. I was in their employment from October, 1894, until March 1, 1901, leaving them to go in the retail business in Bloomington, Ill. I was in the employment of Hamilton, Brown Shoe Co. as traveling salesman. I was hired by Hamilton

ton, Brown Shoe Co. again Jan. 15, 1903, as advertising manager, and remained in that position until August, 1904, when I went back on the road as traveling salesman. I severed my connection with them in Jan., 1906.

Q. 3. I call your attention to No. 13 of Volume 40 of Shoe and Leather Gazette published at St. Louis and dated October 22, 1903, which has been offered in evidence by complainant and marked "Complainant's Exhibit, Gazette, October 22, 1903". At page 3 of this trade magazine is a picture of Gracie Scott identical with the picture which appears on the boxes of Hamilton, Brown Shoe Co.'s American Lady shoes. Below this picture of Gracie Scott appear the words "American Lady". At the top of this picture of Gracie Scott appear the words "The prettiest woman in America". At the left-hand side of this picture in red ink appear the words "She Wears The American Lady Shoe". At the right-hand side of this picture appear the words "And Says the Shoe Deserves Its Name". At the bottom of the picture appear the words "Made by Hamilton, Brown Shoe Co. Largest Shoe House in the World", and the words and figures "14 styles carried in stock". What if anything, do you know of the history of that advertisement in the Shoe and Leather Gazette? A. I got up this ad. myself and it was suggested to me by a letter from Gracie Scott complimenting us upon the style and fit of two or three pairs of American Lady shoes which we had made for her. My recollection is that she used the expression that we had chosen a fitting name for the shoes, and I got up the advertisement referred to after reading her letter.

Mr. Hopkins: I move to strike out that portion of the answer beginning with the words "It was suggested" and concluding with "a fitting name for the shoes", upon the ground that it is secondary and incompetent.

Q. 4. What became of that letter from Gracie Scott referred to in your last answer? Can you produce it? A. I cannot. The letter was put in a basket at the side

of my desk where I put all letters that have been answered or that I was done with. It should have been collected by one of the office boys and filed. A search has been made for it by two or three men and boys in Hamilton, Brown Shoe Co., but they have been unable to find it.

Q. 5. Are you positive that such a letter was received from Gracie Scott? A. I am absolutely positive, and I will give you one reason why I remember it, if you wish to have it. She spells her name Grayce and that was the first time I had ever seen the name spelled in that way.

Q. 6. And this letter was received before the advertisement referred to in my question 3 was prepared by you for publication in the Shoe and Leather Gazette of Oct. 22, 1903, was it? A. It was.

Q. 7. Do you know whether or not in any other advertisement or in any other way the Hamilton, Brown Shoe Co. has used the words "And says the shoe deserves its name" or the words "The shoe deserves its name" in any way in connection with shoes? A. I don't recollect of using it another time; but it is possible that I may have.

Q. 8. What is your best recollection as to whether or not that statement, attributed to Gracie Scott, which I have quoted in my last question, and which originated as you say from Gracie Scott's letter of thanks for American Lady shoes sent to her, ever appeared in any other advertisement of Hamilton, Brown Shoe Co.'s shoes or in any way in connection with shoes sold by Hamilton, Brown Shoe Co.? A. I should say not, except in that advertisement of the Shoe and Leather Gazette at page 3, of Oct. 22, 1903.

Q. 9. One of the officers of the complainant company in giving his testimony at page 124 of the record, in answer to Q. 50, referring to this advertisement of Hamilton, Brown Shoe Co. at page 3 of the Shoe and Leather Gazette of Oct. 22, 1903, says:

"In their advertisements of American Lady shoe, they have used the phrase, 'The shoe deserves its

name'." In this he has deliberately quoted only a part of the statement found in that advertisement. I will ask you whether or not it is true that the sentence composed of thirteen words as it appears to the right and to the left of Gracie Scott's picture in that advertisement is not as follows: On the left-hand side of the picture the six words, "She Wears the American Lady Shoe", and at the right-hand side of Gracie Scott's picture the words, "And Says the Shoe Deserves its Name".

A. That is correct.

Q. 10. Before getting up and causing to be printed this advertisement at page 3 of the Shoe and Leather Gazette of October 22, 1903, for Hamilton, Brown Shoe Co.'s American Lady shoe, with the picture of Gracie Scott, had you ever seen or heard of any advertisement of The Wolf Brothers & Co. or of any other concern, using the so-called catch phrase "A shoe as good as its name"? A. I never had.

Q. 11. You are the person, as I understand it, who got up that advertisement of the Shoe & Leather Gazette of Oct. 22, 1903, for Hamilton, Brown Shoe Co., are you not? A. I am.

Q. 12. In getting up that advertisement was it your intent or purpose to simulate all or any part of any advertisement of the Wolf Bros. & Co., or of anyone else? A. It was not. My intention in all of my advertising was to be original and I had never heard of Wolf Bros. & Co.

Q. 13. When you got up that advertisement, as I understand it, you had never heard of The Wolf Brothers & Co., or of any shoes that they claimed to have made and sold under the name The American Girl, is that correct? A. That is correct.

Q. 14. Another extraordinary contention of the complainant in this case in connection with their attempt to try to make out that the Hamilton, Brown Shoe Co. has attempted fraudulently to imitat the advertisements or catalogues of the American Girl Shoe [is] based upon the alleged proposition that in the Fall of 1904,

the complainant got up a catalogue for shoes on the outside of which are printed the words "The American Girl", and which represents a picture of Uncle Sam holding a young woman by the hand and evidently leading her in to dinner or leading her in a quadrille, and it is contended among other things that Hamilton, Brown Shoe Co. pirated upon that picture in its catalogue marked "Complainant's Exhibit, No. 10", on account of the representation on the cover of this catalogue of Hamilton, Brown Shoe Co., which bears at the foot the words "American Lady Shoe," "American Gentleman Shoe" and at the top, "Hamilton, Brown Shoe Co.", the picture of George and Martha Washington in colors dancing a minuet, the words "Martha Washington" appearing below the picture of Martha Washington, and the words "George Washington" appearing below the picture of George Washington. I will ask you to state what, if you know, as to the origin of this picture of George and Martha Washington on the cover of Hamilton, Brown Shoe Co.'s catalogue which is marked "Complainant's Exhibit, No. 10", and also when that catalogue was ordered and when it was published by Hamilton, Brown Shoe Co.

A. In the fall of 1903 Mr. Brown—Mr. A. D. Brown—and myself decided that George and Martha Washington were probably the first representative American man and woman—or at least the best known, and we adopted the two figures as shown on the catalogue cover to be used in another ad. that we got out Jan. 1, or about that time, 1904. After using it we decided that it would be a good idea to identify George and Martha with our advertising of the American Lady and American Gentleman shoes, and we had sketches submitted to us by the Gray Lithograph Co. of New York of these two figures in colors to be used on our catalogue covers. I placed the order for the catalogue cover with Gray Lithograph Co. early in July, 1904, and my recollection is that the catalogue came out possibly two months after that date. It may have been a few days more or less.

Q. 15. I hand you two letters, one being evidently a letter press copy of a letter dated July 6, 1904, addressed to Gray Lithograph Co. of New York signed Hamilton, Brown Shoe Co. by somebody. The ink signature is so indistinct that with my poor eyesight I cannot make it out. At the foot of the last-named letter are the words "Accepted Gray Lithograph Co. by Joseph P. Schiller". This letter also bears on the right-hand side the words "Please refer to file No. 182". The other letter is on the letter head of Gray Lithograph Co. at New York, dated July 8, 1904, addressed to Hamilton, Brown Shoe Co. at St. Louis and signed "The Gray Lithograph Co. O. D. Gray". This letter also bears the stamp mark as follows "Received Hamilton, Brown Shoe Co. July 11, 1904". What, if anything, do you know in regard to those letters? And to what do they refer? A. The copy of the letter is Mr. A. D. Brown's order to Gray Lithograph Co. for Hamilton, Brown Shoe Co. catalogue cover. Mr. Joseph P. Schiller, salesman for Gray Lithograph Co., was in Hamilton, Brown Shoe Co's store at the time and approved the order and accepted it, as shown by his signature. The original of this letter was mailed to Gray Lithograph Co. on July 6, 1904. The other letter referred to signed "Gray Lithograph Co. O. D. Gray", I identify as their acknowledgment of Hamilton, Brown Shoe Co's order for catalogue covers, and their acknowledgment of the said former letter of July 6, 1904.

Q. 16. You say that this copy of the letter of July 6, 1904, is the letter press of an original letter mailed to Gray Lithograph Co. on July 6, 1904, by Hamilton, Brown Shoe Co. You also said that, as I understood it, Mr. Brown had signed the original letter of July 6, 1904. Although Mr. Brown may have signed that letter, do you know who actually prepared or composed that letter of July 6, 1904, to Gray Lithograph Co.? A. I dictated the letter in Mr. Brown's presence and it was read over carefully by him and signed by him in my presence.

Q. 17. Do these letters of July 6, 1904, and the answer of Gray Lithograph Co. of July 8, 1904, refer to

the cover of this particular catalogue bearing the picture of George and Martha Washington which is marked "Complainant's Exhibit, No. 10"? A. They do.

Q. 18. And the copies of this catalogue of Hamilton, Brown Shoe Co. bearing the picture of George and Martha Washington were received afterward by Hamilton, Brown Shoe Co. and in the fall of 1904, were they not? A. To the best of my recollection they were.

I ask, for the convenience of the Court and counsel, that the Examiner copy into the record said letters of July 6, 1904, and July 8, 1904, which are here offered in evidence and marked respectively "Defendant's Exhibit, Hamilton, Brown Shoe Co. Gray Catalogue Letters A and B".

DEFENDANT'S EXHIBIT, GRAY CATALOGUE LETTER A.

July 6, 1904.

"*Gray Lithograph Co.,*
New York City.

GENTLEMEN:

We have this day agreed upon a front and back for a catalogue, which your Mr. Schiller has agreed to furnish us a proof of, of the size of our catalogue (7⅛x10¾ in. or 14¼x10¾ flat, thus allowing for a quarter-inch trim all around) by August 1st. Mr. Schiller agrees to consult Buxton & Skinner and have the sheets so that the printers in Saint Louis can bind without extra expense. We agree to take thirty-five thousand (35,000) at $35.00 per thousand, to be printed in twelve colors and embossed in gold, proof to be here not later than August 1st, the stock to be coated on two sides and to weigh 120 lbs. to the ream of 500 sheets, size 22x28. Shipment of covers to be made August 20, by Continental Line, so that covers will reach us September 1st. Mark case Train 97, B. & O. We furnish Mr. Schiller a dummy today which will vary but little from the catalogue that we are going to make.

Yours very truly,
HAMILTON, BROWN SHOE CO.
By .....

Accepted:
Gray Lithograph Co.
By Joseph P. Schiller."

DEFENDANT'S EXHIBIT, GRAY CATALOGUE, LETTER B.

NEW YORK, July 8, 1904.

"*Hamilton, Brown Shoe Co.,*
St. Louis, Mo.

DEAR SIRS:

We beg to acknowledge receipt of your order of the 6th for catalogue covers, which order has been entered and to which we shall be pleased to give our prompt and careful attention. We received the dummy for the catalogue this morning.

Thanking you for your favor, and hoping to receive your frequent orders, be beg to remain,

Yours very truly,
THE GRAY LITHOGRAPH CO.,
O. D. GRAY."

Q. 19. In order to refresh your memory as to about the time these catalogues were received, bearing on the cover the picture of George and Martha Washington dancing the minuet, I call your attention to a letter on the letter-head of the Gray Lithograph Co. dated at New York October 18, 1904, stamped with the stamp of Hamilton, Brown Shoe Co. as received Oct. 20, 1904. This letter states in the first sentences as follows: "In reply to your telegram we beg to say that we have shipped you 25,460 catalogue covers. The balance of covers on the order were unfortunately destroyed by the fire which occurred on our premises on the evening of September 23rd." Can you state whether or not this letter refers to these identical covers for Hamilton, Brown Shoe Co.'s catalogue, showing the picture of George and Martha Washington present in "Complainant's Exhibit No. 10"? A. This letter dated Oct. 18, 1904, evidently refers to the catalogue covers in question. I left the advertising department, however about Sept. 15, 1904, and consequently I cannot identify this letter.

Complainant's counsel admits the authenticity of the letter last referred to as to its date and the date of its receipt, and the letter is accordingly offered in evidence and marked "Defendant's Exhibit, Gray Catalogue Letter Oct. 18, 1904", and it is asked that the same be read into the record.

DEFENDANT'S EXHIBIT, GRAY CATALOGUE, LETTER OCT. 18, 1904.

NEW YORK, Oct. 18, 1904.

"*Hamilton Brown Shoe Co.*,
St. Louis, Mo.

DEAR SIRS:

In reply to your telegram, we beg to say that we have shipped you 25,460 of the catalogue covers. The balance of the covers on the order were, unfortunately, destroyed by the fire which occurred in our premises on the evening of September 23rd. New stock was ordered at once to replace the covers that were lost by the fire and water damage, and at the earliest possible moment the remaining covers due on your order will be shipped to you.

While the fire occasioned considerable loss to us, and was the source of a great deal of inconvenience and annoyance, we were fortunate in that it was controlled by the sprinkler system and kept to only one part of the house. The greatest damage having been by water from the sprinkler system enabled us to get to work again within three days' time and we are now rapidly catching up on the work that was destroyed by this unexpected and unfortunate occurrence.

You may rely upon our doing everything possible to get the balance of the covers to you as quickly as the new stock can be gotten into the house and the edition run off. We beg to remain,

Yours very truly,
O. D. GRAY, *Prest*".

Q. 20. At the time you got up this picture and the design for the cover of Hamilton, Brown Shoe Co.'s catalogue marked Complainant's Exhibit No. 10, for Hamilton, Brown Shoe Co. had you ever seen or heard of the catalogue of complainant in this case relating to the

American Girl shoe, marked "Complainant's Exhibit No. 2, Accompanying the Bill", which complainant's witness claims was issued at some indefinite time in the Fall of 1904 and which bears upon it the picture of Uncle Sam holding a young woman in evening dress by the hand? A. I had never seen or heard of this catalogue. I am looking at it now for the first time.

Q. 21. I now hand you a little book or pamphlet on the title page of which appears the name of Hamilton, Brown Shoe Co., St. Louis, U. S. A., and above it the same picture of George and Martha Washington, but in black and white, which appears on Hamilton, Brown Shoe Co.'s catalogue marked "Complainant's Exhibit No. 10". On the cover of this little pamphlet are the words "Our $12,000,00 Prize Story". On the inside of the page of the inside cover is a picture of A. D. Brown, President of Hamilton, Brown Shoe Co. and this little book is enclosed in an envelope on the back of which is the name Hamilton, Brown Shoe Co., Shoe Makers, St. Louis, U. S. A. and on the face of which envelope is the same picture of George and Martha Washington dancing the minuet but in black and white. On the envelope below the picture of George and Martha Washington is the following:

"When the Washingtons danced the minuet
They led the world and social set.
When H. B. built the two great shoes
They led the world as merit does.

American Lady for American Ladies — American Gentleman for American Gentlemen

Keep the Quality UP."

What do you know about this little book or pamphlet and the envelope in which it is contained, and when were the same published by Hamilton, Brown Shoe Co.?

A. These booklets and envelopes were printed in the latter part of 1903. They are descriptive, or rather the

booklet is, descriptive of a prize contest which we had decided to inaugurate. They were ready to mail about Jan. 1, 1904 and we used these figures of George and Martha Washington for the first time I think in connection with this ad. We used these figures in one or two advertisements in the Shoe and Leather Gazette on Jan. 14th and 21st, 1904, calling attention to this prize contest, and on Dec. 10, 1903, we advertised this prize story at page 3 of the Shoe and Leather Gazette published at St. Louis on Dec. 10, 1903. An advertisement of this $12,000.00 story together with this identical picture of George and Martha Washington was published by us in the Shoe and Leather Gazette published on Jan. 14, 1904, at page 3 thereof, and again in the issue of the Shoe and Leather Gazette of Jan. 21, 1904, at page 3. This Shoe and Leather Gazette is one of the standard shoe and leather trade journals for the boot and shoe trade in the United States, and has a circulation throughout all the United States in all the large cities of the U. S. such as Cincinnati, Chicago, St. Louis and Boston. There were sent out by Hamilton, Brown Shoe Co., commencing in Jan. 1904, approximately one million copies of this little $12,000.00 prize story book, identical with the one you have shown me, and in envelopes bearing George and Martha Washington's picture identical with the envelope which you have shown me, and these were sent out broadcast throughout the U. S. and in large quantities in the States of Ohio, Indiana, Kentucky, Illinois, Missouri, Arkansas, Kansas, Texas, California, Pennsylvania, North and South Carolina, and practically every State and territory in the country.

Defendant's counsel here offers in evidence the prize story book referred to, as well as the envelope containing the same, asking that the same be marked respectively "Defendant Exhibit, George and Martha Washington Book and Envelope".

Defendant's counsel also offers in evidence the Shoe and Leather Gazette of Dec. 10, 1903, referred to by the witness, containing at page 3 thereof

Hamilton, Brown Shoe Co.'s advertisement of this $12,000.00 prize story, and asks that the same be marked "Defendant's Exhibit, Shoe and Leather Gazette of Dec. 10, 1903".

Also the Shoe and Leather Gazette of Jan. 14th 1904, and January 21, 1904, particularly with reference to page 3 of each of these numbers of the Shoe and Leather Gazette, containing an advertisement of this prize story as well as American Lady and American Gentlemen shoes, this picture of George and Martha Washington dancing the minuet, and asks that the same be marked respectively "Defendant's Exhibit, Shoe and Leather Gazette, Jan. 14, 1904", and "Defendant's Exhibit, Shoe and Leather Gazette Jan. 21, 1904".

The last three copies of said Shoe and Leather Gazette just offered in evidence are contained in the bound volume marked on the back "Shoe and Leather Gazette, Vol. 40, July 30, 1903, Jan. 21, 1904".

At this point an adjournment was taken for lunch until 2:00 p. m.

Met pursuant to adjournment. Same parties present.

Q. 22. What, if anything, do you know of the hanger which I now show you which is a very large picture in colors, of George and Martha Washington, identical, except as to size, with the picture of George and Martha Washington on that 1904 catalogue of Hamilton, Brown Shoe Co. which was put in evidence by complainant, and marked "Complainant's Exhibit No. 10"? A. This is a picture the Hamilton, Brown Shoe Co. called their George and Martha hanger. The order for this picture was placed with Gray Lithograph Co. of New York by Hamilton, Brown Shoe Co. on May 14, 1904. I recall the date from the copy of the letter which is now before me and which I dictated and handed to Mr. A. D. Brown for his signature. That letter was dictated by me on May 14, 1904, and signed by Mr. Brown in my presence and was addressed

and mailed to Gray Lithograph Co., at New York City, N. Y., on May 14, 1904. I also produce a telegram dated at New York August 19, 1904, addressed to Hamilton, Brown Shoe Co. from the Gray Lithograph Co., which relates to the shipment of these identical pictures ordered May 14, 1904, and which also relates to the covers for those Hamilton, Brown Shoe Co's. 1904 catalogues with the George and Martha Washington picture thereon, that telegram as to its body being in the following words: "Will express George and Martha hangers today. Catalogue covers can not be completed until first week Sept." The hangers referred to in this letter and telegram were received by Hamilton, Brown Shoe Co. a few days after August 19, 1904, and in the month of August, 1904. We sent out 50,000 of these hangers to our customers throughout the U. S., covering every State in the Union with the possible exception of the New England States. and they were largely distributed in the States of Ohio, Indiana, Illinois, Missouri, Kentucky, and all the States and territories except the New England States.

Defendant's counsel offers in evidence the letter of May 14, 1904, to Gray Lithograph Co., from Hamilton, Brown Shoe Co., relating to the 50,000 copies of the George and Martha Washington showcard or hanger, and asks that the same be copied into the record and the letter itself marked "Defendant's Exhibit, Letter Ordering George and Martha Washington hangers".

Defendant's solicitor also offers in evidence the telegram dated at New York August 19, 1904, addressed to Hamilton, Brown Shoe Co. from the Gray Lithograph Co., the body of which has already been read into the record and which has been identified by the witness, and asks that the same be marked "Defendant's Exhibit, Telegram as to George and Martha Washington Hanger and Catalogue Cover".

Q. 23. I notice in small letters on this sample hanger referred to by you, which hanger I now introduce in evidence as "Defendant's Exhibit, George and Martha

Washington Hanger, Published August, 1904", the following words "Copyright 1904, Hamilton, Brown Shoe Co. of St. Louis". I now hand you a certificate of copyright certified to by Herbert Putnam, Librarian of Congress, by Thomas Sulberg, Registrar of Copyright, together with a photograph of this hanger, showing that this hanger was copyrighted by Hamilton, Brown Shoe Co. of St. Louis, on the 13th day of July, 1904, and ask you whether that copyright relates to this identical hanger? A. It does.

The said copyright with photograph and affidavit of photographer, all under the seal of the Librarian of Congress and of the Registrar of Copyright, are here introduced in evidence and marked "Defendant's Exhibit, Copyright of Martha and George Washington Chromo or Lithograph".

I now offer in evidence the following copies of the Shoe and Leather Gazette published at St. Louis, of October 15, 1903, containing at page 3 an advertisement of Hamilton, Brown Shoe Co. of "American Gentleman" shoe, at the bottom of which page advertisement are the words "A shoe with the character of the man"; Shoe and Leather Gazette published at St. Louis, Nov. 12, 1903, containing at page 3 thereof, a whole page advertisement of Hamilton, Brown Shoe Co. upon which appears in prominent letters the words, "We have embodied in the American Lady shoe 'The Character of the Woman'".

These copies of the Shoe and Leather Gazette are marked respectively, "Shoe and Leather Gazette, Oct. 15, 1903", and "Defendant's Exhibit, Shoe and Leather Gazette of November 12, 1903".

Q. 24. What do you know of these advertisements of of American Gentleman and American Lady shoes found respectively in the Shoe and Leather Gazette of Oct. 15, 1903, and Nov. 12, 1903, and of the phrase in the one "A shoe with the character of the man" and the phrase in the other "The character of the woman"? A. The first ad. in the Shoe and Leather Gazette of Oct. 15, 1903, is a reproduction of one of our Ameri-

can Gentleman hangers. The phrase at the bottom of the picture "A shoe with the character of the man" was originated by me and used in connection with this ad. I had at first intended to use in connection with American Lady and American Gentleman ads. the phrase "With the character of the individual", but afterwards decided to use in the men's ad. "With the character of the man" and in the woman's shoe ad. "With the character of the woman".

Q. 25. When did you first know or hear of The Wolf Brothers & Co., the complainant in this case? A. About a year and a half ago in conversation with Mr. W. C. Teasdale in his office at Hamilton, Brown Shoe Co., this was also the first time that I had heard of the American Girl shoe.

Direct examination closed.

Cross-Examination, by Mr. Hopkins.

XQ. 26. During the period between Oct., 1894, and March, 1901, when you were in the service of Hamilton, Brown Shoe Co. as traveling salesman, in what States did you travel? A. The Central and Southwestern part of Missouri. I also made one three weeks' trip in Southeast Kansas.

XQ. 27. Please name some of the towns you made in the States of Missouri and Kansas? A. Herman, Chamois, Jefferson City, California, Tipton, Sedalia, Clinton, Nevada, El Dorado Springs, Rich Hill, Butler. I worked the Missouri Pacific Railroad from Herman to Independence, Mo., and the M. K. & T. R. R. from Marthasville, Mo., to Nevada, Mo. In Kansas I worked Ft. Scott, St. Paul, Parsons, Iola, Yates Center, Wichita, Arkansas City, Winfield, and possibly several other points in Southeast Kansas.

XQ. 28. Prior to your employment as traveling salesman by the defendant, had you any experience as a traveling salesman? If so, in what territory? A. I had had six months' experience with the Hargadine-McKittrick Dry Goods Co. of St. Louis, Mo., in the

Central and Southwest Missouri territory mentioned above.

XQ. 29. In devising such advertisements as those in the Shoe and Leather Gazette to which your attention has just been directed did any other person in the employ of Hamilton, Brown Shoe Co. examine the copy which you sent to the printer? A. Yes. I would frequently submit the ads. to possibly one or two of the Directors when I first went to the Hamilton, Brown Shoe Co. in Jan. and Feb., 1904.

XQ. 30. Did you have occasion to consult Mr. A. D. Brown in regard to the contents of your advertisements? A. Very seldom.

XQ. 31. Do you recollect whether or not you consulted with him with regard to the advertisement in the Shoe and Leather Gazette of October 22, 1903? A. To the best of my recollection I did not.

XQ. 32. As you recall the matter now, the use of the expression "The shoe deserves its name", as embodied in that advertisement was inspired solely by the letter which you received from Miss Gracie Scott?

Mr. Bakewell: The question is objected to inasmuch as it segregates from the sentence in that advertisement only a few of the words contained therein.

A. Yes.

No further cross-examination.

Signature waived.

It is stipulated between counsel for defendant and counsel for complainant that in respect to any publication introduced in evidence heretofore in this case by the complainant bearing on their face a date of publication, that it is admitted that any such publication was published on the date appearing thereon.

It is stipulated between the counsel for defendant and counsel for complainant that in respect to each and all of the exhibits introduced in evidence by either party, whether already filed in court or not,

said exhibits shall remain in the possession of the counsel for the respective parties introducing them in evidence subject at any time to the inspection of the opposing counsel, with the understanding that the same shall be presented to the Court at the final hearing, to be then left with the Court until after the disposition of the case.

JOHN H. MURPHY,

a witness produced on behalf of the defendant, being first duly sworn, deposes and says:

Q. 1. Please state your name, age, residence and occupation? A. John H. Murphy, 46, St. Louis; I am in the stock and bond business.

Q. 2. Were you ever in the employ of the Hamilton, Brown Shoe Co. and if so please [state] between what years and in what capacity? A. Between 1884 and 1902. I was the advertising manager and manager of the rubber department, and one of the directors.

Q. 3. I now call your attention to three pairs of shoes that have been offered in evidence in this case, and marked "Defendant's Shoes, McElroy, A, B and C". I will ask you to state whether or not shoes similar to those shoes which I call your attention to, and marked as those shoes are marked, were manufactured by Hamilton, Brown Shoe Co. while you were connected with it? A. They were.

Q. 4. I now call your attention to the lid of the cartons in which those shoes are contained and ask you to state whether or not during the time that you were connected with Hamilton, Brown Shoe Co. lids labeled as these lids are labeled were used by Hamilton, Brown Shoe Co. in connection with this brand of shoes? A. They were.

Q. 5. Please state, if you know, when the name American Lady appearing on those shoes and cartons was adopted by Hamilton, Brown Shoe Co. for a brand of ladies' shoes? A. About the year 1900.

Q. 6. Please state all that you know with reference to the selection and adoption of this name by Hamilton,

Brown Shoe Co.? A. My recollection is this: About that time we had been trying to get a suitable name for our ladies' shoes, and Mr. McElroy one day brought to my attention this name American Lady, and asked me what I thought of it. It struck me as being a good name, and as I was getting out the advertising at that time we talked about getting up special advertising bearing that name. Mr. McElroy brought it to my attention, and in connection with the others of the crowd, we decided to adopt that name. That is about the way it came about.

Q. 7. Did you know when this name American Lady was brought to your attention that the name American Girl was being used in connection with shoes by a concern at Cincinnati, or by any one? A. I never did.

Q. 8. I now call your attention to a series of pictures that have been introduced in evidence in this case, and which it appears from the testimony of certain witnesses were used by the defendant in this case for the purpose of advertising, and will ask you to state what you know of those pictures and the purpose of Hamilton, Brown Shoe Co. in using those pictures? A. They were used for two purposes. One was to push ladies' shoes and the other to advertise their business. The main idea was to push the ladies' shoes. That is why we picked out a woman. I selected the pictures in connection with Mr. Brown, and they were picked out for those two purposes. We always had in mind to push the sale of our ladies' fine shoes. We usually figured on not less than 10,000 with the privilege of increasing five or ten thousand more. They were distributed to all our customers, to hotels, freight conductors, railroad conductors, hotels, and distributed thoroughly. We always got out at least 10,000.

Q. 9. Was it the idea of Hamilton, Brown Shoe Co. in using those pictures in the manner indicated by your last answer to call particular attention to the line of ladies' shoes marketed by Hamilton, Brown Shoe Co.? A. It was.

Q. 10. I now call your attention to a pair of shoes

and the carton in which they are contained, which have been offered in evidence in this case and marked "Box of American Gentleman Shoes". I will ask you to state when that line of shoes was first placed on the market by Hamilton, Brown Shoe Co.? A. I can't state the date, but it was subsequent to the date the American Lady was turned out, but before I left the company in 1902.

Q. 11. Was that line of shoes, the American Gentleman line, gotten out by Hamilton, Brown Shoe Co. as a companion line for the American Lady shoe? A. It was.

Direct examination closed.

No cross-examination.

Signature waived.

At this point an adjournment was taken until 10 o'clock a. m. Wednesday, May 15, 1907.

Met pursuant to adjournment, at 10:00 o'clock Wednesday, May 15, 1907.

Same parties present.

WILLIAM CAREY TEASDALE, JR.,

a witness produced on behalf of defendant, being first duly sworn, testified as follows:

Q. 1. Please state your name, age, residence, and occupation. A. William Cary Teasdale, Jr., age 35, residence St. Louis, I am treasurer of the Shoe Mart Company. I also act in an advisory capacity to the Board of Directors of Hamilton, Brown Shoe Co., being a stockholder in that company.

Q. 2. What is the business of the Shoe Mart Company? A. Retail shoe business.

Q. 3. What brands of shoes are handled by the Shoe Mart Co.? A. Many of the brands of Hamilton, Brown Shoe Co. but principally the American Lady and American Gentleman, also some Eastern brands.

Q. 4. What is the extent of your purchases of the American Lady and American Gentleman shoes from

Hamilton, Brown Shoe Co. as compared with the purchases of other customers of the Hamilton, Brown Shoe Co.? A. Our purchases are the largest of any of the customers of Hamilton, Brown Shoe Co.

Q. 5. Were you ever employed by Hamilton, Brown Shoe Co., and if so in what capacities and during what periods of time?

A. I was employed by Hamilton, Brown Shoe Co. June 15th, 1889, and was in their employ until September, 1906. I started working in the stock room. I remained in various positions in the stock department for three years. I then spent three years in the various departments of the office. Part of this time I was also a house salesman. I then spent nine years as a traveling salesman, in the territories of New Mexico, Arizona, Old Mexico, a few towns in Colorado, El Paso, Texas, and a few points in Southern California. I was appointed advertising manager in August, 1904, but had worked in that department since June of 1904, preparing our Annual Merchants' Catalogue. I had charge of the advertising department and acted in an advisory capacity at all Directory meetings during this period of time from August, 1904, to September, 1906, when I severed my connection with the advertising department.

Q. 6. Are you familiar with the business of the Hamilton, Brown Shoe Co.? A. I am.

Q. 7. Please give the names and locations of the various factories of the Hamilton, Brown Shoe Co., also the location of their executive office and warehouses. A. The executive office and warehouse is on the southeast corner of 12th and Washington avenue, in St. Louis. The American Lady factory is on the northeast corner of 21st and Locust streets, St. Louis. The American Gentleman factory is on the southeast corner of 21st and Locust streets. The Security factory is on the northeast corner of 21st and Olive streets. The Sunlight factory is on 8th, 9th and Marion streets. The Rugby factory is on 9th and Carroll streets. The Union factory is on Jefferson avenue and Randolph street. The Columbia factory, at Columbia, Missouri.

All except the Columbia factory at Columbia, Missouri, are situated at the City of St. Louis.

Q. 8. How many brands of shoes are manufactured by the Hamilton, Brown Shoe Co.? A. In excess of 150.

Q. 9. Please name a number of the principal brands. A. American Lady, American Gentleman, Highland Calf, Country Club, Vassar, Picnic, Watch Us, Hamilton, Granite Calf, Faith, Hope, Love, Security, Easy Walker, Success, Power.

Q. 10. Please give the capacity of the factories of the Hamilton, Brown Shoe Co. A. American Lady 7,000 pair per day; American Gentleman 7,000 pair per day; Security 4,000 pair; Sunlight, 20,000 pair; Rugby 2,000 pair; Union 10,000 pair; Columbia 6,000.

Q. 11. Please give the total amount of the sales of Hamilton, Brown Shoe Co. during the year 1906, also during the year 1905. A. 1906 in excess of eleven million dollars; 1905, in excess of nine million five hundred thousand dollars.

Q. 12. Who is the President of Hamilton, Brown Shoe Co. A. A. D. Brown.

Q. 13. To what extent does the business of Hamilton, Brown Shoe Co. permit of Mr. Brown's examining into and familiarizing himself with the details of its business?

Mr. Hopkins: Objected to as immaterial as Mr. Brown is not a party to this action.

A. Not to any great extent.

Q. 14. Have you made an investigation for the purpose of ascertaining the amount of money expended by Hamilton, Brown Shoe Co. in advertising its American Lady brand of shoes? A. I have.

Q. 15. What amount have you ascertained that they spent in advertising the American Lady brand of shoes prior to Jan. 1, 1906?

Mr. Hopkins: Objected to as immaterial.

A. From the records as near as I can ascertain, $150,000.

Q. 16. What amount was expended in that way from Jan. 1, 1906, up to May 1, 1907?

Mr. Hopkins: Objected to as immaterial.

A. From Hamilton, Brown's record, as near as I can ascertain, $110,000.

Q. 17. What means and methods have been adopted by Hamilton, Brown Shoe Co. in advertising the American Lady brand of shoes? A. Two methods have been adopted and used in the advertising of the American Lady shoe. One method in advertising to the merchants or dealer, the other in advertising direct to the consumers or wearer. Under the first method we advertise through the trade magazines or journals such as the Shoe and Leather Gazette, of St. Louis, the Boston Boot and Shoe Recorder, of Boston, and the Coast Shoe Reporter of San Francisco, the Drygoodsman of St. Louis. Also by direct solicitation through the mail, in the way of circulars, catalogues, etc.

The second method, in advertising to the wearer we use the standard magazines such as the Ladies' Home Journal, the Delineator, Woman's Home Companion, by booklets sent direct to the consumer, through newspapers, large hangers, signs, including fence signs, bill posters, billboards, street car cards, transparencies, purses, mirrors, gold shoes, signs on the sides of shoe cases, etc.

Q. 18. As an advertising man familiar with advertising business, please state what is the estimate as to the number of times the advertisement in one of the standard magazines such as you have mentioned is read?

Mr. Hopkins: Objected to as calling for a wholly speculative answer.

A. Conservative publishers claim that each advertisement inside the covers of a magazine is read three times to each one of the circulation. The outside covers are read from five to ten times to each one of the circulation.

Q. 19. You have mentioned the Ladies' Home Journal, the Woman's Home Companion and the Delineator

as being among the standard magazines in which Hamilton, Brown Shoe Co. advertise the American Lady shoe. Please state what the circulation of each of those magazines is, or what it is represented to the advertisers to be. A. The Home Journal claims a circulation of twelve hundred thousand; the Delineator claims a circulation of a million, and the Woman's Home Companion claims a circulation of five hundred thousand.

Q. 20. I now call your attention to a copy of the Ladies' Home Journal dated September, 1906, and will ask you whether or not the advertisement on the back cover of this magazine is one of the advertisements referred to in your former answers? A. It is.

Q. 21. Please state what would be the expense to the Hamilton, Brown Shoe Co. of that advertisement? A. The Home Journal charged $5,000 for the back cover of this magazine in which our advertisement appears. We paid this amount plus the cost of preparation for cuts, art work, etc. $500. The total cost $5,500, for this one issue.

Q. 22. What was the expense to Hamilton, Brown Shoe Co. of inserting in the Woman's Home Companion the advertisement of which I now hand you a copy, and also state when that advertisement appeared in the Woman's Home Companion? A. The cost of the advertisement before me on the back cover of the Woman's Home Companion of March, 1905, was $2,000.

The copy of the Ladies' Home Journal referred to by the witness, is offered in evidence by defendant and marked "Defendant's Exhibit, Ladies' Home Journal, September, 1906".

The advertisement referred to by the witness as having appeared in the Woman's Home Companion of March, 1905, is offered in evidence by defendant, and marked "Defendant's Exhibit, Woman's Home Companion, March, 1905".

Q. 23. I now hand you a number of pages bound together and will ask you to state what those are? A. These pages contain the record of proofs of the magazine advertisements which Hamilton Brown Shoe Co.

placed through what was then The Lesan Company, and are taken from their records, showing the advertising and extent of this advertising in the standard magazines of the United States, of American Lady and American Gentleman shoes; also some newspaper advertising which was placed through them.

Q. 24. You have spoken of the Delineator. Please state what it cost Hamilton, Brown Shoe Co. to insert a back cover advertisement in the Delineator such as bears the number 59 in this Lesan Company record? A. Five Thousand Dollars without cost of preparation.

Q. 25. Is the number 59 referred to a back-cover advertisement, which appeared in the Delineator? A. It is the back cover ad. which appeared in what is known as the Butterick Trio, which includes the Delineator, the Designer, and the New Idea magazines.

The pages of advertising matter referred to by the witness are offered in evidence by defendant, and marked "Defendant's Exhibit, The Lesan Company's Record".

Q. 26. I now call your attention to a pair of shoes and the carton in which they are contained and which have been offered in evidence here and marked "Box of American Gentleman Shoes". Please state if you know when that brand of shoes was gotten out by Hamilton, Brown Shoe Co. A. I do. It was gotten up in the Spring of 1901.

Q. 27. Do you know whether or not it was gotten out as a companion shoe for the American Lady brand of shoes? A. It was gotten out as a companion line six months after the introduction of American Lady, or the season following.

Q. 28. Have you made an investigation for the purpose of ascertaining the value of the American Lady shoes sold by Hamilton, Brown Shoe Co. up to and including Jan. 1, 1906? A. I have.

Q. 29. Please state what was the value of the shoes so sold? Also the number of pairs sold? A. The value was one million six hundred and sixty-seven thousand

eight hundred and forty-three dollars and eighty cents, representing 833,652 pairs.

Q. 30. Have you made an investigation for the purpose of ascertaining the total sales of the American Lady shoe from Jan. 1, 1906 to May 1, 1907? If so, please state. A. I have. Our records show sales of $1,808,271.09 of the American Lady shoe during the year 1906 and up to May 1, 1907, representing 907,820 pairs.

Q. 31. Have you made an investigation for the purpose of ascertaining the total sales of the American Gentleman shoe up to the present time, and the number of pairs sold?

Mr. Hopkins: Objected to as irrelevant and immaterial.

A. I find the sale of the American Gentleman shoe is just about equal that of the American Lady in the number of pairs made, but that the value is a little more it being sold at a higher price.

Q. 32. At what price was the American Lady shoe sold to dealers when it was first put on the market? A. The high cut shoes known as boots were sold at $2.25 to dealers, with no discount. The low cuts or oxfords were sold at $2.00

Q. 33. What is the regular retail price of the American Lady shoe and what has it been since that shoe was first placed upon the market? A. The retail price for the high cut or boot has always been advertised at $3.00 and $3.50. The low-cuts or oxfords and slippers $2.50 and $3.00

Q. 34. I now call your attention to a pair of shoes which has been offered in evidence by complainant and marked "Complainant's Exhibit No. 19", and which an officer of the complainant company testified that he purchased for $1.15. I will ask you to state whether or not that pair of shoes is a fair sample of the American Lady shoes or oxfords and if that pair of shoes was sold by Hamilton, Brown Shoe Co. in the regular and ordinary manner, and I will ask you to give the reasons

for your answer. A. It is not a fair sample of the American Lady shoes which we make and sell. It was not sold in the ordinary manner in which the American Lady shoes are sold. In every shoe factory a certain number of shoes are damaged in the making. Hamilton, Brown Shoe Co. punch or mark all of their damaged shoes. These shoes are then sold at a cut price or reduced figure. The reason for marking or punching them is to let people know that the article is not perfect and also so that in case a claim should be made against Hamilton, Brown Shoe Co. there would be marks on the shoe to indicate that they were not sold as perfect goods.

Q. 35. Please point out the defects which you say exist in this shoe and the punch marks appearing in these shoes, if such shoes have been punched. A. On the left shoe I note that the patent leather over the toe is cracked. On the right shoe, on the inner side of the toe, near the sole, the patent leather has been cracked. The punch marks denoting that they are damaged shoes you will find on the top strap to which the button is fastened.

Q. 36. I now call your attention to "Complainant's Exhibit No. 10", which appears to be a catalogue of Hamilton, Brown Shoe Co., and will ask you to state whether or not the prices quoted on the American Lady shoe, illustrated in this catalogue, are the wholesale or retail prices. A. The prices in this catalogue before me are the wholesale prices to merchants and dealers.

Q. 37. Referring to "Exhibit No. 6, Accompanying the Bill", which appears to have been published by Hamilton, Brown Shoe Co. under the title "Shoelight", I will ask you to state whether or not that booklet was intended for circulation among the wearers of shoes, and whether or not the price quoted on the American Lady shoe illustrated in that catalogue is the retail price? A. The retail prices in this little booklet, "Shoelight", are the only prices quoted. It was intended for circulation among the consumers and wearers of shoes.

Q. 38. Complainant offered in evidence two booklets or catalogues which it identified as "Exhibit, No. 2, Accompanying the Bill", and "Exhibit, No. 4, Accompanying the Bill". At page 6 of Exhibit, No. 2, Accompanying the Bill is shown an illustration of a shoe accompanied by the number "407", also a shoe accompanied by the number "408". At page 30, of Exhibit No. 4, accompanying the bill, there appears a cut of a shoe accompanied by the number "404", and at page 31 of this exhibit there appears a cut of a shoe accompanied by the number "403". It is contended by complainant that it was the first to use those numbers in this manner and that the Hamilton, Brown Shoe Co., as a means of pirating upon the complainant, has copied those numbers in its catalogues, especially with reference to "Complainant's Exhibit No. 10", and "Exhibit, No. 6, Accompanying the Bill". What do you know of the origin and publication of the catalogue marked "Complainant's Exhibit No. 10", and the numbers used therein? A. As I made the entire catalogue with the exception of the cover, I know all about the origin and the publication and also the numbers in that catalogue. When I came off of the road from one of my trips in June, 1904, I was asked by Mr. A. D. Brown if I would not help to get up the catalogue for merchants which was to come out the Fall of that year. I told him if he would give me entire charge of it I would do so. This he did, and I immediately started to work on it. The numbers given to these shoes or styles I placed on them myself at least thirty to sixty days prior to the time the book was ready to be mailed. It was the first catalogue that I had ever undertaken to make and as I had my way absolutely as to its construction I started numbering the men's shoes with No. "1" as I put these shoes into the catalogue first.

After running the numbers for men's shoes to 273, I started in with the boys' shoes at 280. They consumed the numbers up to 332. I then started our ladies' shoes with 400 and used these numbers up to 486. I then started the children's shoes at 500, and used those up

to 580. I then started the women's low cut shoes at 600 and used those up to 691.

The reason that there were some numbers lacking between some of the lines of men's, women's and children's shoes was because I figured that these blank numbers would take care of the additional styles that would probably be added when the next catalogue was made, and that the numbers on the men's shoes could be kept together, and those on the women's shoes could be kept together so as to make the numbering more regular and uniform.

At this point an adjournment was taken for lunch until 2:00 o'clock.

Met pursuant to adjournment. Same parties present.

Q. 40. Please state whether or not the numbers as used in that catalogue had ever been used in a similar manner prior to that time, to your knowledge? A. They were never used to my knowledge, never having examined the numbers of other catalogues.

Q. 41. Please state when this catalogue, "Complainant's Exhibit No. 10" was issued? A. This catalogue was issued by Hamilton, Brown Shoe Co. the latter part of October, or the first of November, 1904.

Q. 42. I now hand you two slips of paper and will ask you to state what they are? A. These slips of paper before me are memorandums of catalogue covers shipped to us by the Gray Lithograph Company of New York September 30th and October 14th, 1904.

Q. 43. Do they refer to the covers for the catalogue of which "Complainant's Exhibit No. 10" is a copy? A. They do.

Q. 44. Do those memorandums enable you to fix the date when the catalogue similar to "Complainant's Exhibit No. 10" were issued? A. They do.

The memorandums identified by the witness are offered in evidence by defendant, and marked "Gray Lithograph Company's Freight Memorandum A and B", respectively.

Q. 45. Please state whether or not the system of numbering used in the catalogue identified as "Complainant's Exhibit No. 10" and in which you used the numbers "403", "404", "407", and "408" complained of proved satisfactory? A. Immediately after this catalogue was finished, being my first attempt, I saw that our present system of numbering could not be used satisfactorily owing to the heavy expansion of our business, and that a new system would have to be adopted on the next annual catalogue for merchants.

Q. 46. Please state whether or not the numbers complained of were again used by the Hamilton, Brown Shoe Co. in a catalogue or booklet? And if so, state when? A. We used the style numbers applied to the American Lady shoes again in a little booklet which we issued on these American Lady shoes to the consumer or wearer. This booklet was issued some time in March, 1905. I here produce a copy of this little booklet. They were again used in a booklet which was prepared some time during the month of April or May, and sent to the trade during the month of August, with some additional styles and numbers which we had added to the line.

Q. 47. I now call your attention to "Exhibit No. 6, Accompanying the Bill", and ask you to state whether or not it is one of the booklets last referred to by you? A. It is.

> The booklet produced by the witness and identified by him as having been issued by Hamilton, Brown Shoe Co. in March, 1905, is offered in evidence by defendant, and marked "Defendant's Exhibit, Shoelight, March, 1905".

Q. 48. Please state from what the numbers used in "Defendant's Exhibit, Shoelight, March, 1905", which you say was issued in March, 1905, and the numbers appearing in "Exhibit No. 6, Accompanying the Bill", which you state was issued in August, 1905, were taken? A. All of the numbers in the little booklet issued in March, 1905, were taken from the large merchants' annual catalogue which we had already issued in the latter part of October or first of November, 1904,

as was also all of the numbers in the little booklet issued some time in August of 1905, with the exception of some additional styles which we had added to the line after the issuing of our large merchants' annual catalogue.

Q. 49. I now call your attention to the fact that in "Exhibit No. 6, Accompanying the Bill" several numbers are used which are under 400, and will ask you to explain the use of those numbers, you having previously stated that the numbers above 400 were adopted by you for use in connection with your ladies' shoes. A. The new styles which were added to the American Lady line after the issuing of the large merchants' catalogue of 1904, and prior to the making or formation of the merchants' annual catalogue of 1905, I decided to number as near as possible to those numbers given the American Lady shoes, and finding vacant the numbers immediately less than 400, such as 399, 398, 397, 396 and 395, I gave them those numbers.

Q. 50. What system of numbering was adopted by Hamilton, Brown Shoe Co. for their next annual catalogue following "Complainant's Exhibit No. 10"? A. We adopted an entirely new system. As I stated before, after the publication of the catalogue of 1904 I found it would not meet with the expansion of the business, and I decided immediately that the next catalogue would have to be made up with a different system, giving each factory a thousand numbers to work with, so that the stock numbers could be used on the same styles of shoes as long as we made those shoes, and also so that it would help our order department in knowing which factory the goods were from.

Q. 51. I now hand you what appears to be a catalogue of the Hamilton, Brown Shoe Co. which bears upon its cover page the words "For Merchants 'Shoelight' Hamilton, Brown Shoe Co.", and will ask you to state what this is? A. This is the merchants' annual catalogue styled Shoelight No. 2, published the latter part of October, 1905, and mailed to over thirty thousand merchants, which is the first merchants' catalogue

following the issuance of "Complainant's Exhibit No. 10".

Q. 52. Was the new system of numbering which you state was decided upon immediately following the issuance of the catalogue marked "Complainant's Exhibit No. 10" used in this 1905 catalogue? A. It was.

Q. 53. If the system of numbering used in the catalogue of 1905 was decided upon immediately following the issuance of catalogue marked "Complainant's Exhibit No. 10" in the latter part of 1904, why is it that the same system of numbering which appears in "Complainant's Exhibit No. 10" was used in "Defendant's Exhibit, Shoelight, March, 1905", and again in "Exhibit No. 6, accompanying the Bill" issued in August, 1905? A. It was not possible to change our system until we were able to do it as a whole. The stock numbers used under the old system in this catalogue of 1904 were never put onto the cartons or shoes we manufactured, and no numbers were put onto these shoes except the serial factory number, until the new system went in in 1905. The booklets following the catalogue of 1904 and prior to the issuing of the catalogue in 1905 bore the stock numbers of the 1904 catalogue with the exception of those few additional numbers which we added between seasons, in order to help the merchants in identifying the requests of their customers for the American Lady shoes.

The catalogue identified by the witness as having been issued by Hamilton, Brown Shoe Co. in the latter part of October, 1905, is here offered in evidence by defendant, and marked "Defendant's Exhibit, 1905 Catalogue".

Q. 54. I now call your attention to a booklet which has been offered in evidence as "Complainant's Exhibit No. 7", and will ask you to state whether or not it was issued by the Hamilton, Brown Shoe Co. following the issuance of "Defendant's Exhibit, 1905 Catalogue" in the same manner in which "Defendant's Exhibit, Shoelight, March, 1905", and "Exhibit No. 6,

Accompanying the Bill", were issued, and if the numbers used in this booklet are taken from "Defendant's Exhibit, 1905, Catalogue"? A. It was issued in the same manner, and the numbers were taken from the merchants' 1905 catalogue.

Q. 55. Prior to the issuance of "Complainant's Exhibit No. 10", "Defendant's Exhibit, Shoelight, March, 1905", and "Exhibit No. 6, Accompanying the Bill", were you aware of the fact that there was a manufacturer of shoes doing business under the name of Wolf Brothers & Co. or The Wolf Brothers & Company at Cincinnati, O.? A. I was not aware of this fact.

Q. 56. When did you first become aware of that fact? A. It must have been some time in the early part of May, 1905.

Q. 57. What enables you to fix the date as the early part of May, 1905, and please explain the circumstances under which you first became aware of this fact. A. One of the Hamilton, Brown Shoe Co's salesmen came into the advertising office one day with a copy of the Boot and Shoe Recorder of Boston, Mass., and showed me an advertisement which appeared on page 76 by Wolf Brothers & Co. of Cincinnati, warning infringers of the American Girl shoe that they would be vigorously prosecuted. The salesman asked me who I thought they were referring to, and I told him I did not know, that it was possibly an advertising scheme. That was my first knowledge that there was a Wolf Brothers & Co. at Cincinnati, or that there was an American Girl shoe on the market.

Q. 58. Is the copy of the Boot & Shoe Recorder dated April 26, 1905, which is now before you the copy to which your attention was called at that time? A. It is.

The copy of the Boot & Shoe Recorder identified by the witness and which contains at page 76 thereof a "Warning" over the name Wolf Brothers & Co. is here offered in evidence, particularly with reference to page 76 thereof, and marked "Defendant's Exhibit, Boot & Shoe Recorder April 26, 1905".

Q. 59. Did it occur to you at the time your attention was called to this ad. that Hamilton, Brown Shoe Co. was the party referred to therein?

Mr. Hopkins: Objected to as immaterial as the possible obtuseness of the witness cannot constitute a defense in this case.

A. It did not.

Q. 60. Please state whether or not the Hamilton, Brown Shoe Co. does any advertising aside from the advertising which it devotes to its American Lady and American Gentleman brands of shoes. A. We do an immense amount of advertising in addition to what is spent in advertising the American Lady and American Gentleman shoes, probably as much as any house in the United States spends on a general line.

Q. 61. Does the American Lady brand of shoes also derive benefit from this general advertising which is done by Hamilton, Brown Shoe Co.? A. It does.

Q. 62. I now call your attention to a number of pictures which it appears from the testimony in this case Hamilton, Brown Shoe Co. distributed commencing with the year 1889, and extending up to 1900, the same being pictures of women which it has been testified were sent out to the trade and to customers of Hamilton, Brown Shoe Co. Please state what you know of those pictures and their use by Hamilton, Brown Shoe Co. A. I know that these pictures in quantities of ten thousand or more were sent out during the various years, advertising primarily their own make of ladies' shoes, and secondarily, the business in general, to customers, prospective customers, to hotels, railway stations, and other public places.

Q. 63. State what you know as to the purpose and object of Hamilton, Brown Shoe Co. in using those pictures in the manner indicated by your last answer. A. The object was to make better known and push the sale of their own make of ladies' shoes, which were the first shoes they ever started to make. This was the

primary reason. The secondary reason was to advertise their business in general with these pictures.

Q. 64. What do you know of the adoption and use by Hamilton, Brown Shoe Co. of the name "American Lady" as applied to shoes? A. I was the first man to insist that the new line of ladies' shoes which we were about to bring out be given a name. The name American Lady was given to this line while I was away, and it was the natural evolution and sequence that this name American Lady would be applied to the new line of shoes inasmuch as for years we had been getting out pictures of American women advertising ladies' shoes.

Q. 65. Please state why, if you know, this new brand of shoes was being got out by Hamilton, Brown Shoe Co.? A. Prosperous conditions throughout the country made a demand for higher grade shoes. Our advertising prior to the adoption of the American Lady shoe had been largely applied to the promotion of what was known as our women's $2.50 shoe. We found it necessary owing to this prosperous condition, to make and advance a better line of shoes to meet the popular demand, which is the reason for putting out and advertising the American Lady shoe.

Q. 66. Have you been instrumental in the development of this line of shoes since it was first placed on the market? A. I have. I am largely responsible for the methods in advertising it even prior to the time that I took the advertising position.

Q. 67. Please state what you know in regard to the use of the name "Hamilton, Brown Shoe Co." in connection with the name "American Lady" as applied to shoes by Hamilton, Brown Shoe Co.? A. We have always considered the name Hamilton, Brown Shoe Co. the greatest asset of the business. We considered when we put out the American Lady shoe that the name Hamilton, Brown Shoe Co. accompanying it in all the advertising matter would give it standing, character and guarantee of its worth, and we have seldom and never knowingly advertised the American Lady

shoe without the name Hamilton, Brown Shoe Co. accompanying it.

Q. 68. I now call your attention to a pair of shoes which have been offered in evidence in this case as "Complainant's Exhibit, American Girl Shoes", and which an officer of the complainant company testified were a specimen pair of the shoes sold by the complainant under the name "American Girl", and will ask you to state how those shoes compare with the two pairs of shoes which I now show you and which Mr. J. F. Hudson testified were fair samples of those manufactured and sold by the complainant under the name "American Girl", and which have been offered in evidence in this case as "Defendant's Exhibit, American Girl Shoe, Hudson A" and "Defendant's Exhibit, American Girl Shoe, Hudson B". A. They (the Hudson shoes) are much cheaper shoes than the pair of shoes marked "Complainant's Exhibit, American Girl Shoes". The latter are not in the same class whatever with the two pair submitted to Mr. Hudson as fair samples of the shoes manufactured by The Wolf Bros. & Co. called the American Girl shoe.

Q. 69. Please state what you know as to the policy of the Hamilton, Brown Shoe Co. in employing traveling salesmen:

Mr. Hopkins: Objected to as immaterial.

A. As I have been instrumental in employing a number of the traveling salesmen for Hamilton, Brown Shoe Co., I know they are employed first on their character and standing as a man, and second on their ability as salesmen, as to the quantity of goods they may have sold for other parties.

Q. 70. Do they employ salesmen for the purpose of handling or selling one of their special lines of shoes, or by reason of the fact that such salesmen might represent himself as being peculiarly fitted to push the sale of one of their special lines of shoes?

Mr. Hopkins: The question is objected to as immaterial.

A. We only hire salesmen to sell goods on their ability to sell goods without regard to the special brands.

Q. 71. Please state what you know of the policy of Hamilton, Brown Shoe Co. in conducting its advertising, in any effort which it may make to distinguish the goods advertised by it as its own.

Mr. Hopkins: Objected to as immaterial and because we are here concerned only with what the defendant has actually done.

A. It has been the policy, and is at the present time, of Hamilton, Brown Shoe Co. to conduct their advertising and business methods along original lines, along lines that show individuality and character, and they have been largely responsible for the peculiar method which has been used in developing St. Louis as the great western shoe market.

Q. 72. I now call your attention to a picture which has been identified as "Defendant's Exhibit, Gracie Scott Picture", and ask you to state what you know of that picture? A. I know that that picture was selected as the souvenir picture for the year, 1901, and was selected either a little prior to or about the time of the adoption of the new line of ladies shoes; and after the adoption of the name American Lady was decided upon for this new line of shoes it was also decided owing to the rare beauty of the picture to associate it on the box cover so long as we made this line of shoes.

Q. 73. Was the use of this Gracie Scott picture in the manner indicated by this "Defendant's Exhibit, Gracie Scott Picture" along the same lines and in the same manner as that of the pictures issued prior to that time? A. It was, only to a much greater extent. Prior to that time we had been issuing about ten thousand pictures or hangers annually; and of this picture we issued nearly or quite one hundred and fifty thousand copies in colors.

Q. 74. Please state what you know in regard to the use of this picture on the lids of the boxes of American Lady shoes such as is shown in "Defendant's Shoes,

McElroy A". A. I know that this picture is used on the box of all our American Lady shoes, both now and in the past. I did not suggest its use but its use was undoubtedly suggested by the fact that we had always associated our ladies' shoes or ladies' shoes of our own manufacture with the picture of a woman, and hence its natural adoption owing to the beauty of the picture as a label on the box for the American Lady shoe.

Q. 75. In answer to Q. 27 you stated that the American Gentleman brand of shoes was gotten out the season following the adoption of the American Lady brand of shoes. Into how many seasons is the year divided A. Two seasons—the Fall and Spring.

Defendant's counsel now offers in evidence the file wrapper and contents of trade-mark registration No. 43,640, dated Nov. 8, 1904, for the name American Lady as applied to shoes by Hamilton, Brown Shoe Co., and asks that the same be marked "Defendant's Exhibit, American Lady File Wrapper and Contents".

Direct examination closed.

Cross-Examination, by Mr. Hopkins.

XQ. 76. I hand you a rectangular card bearing the picture of a lady of rare beauty, the words American Lady and the figures $2.50, together with the belt mark containing the words Hamilton, Brown Shoe Co., largest in the world. I ask you, if you can, to identify this card, and if so to state what it is. A. I identify this card as being one of a series of price tickets sent to customers of Hamilton, Brown Shoe Co., who handled our American Lady shoes and oxfords or low-cuts. In this series there were three sets of prices, $2.50, $3.00 and $3.50. This $2.50 American Lady price ticket was for the oxfords or low-cuts which were sold at a less price than the high-cuts, to the merchant, and which he retailed at $2.50 and $3.00.

The card identified by the witness is offered in evidence by complainant, with the request that the

same be marked "Complainant's Exhibit, Teasdale Cross-Examination Exhibit No. 1".

XQ. 77. In selling American Lady shoes of the type and grade indicated by Complainant's Exhibit No. 19 are price tickets furnished to the purchaser? A. Not always.

XQ. 78. Are the damaged and inferior American Lady shoes such as are illustrated by "Complainant's Exhibit No. 19" sold by the defendant in the condition that this exhibit pair of shoes appears, and without obliteration of the American Lady imprint on the soles? A. They are.

No further cross-examination.

Signature waived.

At this point an adjournment was taken until 4:00 o'clock May 17, 1907.

Met pursuant to adjournment, at 4:00 o'clock Friday, May 17, 1907.

Same parties present as before.

JACOB L. SELIG,

a witness produced on behalf of the defendant, being first duly sworn, testifies as follows:

Q. 1. Please state your name, age, residence and occupation. A. Jacob L. Selig, 34 years, residence Peoria, Illinois, traveling salesman for the Hamilton, Brown Shoe Co.

Q. 2. Were you ever in the employ of Wolf Bros. & Co. or The Wolf Brothers & Co. of Cincinnati, O.? A. Yes, sir.

Q. 3. During what period of time and in what capacity? A. Part of 1900 and 1901, as traveling salesman.

Q. 4. Do you know whether or not a person named Julius L. Selig was in the employ of Wolf Brothers & Co. about that time? A. There is no Julius L. Selig, but Jacob L. Selig.

Q. 5. An officer of the complainant company testified that at about that time they employed a man named

Julius L. Selig as a traveling salesman in the State of Illinois. Are you the party who thus represented Wolf Brothers & Co.? A. Yes.

Q. 6. What line of goods did you handle when representing Wolf Brothers & Co.? A. Wolf Brothers' line of shoes.

Q. 7. Did you sell any particular brand of shoes and if so state what brand you sold. A. American Girl brand.

Q. 8. In what territory did you represent Wolf Brothers & Co.? A. The entire State of Illinois, and part of Iowa.

Q. 10. Was the American Girl brand of shoes which you sold for Wolf Brothers & Co. advertised, and if so please state in what manner? A. It was not advertised very much. First we did not have any advertising when I first went out and towards the latter part they had a magazine "Our Girl".

Q. 11. I now call your attention to "Complanant's Exhibit, Our Girl", and will ask you to state if you recognize it as a copy of the magazine referred to in your last answer, and if so please state the manner in which it was distributed. A. They were supposed to be distributed by mail direct to customers but instead of that they sent them by express to customers, supposed to be prepaid, but they were sent to the customers C. O. D. That was done just for two or three times. This is a copy of the magazine.

Q. 12. Do you know whether or not the magazine was distributed to the retail trade when received by the retailers? A. I don't know that they were distributed; they were used more as wrapping paper. In lots of cases they were supposed to print the dealers' names, but not one case in ten was the name of the dealer inserted in the space.

Q. 13. Do you know of any case in which the dealer refused to accept the magazine after it had been forwarded to him in the manner previously described by you? A. There were several instances where dealers refused to accept the magazine when they came charges

collect. Several cases I paid the express charges myself so that the dealer would accept the magazine.

Q. 14. I now call your attention to a pair of shoes which has been offered in evidence in this case as "Complainant's Exhibit, American Girl Shoes", and will ask you to state whether or not the shoes which you sold for Wolf Brothers & Co. under the brand "American Girl" were of the kind or class, quality and price, as well as grade, represented by this pair of shoes which I now show you.

Mr. Hopkins: Objected to as immaterial.

A. This is far above the average sample, and at the time they never branded an American Girl shoe higher than $2.50.

Q. 15. Referring now to "Complainant's Exhibit, American Girl Shoes", I will ask you to state how that shoe compares with the two pairs of shoes which I now show you and which are marked "Defendant's Exhibit, American Girl Shoes, Hudson A" and "Defendant's Exhibit, American Girl Shoes, Hudson B", respectively, and which it appears from the testimony in this case are fair samples of the shoes sold by the complainant under the name American Girl.

Mr. Hopkins: Objected to as immaterial.

A. These are just fair samples of the shoes the way they came when I was in the territory, I refer to the Hudson A and Hudson B shoes. That shoe is 100% better than these shoes. By "that" shoe I refer to "Complainant's Exhibit, American Girl shoes".

Q. 16. Please state whether or not the American Girl shoes sold by you when in the employ of Wolf Brothers gave satisfaction.

Mr. Hopkins; Objected to as immaterial.

A. They did not give satisfaction. I had over 50% of the shoes I sold returned, not coming up to the samples.

Q. 17. Were there any cases in which the entire order was returned because they did not come up to the samples?

Mr. Hopkins: Same objection.

A. Very many cases, about 50% of them were returned.

Q. 18. When did you enter the employ of Hamilton, Brown Shoe Co.? A. March, 1902.

Q. 19. Please state the circumstances under which you entered the defendant's employment. A. I met one of Hamilton, Brown Shoe Co.'s salesmen, Johnnie Hockmuth, and he spoke of a change in the Northern Illinois territory. I came into St. Louis and made application at Hamilton, Brown Shoe Co. for the territory.

Q. 20. To whom did you apply for your position with the Hamilton, Brown Shoe Co.? A. A. D. Brown, President of Hamilton, Brown Shoe Co., and also the Directors.

Q. 21. Please state what, if anything, was said at that time with reference to your experience as a shoe salesman. A. They asked me my experience as a shoe salesman, and how many goods I had been selling in my territory.

Q. 22. Was anything said at that time in regard to the fact that you had been selling American Girl shoes? A. There was nothing said at all.

Q. 23. Please state what territory you were assigned to when you first entered the employ of defendant, Hamilton, Brown Shoe Co. A. Northern Illinois.

Q. 24. How did the territory in which you were assigned to represent Hamilton, Brown Shoe Co. compare in extent with the territory in which you had previously represented Wolf Brothers & Co.? A. It was just about one-third of the territory I used to travel for Wolf Brothers.

Q. 25. Did you carry a line of shoes branded with the name American Lady when you were representing Hamilton, Brown Shoe Co.? A. I had Hamilton, Brown's full line with four or five samples of American Lady shoes.

Q. 26. Did you make a specialty of the American Lady or did you handle Hamilton Brown's general line of shoes when you went on the road for Hamilton,

Brown Shoe Co.? A. I made a specialty of Hamilton, Brown's general line, but not of any particular brand.

Q. 27. Did Hamilton, Brown Shoe Co. at that time, make any particular effort to sell the American Lady brand of shoes? A. Not any more so than they did of other lines they had.

Q. 28. At the time that you were employed by Hamilton, Brown Shoe Co. were any questions put to you as to your ability to sell American Lady shoes aside from your general ability as a shoe salesman? A. It wasn't mentioned.

Q. 29. Did you make any effort to divert the trade of Wolf Brothers, in the territory in which you were representing them previously, to Hamilton, Brown Shoe Co.? A, I did not.

Q. 30. I now call your attention to the advertisement appearing upon the back cover of the magazine marked "Complainant's Exhibit, Our Girl", which calls particular attention to the fact that the price of the American Girl shoe is $2.50, and that that brand is stamped on the shoes themselves, and will ask you to state if that is a sample of the advertising matter which appeared in all of the editions of the Our Girl magazine? A. Yes, sir.

Q. 31. Did Wolf Brothers & Co. manufacture an American Girl shoe to retail at a larger price than $2.50 at the time you were in their employ?

Mr. Hopkins: Objected to as immaterial and irrelevant.

A. They did not.

Q. 32. At what price did the oxfords or low-cuts sold under the name American Girl sell at retail?

Mr. Hopkins: Same objection.

A. At $2.00.

Q. 33. Did any oxfords or low-cut shoes branded "American Girl" retail for more than $2.00 at that time?

Mr. Hopkins: Same objection.

A. They did not.

Direct examination closed.

Cross-Examination, by Mr. Hopkins.

XQ. 34. What was the date of your first communication with Hamilton, Brown Shoe Co. in regard to securing a position with them. A. A short time previous —previous to March, 1902.

XQ. 35. In what year was it? A. In 1902.

XQ. 36. Was that first communication verbal or in writing? A. Verbal.

XQ. 37. Was it the same occasion to which you referred on your direct examination when you talked with Mr. A. D. Brown? A. It was.

XQ. 38. Who else was present at that conversation? A. When I was in the house the conversation was with Mr. Brown and the Directory.

XQ. 39. How many Directors were present besides Mr. Brown? A. To the best of my recollection there were five Directors, and C. W. Moore, A. D. Brown's Private Secretary.

XQ. 40. Please name those five Directors? A. Horace Brady, Chauncy Ladd, J. M. Sloan, Will Sloan and Mr. McElroy.

XQ. 41. Can you fix the month in which this conversation occurred? A. Some time prior to March, 1902.

XQ. 42. Can you fix the month in which this conversation occurred? A. To the best of my knowledge it was some time prior to March, 1902.

XQ. 43. You were still in the employ of Wolf Brothers & Co. at that time were you not?

Mr. Hart: The question is objected to as immaterial.

A. I was.

XQ. 44. What was the last town you visited for Wolf Brothers & Co. before coming to St. Louis on the occasion when you had this conversation? A. I don't remember,

XQ. 45. Prior to the time of this conversation had

you ever had any conversation with with Mr. A. D. Brown? A. I did not.

XQ. 46. Have you ever given a different version of this interview than the one you have here testified to here today? A. Not to my knowledge or recollection.

XQ. 47. After entering the employ of Hamilton, Brown Shoe Co. did you visit any of the cities in Northern Illinois in their behalf which you had formerly visited for Wolf Brothers & Co.? A. I did.

XQ. 48. Did you visit the same shoe dealers in Northern Illinois that you had called on for Wolf Brothers? A. I called on a better class of trade than I had been selling to for Wolf Brothers.

XQ. 49. Did you visit any of the same shoe dealers in Northern Illlinois whom you had formerly visited for Wolf Brothers & Co.? A. In some towns I did.

XQ. 50. Did you offer the American Lady shoes to any of the same dealers to whom you had previously sold the American Girl shoes? A. I offered them Hamilton, Brown's shoes.

XQ. 51. Did you sell any of the American Lady shoes to dealers to whom you had previously sold the American Girl shoes? A. I may have sold them American Lady shoes, but I pushed Hamilton, Brown's general line.

XQ. 52. At the conversation with Mr. A. D. Brown and his satellites at which you were employed, are you positive that no reference was made to the American Girl shoe? A. I am positive that there was no mention made of the American Girl shoe.

XQ. 53. When did you have the conversation with Mr. John Hockmuth, to which you referred in your direct examination? A. Some time prior to March, 1902?

XQ. 54. Can you fix the year? A. 1902.

XQ. 55. Can you fix the month? A. Some time prior to March.

XQ. 56. Was anything said in that conversation about the American Girl shoe? A. Not to my recollection.

XQ. 57. Have you traveled in the same territory that

you did when you entered employ of the defendant? A. I have traveled in the same territory.

XQ. 58. Please describe that territory more particularly as to boundaries? A. We use the C. & A. for the dividing line from Chicago to St. Louis, and I have the northwestern portion of Illinois, with the C. & A. as the eastern boundary, and the Wabash as the southern boundary from Quincy to Jacksonville. I have no towns on the Wabash or the C. & A.

XQ. 59. When did you enter the employ of the Wolf Brothers & Co.? A. To my best recollection, some time in the year 1900.

XQ. 60. When did you first hear of the American Lady shoes?

Mr. Hart: The question is objected to as immaterial.

A. I don't remember the exact time.

XQ. 61. Was it before or after you had entered the employ of Wolf Brothers & Co.? A. I don't remember.

Cross-examination closed.

Signature waived.

Adjourned until tomorrow afternoon, Saturday, May 18, 1907, at 2.30 o'clock.

Met pursuant to adjournment at 2:30 o'clock Saturday, May 18th, 1907.

Present: Same parties as before.

RICHARD F. SPENCER,

a witness produced on behalf of defendant, being first duly sworn, testifies as follows:

Q. 1. State your name, age, residence and occupation? A. Richard F. Spencer, age 53, residence St. Louis, Mo. occupation, treasurer Hamilton, Brown Shoe Company.

Q. 2. How long have you been treasurer of the Hamilton, Brown Shoe Company? A. Something over ten years.

Q. 3. I now call your attention to "Complainant's Exhibit, Appendix D", "Complainant's Exhibit, Appendix E" and "Complainant's Exhibit, Appendix F", which it appears from the testimony of an officer of the complainant company are copies of correspondence and correspondence itself which passed between the complainant and the defendant during the month of January, 1901. Please state whether or not this correspondence was attended to by you on behalf of the Hamilton, Brown Shoe Company at that time? A. I did.

Q. 4. When the letter identified as "Complainant's Exhibit, Appendix D" was received by you on behalf of the Hamilton, Brown Shoe Co. did you take up the matter referred to therein with any other person connected with the conduct of the affairs of the Hamilton, Brown Shoe Company?

Objected to by Mr. Hopkins as irrelevant and immaterial.

A. No, of course I have no very distinct recollection of the particular manner in which I handled it, but any letter that was referred to me or answered by me was always dictated according to my own judgment and without reference to the opinion of anybody else. I did not take this matter up with anybody else. It is possible that after this letter was written it was read to somebody else, but I have no recollection of doing it.

Q. 5. Is "Complainant's Exhibit, Appendix E" the letter which you wrote to complainant in reply to that letter? A. Yes.

Q. 6. "Complainant's Exhibit, Appendix F" it appears from the testimony of an officer of the complainant company was written by the complainant in response to that letter from you, "Complainant's Exhibit, Appendix E". Did you answer the letter identified as "Complainant's Exhibit, Appendix F", and if not, please state why you did not answer it?

Mr. Hopkins: The latter portion beginning with the words "if not" is objected to as immaterial.

A. If I did not answer the letter it was because I did not think it of sufficient importance to waste the time necessary to do so. I do not remember that I did not reply to it. But my impression is that I did not.

Q. 7. Why did you consider the matter not of sufficient importance to waste the time necessary to answer this letter.

The question is objected to as immaterial and as the case for the complainant is not concluded by whatever the witness' thoughts may have been at that time.

A. Because I knew of the thought and effort invariably exercised by my company in trying to avoid trademarks or designs of any kind used by any other shoe manufacturing concerns, and because I considered the expression "American Lady" as used by us and American Girl so entirely dissimilar that they could not be in any way connected.

Counsel for complainant moves to strike out the answer upon the ground that it is grossly impertinent.

Q. 8. Who opens the mail received by the Hamilton, Brown Shoe Company? A. It is all opened in my office and under my supervision.

Q. 9. How long has the mail of the Hamilton, Brown Shoe Company been opened in your office and under your supervision? A. For more than ten years.

Q. 10. Have any facts ever come to your attention through the mail received from your traveling salesmen or your customers or in any other manner indicating that the names American Lady and American Girl were confused in the minds of customers either at wholesale or retail? A. No. On the contrary I have never heard of the American Girl shoe except as it has been mentioned in connection with this case, and through this correspondence.

Q. 11. If there had been instances of confusion of those names and if such confusion had come to the attention of the customers of Hamilton, Brown Shoe

Company or its traveling salesman would such fact have been likely to have been called to your attention? A. Undoubtedly.

Q. 12. Was the letter, "Complainant's Exhibit, Appendix E" which you state you wrote on behalf of Hamilton, Brown Shoe Co. in response to "Complainant's Exhibit Appendix D" written by you by reason of the fact that you thought that there was any merit in the contention set up in that letter by the complainant or merely as a courtesy between one house and another?

Objected to as immaterial.

A. My answer was prompted solely by a feeling of courtesy and politeness as I never seriously regarded their claim, in fact coming from a house relatively obscure, it seemed to me more a joke than a matter of any serious importance.

Q. 13. Did you know at the time you received this letter from the complainant or its predecessor Wolf Bros. & Company that there was such a concern in existence as Wolf Bros. & Co. of Cincinnati, Ohio?

Objected to as immaterial.

A. I did not.

Direct Examination closed.

Cross-Examination, by Mr. Hopkins.

XQ. 14. Before writing the letter Appendix E, did you consult counsel? A. I did not. Nor any one else.

XQ. 15. Did any one connected with the defendant, to your knowledge, consult counsel in regard to this matter before you wrote the letter Appendix E? A. No one, as the letter was opened and read by me and answered absolutely without suggestion or opinion of anyone else.

Cross-Examination closed.

Signature waived.

CERTIFICATE.

State of Missouri, } ss.
City of St. Louis. }

I, George Bakewell, a Notary Public within and for the above named City and State, do hereby certify that the foregoing depositions in the case in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, entitled the Wolf Brothers & Company v. Hamilton, Brown Shoe Company, in Equity No. 5262, were by consent of parties taken before me acting as Special Examiner under the 67th Rule in Equity, as amended, at the offices of Bakewell & Cornwall, 806 Chemical Building, St. Louis, Missouri, beginning at 10:30 a. m., Friday, May third, 1907, and ending at 4:30 p. m. Saturday, May eighteenth, 1907, adjournments having been taken between the several sessions, as therein noted; that both parties were represented by counsel throughout; that the witnesses, namely, Walter H. Spahr, John F. Hudson, Warren F. McElroy, Charles W. Moore, James Spencer, John H. Murphy, William Carey Teasdale, Jr., Jacob L. Selig, and Richard F. Spencer, were, before giving their testimony, each duly sworn and cautioned by me to tell the truth, the whole truth, and nothing but the truth concerning the matter in controversy; that, by stipulation, the testimony of each of the witnesses was immediately reduced to writing on a typewriting machine by a skilled operator; that each of the witnesses read over his testimony, the signature to same being waived by consent as noted.

I further certify that I am not attorney nor of counsel for, nor related by blood or marriage to either of the parties to this suit, nor in any way interested in the result thereof.

In testimony whereof, I hereunto set my hand and attach my seal of office at St. Louis, Missouri, this twentieth day of May, 1907.

[SEAL] GEORGE BAKEWELL,
Notary Public, acting as Special Examiner.

My term expires February 14th, 1909.

The cost of taking these depositions, $108.00, paid by defendant.

Witness fees, 9 @ $1.50 paid by defendant, $13.50.

495 (#3. Exhibit No. 1 Accompanying the Bill.)

92 Boot and Shoe Recorder. April 17, 1901.

(Picture of Shoe)
The American Girl
$2.00.
(Picture of Shoe)
Style No. 468.

(Picture of Shoe)
The American Girl
$2.00
(Picture of Shoe)
Style No. 460.

The American
Girl. Trade Mark.
(Picture of Girl's
Head.)

"A shoe is good as its name."

Here are six of fifty styles

(Picture of Shoe)
The American Girl
(Picture of Shoe)
Style No. 408.

(Picture of Shoe)

(Picture of Shoe)
Style No. 413.

We show in our
New Spring Catalog

of
"The American Girl"
Shoe.
Oxfords cost $1.50 Retail at $2.50
Shoes Cost $1.80 Retail at $2.00

(Picture of Shoe)
The American Girl
$2.00
(Picture of Shoe)
Style No. 456.

(Picture of Shoe)
The American
Girl $2.00
(Picture of Shoe)
Style No. 466.

We advertise liberally
for the dealer.

Exclusive Agencies Given.

Write the Makers:

Wolf Bros. & Co.

To advertise the shoe we sell
"The American Girl" shoe Polish
at $3.25 per gross.

Cincinnati, U. S. A.

Exhibit No. 1 Accompanying the bill.

496 (#4. Pages 3 and 6 of Exhibit 2 accompanying Bill of Complaint.)

The American Girl

403 VICI KID Polish, patent or kid tip.

409 VICI KID Button, patent or kid tip.

The American Girl

407 VICI KID Button, spring heel, kid or patent tip. We make this shoe in Polish also.

408 VICI KID Button, three-quarter foxed, patent or kid tip.

498 (#5. Page 5 of exhibit 3 accompanying Bill of Complaint.

Mercy and truth are met together,
righteousness and peace have kissed each other.
Look out!!!

The American Girl
TRADE MARK

Style 407
$2.50

"The Richmond."

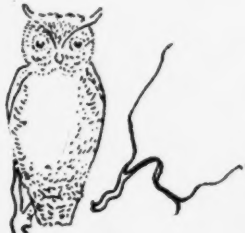
W. B. Dull Kid Lace Boot; made of all dull kid, neat opera last with plain toe, high Cuban heel, light weight and very flexible sole.

A neat dress boot for the most fastidious.

5

498a (#6. Pages 30 and 31 of Exhibit 4 accompanying Bill of Complaint.)

Mistakes are lessons of wisdom.
Next time buy



The American Girl

Style 404.
$2.50

"The Philadelphia"

W. B. Kid Lace Boot; medium wide toe, imitation tip; square close edge; low heel.

No. 404½ same with patent leather tip.

"A Comely Boot—A Staple Style."

30

The best investment is honesty—buy

"The American Girl"

Style 403.
$2.50

"The New Orleans"

W. B. Patent Colt Lace Boot; dull kid quarter; natty toe without tip; light flexible sole; high leather French heel.

"A Boot of Delicate Beauty."

500 (#7. Pages 24 and 29 of Exhibit 5 accompanying Bill of Complaint).

"The American Girl"

Two heads are better than one, particularly on a barrel of money.

Style 403
$2.50

"The New Orleans."

W. B. PATENT COLT Lace Boot, dull kid quarters, wide dull kid back stay, natty toe with no tip, high concaved heel, light weight sole.

A stylish and dressy boot.

24

490 WOLF BROS. & CO. VS. HAMILTON-BROWN SHOE CO.

It's the first straw hat which shows how the wind blows.

"The American Girl"

Style 404
$2.50

"The Philadelphia."

W. B. KID Lace Boot, imitation tip, flexible sole, with close square edge, medium wide toe, low heel. (Same style in patent tip is No. 404½.)

A comfortable light weight boot.

(#8. Pages 11, 16, 17 and 18 of Exhibit 6 accompanying Bill of Complaint.)

American Lady
SHOE

Style 397

A vici kid blucher lace boot, with patent lace stays and heel foxing, welted sole, military heel and patent tip

"Vassar" Toe

$3.00
3.50

Fast Colored Eyelets Used

American Lady
SHOE

Style 404

A vici kid lace boot, welted sole, military heel, patent tip

"Duchess" Toe

$3.00
3.50

Fast Colored Eyelets Used

American Lady
SHOE

Style 407

A vici kid blucher lace boot, yellow stitched welted sole, military heel, patent tip

"Arcadia" Toe

$3.00
3.50

With Colored Eyelets Used

American Lady
SHOE

Style 408

A vici kid lace boot with fancy lace stay, hand turned flexible sole, military heel, patent tip

"Arcadia" Toe

$3.00
3.50

Fast Colored Eyelets Used

505 (#9 Final Decree)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

The Wolf Brothers & Company, Complainant,

#5262 vs.

Hamilton-Brown Shoe Company, Defendant.

This cause having come on to be heard at this present term, and having been duly submitted to the Court upon the pleadings and proofs adduced and the arguments of counsel for the respective parties, the Court now being fully advised in the premises, doth

Order, Adjudge and Decree that the bill of complaint in this cause be and the same is hereby dismissed at the costs of said complainant, for which let execution issue as at law.

February 3rd, 1908.

DAVID P. DYER, Judge.

506 (#10 Petition for Appeal)

In the Circuit Court of the United States Eastern Division of the Eastern District of Missouri.

The Wolf Brothers & Company, Complainant,
No. 5262. vs. In Equity.
Hamilton, Brown Shoe Company, Defendant.

Petition for Appeal.

The above-named Complainant conceiving itself aggrieved by the decree made and entered on the third day of February 1908, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit [—] of Appeals for the Eighth Circuit.

JAMES L. HOPKINS AND JOHN E. JONES,
Solicitors and Of Counsel for Complainant.

The foregoing petition for appeal is allowed this 25th day of February, 1908.

DAVID P. DYER, Judge.

Endorsed: Filed February 25" 1908. James R. Gray, Clerk.

507 (#11 Assignment of Errors.)

In the Circuit Court of the United States Eastern Division of the Eastern District of Missouri.

The Wolf Brothers & Company, Complainant,
No. 5162. vs. In Equity.
Hamilton-Brown Shoe Company, Defendant.

Assignment of Errors on Appeal.

And now on the 25th day of February, 1908, comes the said Complainant, by Hopkins & Eicks, its solicitors, and says that the decree in said cause is erroneous and against the just rights of said Complainant, for the following reasons:

1. That the Court erred in refusing to grant the relief prayed for in Complainant's bill.

2. That the Court erred in finding that the Complainant's trademarks had not been infringed by the Respondent.

3. That the Court erred in finding that the Defendant had not been guilty of unfair competition with the Complainant.

4. That the Court erred in refusing to decree that Complainant has, and at the time of the institution of this action, had a good and valid trademark in the words "American Girl."

5. That the Court erred in refusing to enjoin the Defendant from using the words "American Lady" as a brand or mark for women's shoes sold by it, not of Complainant's manufacture.

6. That the Court erred in refusing to decree that Complainant has, and at the time of the institution of this action, had a good and valid trademark in the portrait of a [women] as applied to women's shoes.

7. That the Court erred in refusing to enjoin the defendant from using a portrait of a [women] in application to women's shoes sold by it and not manufactured by Complainant.

8. That the Court erred in refusing to enjoin the Defendand from the simulation and imitation of the catalogue numbers, catalogue designs, and catch-phrases employed by Complainant in the advertising and sale of its women's shoes.

9. That the Court erred in directing the dismissal of the Bill of Complaint.

10. That the findings and decree of the Court as above complained of are contrary to law and contrary to the evidence in this case.

508 Wherefore, complainant prays that said findings as above complained of may be reversed, and that said Court may be directed to enter a decree in full accord with the prayer of its Bill of Complaint.

THE WOLF BROTHERS & COMPANY,
By Hopkins & Eicks,
Its solicitors.

Endorsed: Filed February 25" 1908. James R. Gray, Clerk.

509 (#12 Bond on Appeal)

In the United States Circuit Court of Appeals for the Eighth Circuit.

The Wolf Brothers & Company, Appellant,
vs.
Hamilton-Brown Shoe Company, Appellee.

Bond on Appeal.

Know all men by these presents, that we, The Wolf Brothers & Company, as principal, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Hamilton-Brown Shoe Company in the full and just sum of One Thousand Dollars ($1000.00), to be paid to the said Hamilton-Brown Shoe Company, its certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we [find] ourselves our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 25th day of February, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Circuit Court of the United States for the Eastern Division of the Eastern District [District] of Missouri in a suit depending in said court, between the Wolf Brothers & Company, plaintiff, and Hamilton-Brown Shoe Company, defendant, a decree wa rendered against the said the Wolf Brothers & Company, and the said the Wolf Brothers & Company having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Hamilton-Brown Shoe Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Eighth Circuit, to be holden at the city of St. Paul, Minnesota, in said circuit, on the first Monday of May next.

Now, the condition of the above obligation is such that if the said The Wolf Brothers & Company shall prosecute its appeals to effect, and answer all damages and costs [of] it fail to

make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Signed and delivered in the presence of.

THE WOLF BROTHERS & COMPANY,
By James L. Hopkins,
Its Solicitor and Counsel

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
(Seal) By Noel L. Robyn, Attorney in Fact.

Approved David P. Dyer, Judge.

Endorsed: Filed February 25" 1908. James R. Gray, Clerk.

510 (#13 Order for transmission of all original exhibits)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

The Wolf Brothers & Company, Complainant,
#5262. vs.
Hamilton-Brown Shoe Company, Defendant.

On motion this day filed and presented by said complainant, it is

Ordered that the Clerk of this Court be and he is hereby authorized to omit from the transcript of the record on appeal to the United States Circuit Court of Appeals for the Eighth Circuit all of the original exhibits in this cause, that said original exhibits be delivered intact by the Clerk of this Court to the Clerk of said Court of Appeals at the time of th delivery of said transcript on appeal, and that this order be entered nunc pro tunc as of February 25th 1903.

February 28th 1908.

DAVID P. DYER, Judge.

511 (#14 Opinion of Circuit Court.)

The Wolf Brothers & Company, Complainant,
No. 5262. vs. In Equity.
Hamilton-Brown Shoe Company, Defendant.

Dyer, J.

This is a suit in equity, the prayer of which is for an injunction and accounting.

The Complainant alleges in its bill that its predecessor in business, George F. Dana & Company, in January 1896, adopted a certain trade-mark for shoes, consisting of the words

"The American Girl." That said mark was neither descriptive nor deceptive and had never been applied to shoes by any other person or corporation, and was, as applied to shoes, an arbitrary and fanciful mark. That this predecessor did apply said trade mark to shoes manufactured by it, by imprinting the same upon the soles of shoes by means of a die and by vending the shoes in paste-board cartons, the said cartons having imprinted upon their tops and ends the said trade mark "The American Girl." That thereafter the complainant acquired the right to this trade mark, and continued the making of shoes and the use of the said trade-mark.

That the complainant's immediate predecessor in 1899 devised for use in connection with the advertising and vending of shoes a certain catch-phrase, consisting of the words:

"A shoe as good as its name." It is further averred that the predecessor of complainant used in connection with the said trade mark, in the advertising of its shoes, the portrait of a young woman, and that since 1899 the same has been continuously used (with the said mark) upon cartons containing shoes manufactured and offered for sale by the complainant.

The bill then alleges as follows:

"That well knowing the premises, and well knowing the rights of said Wolf Brothers & Company in and to the said trade-marks and catch-phrase, and with the wrongful, fraudulent, dishonest and malicious intent of destroying the trade of said Wolf Brothers & Company, and of diverting to itself and profiting by the established trade and reputation of the said shoes of Wolf Brothers & Company, the co-partnership, and in order to divert to itself the benefits of the advertising of the said shoes designated by the trademark "The American Girl," the portrait aforesaid, and the catch-phrase "A shoe as good as its name" the respondent, Hamilton-Brown Shoe Company, during the year A. D., 1901, put upon the market a shoe under the mark "The American Lady" accompanied by the portrait of a young woman, and has continuously ever since,
512 from day to day, made and sold shoes to which the said name "The American Lady" has been affixed, and has continuously ever since used advertising matter, including the said portrait of a young woman, in unfair competition with your Orator and in infringement of your Orator's trade-mark rights acquired and established in the manner and in the territory hereinbefore set forth."

The answer of the defendant makes specific denial of the allegations of complainants bill, and makes further answer as follows:

"Respondent further states that its shoes manufactured and sold under the name of "The American Lady" and prominently branded with the name of the respondent company as the manufacturer of the said shoes, as aforesaid, have always been of very high quality and have always been identified by the trade and public and purchasers of such shoes as shoes emanating from the factory of the Hamilton-Brown Shoe Company, and that, in every instance, in sales of respondent's said "The American Lady" shoes made by respondent or any of its agents, such shoes have always been represented as shoes emanating from the factory of the respondent.

Respondent further says that its said shoes marked with the name "The American Lady" are sold to people of intelligence who can readily see, on examining the boxes containing said shoes or on examining any of these particular shoes, that each of said shoes and boxes is marked distinctly with the name of the respondent company, so that in every instance the name and fame of the respondent has been associated with the shoes made and sold by respondent bearing the name "The [American] Lady," so that it is impossible for any one, unless he or she be a fool or idiot, to buy respondent's shoes marked with the name "The American Lady" under the supposition that the said shoe is a shoe made by or emanating from the factory of the complainant.

Respondent further says on information and belief, that all of its shoes manufactured and sold under the name "The American Lady" are superior in quality to shoes of the complainant company and marked with the name "The American Girl;" that respondent is informed and believes, on information that it has received since the filing of the bill of [complainant] herein that the complainant is putting upon the market a shoe marked with the name "The American Girl," which does not bear either upon the shoe itself or upon the box or carton containing the said shoe the name of complainant or the name of any person or company as the manufacturer of said shoe, and that the said shoe is not only inferior in quality to shoes manufactured and sold by the respondent under the name "The American Lady," but that said shoe is put up in boxes or cartons upon which the price of said shoe is marked at the fixed price of $2.50, which is a lower price than the price at which respondent's shoes marked with the name "The American Lady," and with the respondent's name are sold to the user or consumer."

513 The proof in this case shows to the satisfaction of the court that the facts last above pleaded are substantially sustained by the evidence in the cause. I do not find

from the evidence that the defendant has conducted its business in such a way as would warrant me in saying that it is in any wise an unfair competitor of the complainant, nor can I find from the evidence that it has knowingly or otherwise infringed the trade mark of the complainant.

It follows that complainant's bill must be dismissed and it is so ordered.

(Clerk's Certificate).

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

In the Circuit Court of the United States for said Division and District.

I, James R. Gray, Clerk of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true and complete Transcript of the record and proceedings in the cause therein entitled, (save as restricted by the Praecipe for Transcript therein set forth), together with all things of and concerning the same, as fully as the same remains on file and of record in said cause in my office; and that the original Citation is hereto attached and herewith returned.

Seal
U. S. Circuit Court
Eastern Division
Eastern Judicial District
Missouri.

In Witness Whereof I hereunto set my hand and affix the seal of said Circuit Court at office in the City of St. Louis, in said Division of said District, this ninth day of March A. D. 1908.

JAMES R. GRAY, Clerk.
By Irvine Mitchell, Deputy Clerk.

Filed Mar. 12, 1908. John D. Jordan, Clerk.

503 (Clerk's Certificate to Printed Record.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record in the case of Wolf Brothers & Company, Appellant, vs. Hamilton-Brown Shoe Company, No. 2811, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in said Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of January, A. D. 1909.

Seal
United States
Circuit Court of Appeals,
Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States
Circuit Court of Appeals
for the Eighth Circuit.

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1908, of said Court, before the Honorable Walter H. Sanborn and the Honorable Willis Van Devanter, Circuit Judges, and the Honorable William H. Munger, District Judge.

Attest:

Seal
United States
Circuit Court of Appeals,
Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States
Circuit Court of Appeals
for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the twelfth day of March, A. D. 1908, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the Eastern District of Missouri, was filed in the office of
504 the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Wolf Brothers & Company was Appellant and Hamilton-Brown Shoe Company was Appellee, which said transcript, of record was filed and docketed in said Circuit Court of Appeals as No. 2811.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

(Appearance of Messrs. Hopkins & Eicks as Counsel for Appellant).

On the thirteenth day of March, A. D. 1908, the appearance of Messrs. Hopkins & Eicks, as counsel for appellant, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

Wolf Brothers & Company, Appellant,
No. 2811. vs.
Hamilton-Brown Shoe Company.

The Clerk will enter our appearance as Counsel for the Appellant.

JAMES L. HOPKINS,
ALFRED A. EICKS.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2811. Wolf Brothers & Company, Appellant, vs. Hamilton-Brown Shoe Company. Appearance. Filed March 13, 1908, John D. Jordan, Clerk. James L. Hopkins, Alfred A. Eicks, Counsel for Appellant.

(Appearance of Messrs. Burch & Johnson as Counsel for Appellant.)

And on the sixteenth day of March, A. D. 1908, the appearance of Messrs. Burch & Johnson, as counsel for the
505 appellant, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

Wolf Brothers & Company, Appellant,
No. 2811. vs.
Hamilton-Brown Shoe Company.

The Clerk will enter our appearance as Counsel for the Appellant.

SIMEON M. JOHNSON,
WALLACE BURCH,
401-2 Johnston Bldg.,
Cincinnati, Ohio.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2811. Wolf Brothers & Company, Appellant, vs. Hamilton-Brown Shoe Company. Appearance. Filed March 16, 1908, John D. Jordan, Clerk. Simeon M. Johnson, Wallace Burch, Counsel for Appellant.

(Appearance of Messrs. Bakewell & Cornwall as Counsel for Appellee.)

And on the third day of April, A. D. 1908, the appearance of Messrs. Bakewell & Cornwall, as counsel for the appellee, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

Wolf Brothers & Company, Appellant,
No. 2811. vs.
Hamilton-Brown Shoe Company.

The Clerk will enter [my] appearance as Counsel for the Appellee.

PAUL BAKEWELL,
F. R. CORNWALL.

April 3, 1908.

506 Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2811. Wolf-Brothers & Company, Appellant, vs. Hamilton-Brown Shoe Company. Appearance. Filed April 3, 1908, John D. Jordan, Clerk. Paul Bakewell, F. R. Cornwall, Counsel for Appellee.

(Appearance of Mr. John Elias Jones as Counsel for the Appellant.)

And on the sixth day of June, A. D. 1908, the appearance of Mr. John Elias Jones, as counsel for the appellant, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

Wolf Brothers & Company, Appellant,
No. 2811. vs.
Hamilton-Brown Shoe Company.

The Clerk will enter my appearance as Counsel for the Appellant.

JOHN ELIAS JONES,
Cincinnati, Ohio,
519 Main St.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2811. Wolf Brothers & Company, Appellant, vs. Hamilton-Brown Shoe Company. Appearance. Filed June 6, 1908, John D. Jordan, Clerk. John Elias Jones, Counsel for Appellant.

(Argument Commenced.)

And on the twelfth day of June, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is an order of argument in said cause, in the words and figures following, to-wit:

507 United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1908.

Friday, June 12, 1908.

Wolf Brothers & Company, Appellant,
No. 2811. vs.
Hamilton-Brown Shoe Company.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This cause having been called for hearing in its regular order, argument was commenced by Mr. James L. Hopkins for appellant, and the hour for adjournment having arrived further argument is postponed until to-morrow.

(Order of Submission.)

And on the thirteenth day of June, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1908.

Saturday, June 13, 1908.

Wolf Brothers & Company, Appellant,
No. 2811. vs.
Hamilton-Brown Shoe Company.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This cause having been called for further hearing, argument was continued by Mr. James L. Hopkins for appellant, continued by Mr. Paul Bakewell for appellee and concluded by Mr. Simeon M. Johnson for appellant.

Thereupon, this cause was submitted to the court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

508 (Opinion.)

And on the seventeenth day of November, A. D. 1908, an opinion of said United States Circuit Court of Appeals for the Eighth Circuit Court was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

September Term, A. D. 1908.

The Wolf Brothers & Company, Appellant,
No. 2811. vs.
Hamilton-Brown Shoe Company, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. James L. Hopkins and Mr. Simeon M. Johnson (Mr. Wallace Burch, Mr. Alfred A. Eicks and Mr. John E. Jones were with them on the brief) for appellant.

Mr. Paul Bakewell (Messrs. Bakewell & Cornwall were with him on the brief) for appellee.

Before Sanborn and Van Devanter, Circuit Judges, and W. H. Munger, District Judge.

W. H. Munger, District Judge, delivered the opinion of the court.

The record in this case discloses that complainant is a corporation, manufacturing women's shoes, at Cincinnati, Ohio; that in 1896, George F. Dana & Company were manufacturers of shoes in said city, and adopted as a trade-mark for women's shoes manufactured by them, the words "The American Girl." In May, 1898, a co-partnership under the name of Wolf Bros. & Co. acquired said business and trade-mark, and in 1899 said Wolf Bros. & Co. adopted and used in advertising and selling its American Girl shoes the catch phrase—"A shoe as good as its name," and used, in advertising, upon the top facing of the shoes the picture of the head of a lady.

509 In 1901 said Wolf Bros & Co., for the purpose of designating certain styles of its American Girl shoes, adopted and advertised, in its catalogues the numerals 403, 404, 407 and 408, and in its catalogue in 1904, for the same purpose, adopted an additional numeral—397, and in their fall catalogue for 1904 Wolf Bros. & Co. adopted and had printed on its face cover a picture of Uncle Sam and a lady dancing a minuet. In June, 1905, the partnership of Wolf Bros. & Co., incorporated under the name of "The Wolf Bros. & Company," under the laws of the State of Ohio, and complainant then acquired all the assets of the partnership, including the good-will and trade-marks.

The defendant is a corporation organized under the laws of the State of Missouri, and a large manufacturer of shoes at St. Louis, in said state.

In August, 1900, defendant adopted as a trade-mark for women's shoes the words "The American Lady," with the picture of a lady. In October, 1903, it advertised with its American Lady shoes the catch phrase "The shoe deserves its name." The defendant claims that this catch phrase was used by it in advertising upon one occasion only, and we dismiss it from further consideration; thereafter it changed the phrase to the

words "With the character of the woman." In its fall catalogue of 1904 the defendant designated certain styles of its American Lady shoes by the same numerals used by complainant, to-wit: 403, 404, 407 and 408, and in its fall catalogue of 1905 it also adopted the numeral 397. In its catalogue of 1904 defendant placed upon the face cover the picture of George and Martha Washington dancing a minuet.

This action was brought by complainant, in which it charges the defendant with infringing its trade-mark "The American Girl," by the use of the name "The American Lady," and the portrait of a young woman. It further charges the defendant with infringing the catch phrase "A shoe as good as its name" by using the catch phrases "The shoe deserves its name" and "With the character of the woman;" it also charges the defendant with infringement by adopting its numeral num-
510 bers before mentioned for similar styles of shoes; it also charges defendant with unfair trade. Proofs were taken, and upon the hearing the Circuit Court dismissed complainant's bill and the case is brought here on appeal.

The first question for consideration is whether the term "The American Girl" constitutes a valid trade-mark. We think it settled doctrine that geographical names can not be appropriated to the exclusive use of one as a trade name. Columbia Mill Co. vs. Alcorn, 150 U. S. 460; Delaware & H. Canal Co. vs. Clark, 13 Wall. 311; Gennessee Salt Co. vs. Burnap, 73 Fed. 818, 20 C. C. A. 27; Ill. Watch Co. vs. Elgin Nat. Watch Co., 94 Fed. 667, 35 C. C. A. 242; 179 U. S. 665; Allen B. Wrisley Co. vs. Iowa Soap Co., 59 C. C. A. 54.

We also think that the name, as applied to women's shoes is descriptive merely, viz; shoes manufactured in America and to be worn by women, and not an arbitrary or fanciful name to indicate maker; hence the name "The American Girl," applied to shoes, is not the subject of a valid trade-mark.

Nor can numeral numbers, when used to indicate styles rather than origin and manufacture, be the subject of a valid trade-mark. Shaw Stocking Co. vs. Mack, 12, Fed. 707; Dennison Mfg. Co. vs. Thomas Mfg. Co., 94 Fed. 651. In this case we think that the numerals used by the complainant were for the purpose of indicating and designating the different styles of shoes rather than the maker.

While it is true that a geographical name may not be exclusively appropriated as a trade-mark, yet a party having adopted a geographical name as a designation of its goods, may be protected as against unfair trade. Pillsbury-Washburn Flour Mills Co. vs. Eagle, 86 Fed. 608, 30 C. C. A. 386; The French Republic vs. Saratoga Springs Co., 191 U. S. 427. This

is clearly illustrated in the case of Pillsbury-Washburn Flour Mills Co. vs. Eagle, supra, wherein it was held that complainants, who were manufacturers of flour at Minneapolis,
511 Minnesota, and had designated their flour as "Minnesota," "Minneapolis," &c., were entitled to enjoin a party who sold flour manufactured at Milwaukee, Wisconsin, from designating such flour as "Minnesota," "Minneapolis," &c. This was done because defendant, in using the names "Minnesota," "Minneapolis," &c., was expressing a falsehood, and endeavoring to palm off upon the public flour manufactured in Wisconsin as and for flour manufactured at Minneapolis. In this case, while complainant is not entitled to relief upon the ground that the words "The American Girl," or the numerals applied to its several styles of shoes, are valid trade-marks, yet it is entitled to protection from their use by the defendant in a manner and under circumstances constituting unfair trade, the essence of the rule being that one person shall not, in the sale of his goods, so act as to lead the public to believe that they are the goods of another.

The record discloses that complainant and its predecessors extensively advertised its shoes under the name "The American Girl," with the catch phrase before referred to, in various trade journals and in newspapers throughout the United States, but largely throughout the southern states, and established an extensive trade therefor. Defendant is a much larger manufacturer of shoes than complainant, and has advertised much more extensively, expending something over $100,000 in advertising American Lady shoes after the bringing of this suit.

It is plainly obvious, we think, that the words "The American Girl" and "The American Lady" are so similar as to cause confusion, and the evidence fully discloses such to have been the result.

The testimony of the Vice-President and Superintendent of defendant, with reference to adopting the name "The American Lady," is that, in the latter part of August, or the first of September, 1900, they assembled their traveling salesmen, for the purpose of making a selection of samples for the following season, and it was suggested at such meeting that some name
512 be adopted for that line of women's shoes, and the name "The American Lady" was selected. He testifies that at that time he had never known or heard of shoes being made by Wolf Bros. & Co. of Cincinnati, or made and sold by any one, under the name of "The American Girl."

It is further claimed on the part of the defendant that when it used the catch phrases "The shoe deserves its name" and "With the character of the woman," it did no know, and had

not heard, of complainant's catch phrase—"A shoe as good as its name;" that at the time they adopted the various numerals which had been theretofore adopted by complainant, it did not know that complainant used such numerals to designate similar styles of its shoe "The American Girl."

To the adoption of the picture of George and Martha Washington dancing a minuet we do not attach much importance, as the evidence discloses that defendant had ordered engravings of the picture some months prior to the issuance to the public by complainant of its catalogue having engraved thereon the picture of Uncle Sam and a lady dancing a minuet. But we can not believe that at the time of the adoption by defendant of the name "The American Lady," for its shoes, did not know that complainant used the words "The American Girl" for its shoes, as it appears that the salesmen who were assembled by defendant and adopted the name "The American Lady" had been traveling through the territory in which complainant's American Girl shoe had been sold and extensively advertised as such. The adoption by defendant of the catch phrases simulating that of complainant, adopting the same numerals that complainant had adopted, and when complainant went back and adopted the additional numeral 397 then likewise immediately adopting the same, we can not think took place without knowledge that it was following complainant in this regard. Had it only imitated complainant in one respect it might well be said that it was innocently done and without knowledge of the previous adoption by the complainant; but the several
513 acts of complainant being followed so closely in imitation by defendant is persuasive, if not conclusive evidence, that it was done with knowledge that it was imitating complainant. Actions of a similar character were held to overcome protestations of innocence and good faith in Fairbanks Co. vs. Bill Co., 77 Fed. 869; National Biscuit Co. vs. Baker, 95 Fed. 135; Hanson vs. Seigel-Cooper Co., 106 Fed. 690.

That defendant's action in the several respects above enumerated was not taken without knowledge of complainant's rights, we think is shown by the following circumstances:

In January, 1901, Wolf Bros. & Co., on seeing one of defendant's advertisements of its shoes under the designation "The American Lady" immediately wrote defendant, calling its attention to the fact that they regarded it as an infringement upon their trade name "The American Girl." To this letter defendant answered, in substance, that it did not regard its use of the words "The American Lady," with the picture of a lady, as an infringement. To this Wolf Bros. & Co. replied, suggesting that if defendant would further consider the matter they thought it would come to the con-

clusion that it did constitute an infringement, and expressing a desire that the matter be adjusted between themselves without legal proceedings. To this letter defendant made no reply. Defendant's treasurer, upon cross-examination, in answer to the inquiry as to whether the first of the above letters was answered by him merely as a matter of courtesy between one house and another, or because there was merit in the contention set up by complainant in the letters, said—"My answer was prompted solely by a feeling of courtesy and politeness, as I never seriously regarded their claim. In fact, coming from a house relatively obscure, it seemed to me more a joke than a matter of any serious importance." In a question relative to the second of said letters written by complainant to defendant he was asked if the same was answered; if not, why not? To
514 which he answered—"If I did not answer the letter it was because I did not think it of sufficient importance to waste the time necessary to do so. I do not remember that I did not reply to it but my impression is that I did not."

It may be that some parties regard a complaint coming from one relatively more obscure as a joke, not a matter to receive serious consideration, and not of sufficient importance to waste the time necessary to answer, but in the courts the most obscure and lowly person is entitled to be received upon the same level as his opponent, and the claim that his opponent has trampled upon his rights is entitled to such time of the court as may be necessary to give it full and careful consideration, however small to others his claim may appear to be.

In some respects the markings upon the bottom of defendant's shoes and upon the cartons and boxes in which the shoes were placed were in simulation of those of complainant, but as the simulation in these respects was discontinued by defendant upon the bringing of this suit, we will not extend this opinion by pointing out the similarity.

Legitimate competition in trade is not only the right of every person but to be commended when of public benefit. It is only when competition is deceptive that it is condemned by the law. While the term "The American Girl," as applied by complainant and its predecessors, was not subject to exclusive appropriation by them, it had, nevertheless, by their long continued use of it, come to have a secondary meaning, indicative, of the origin and manufacture of the shoes to which it was applied, and had come to be recognized in the trade as meaning that such shoes were those of the complainant and its predecessors. Whatever of good will and advantage resulted from this was the

property of the complainant, and while others were entitled to use the same or any similar term because of its being common property, they could do so only on condition that they accompanied it with such distinguishing marks or matter as would plainly indicate that it was not being used with its secondary signification; that is, as pointing to the complainant as the manufacturer of the goods to which it was applied.

515 Howe Scale Co. vs. Wyckoff, 198 U. S. 118; Donnell vs. Herring-Hall-Marvin Safe Co., 208 U. S. 267.

Complainant is not guilty of such laches as to deprive it of an injunction, but we think an accounting should be limited to the time since the commencement of this suit.

Complainant is entitled to a decree enjoining the defendant from using the name "The American Lady," as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture and therefore not of complainant's, and from using, in connection with such name, as applied to its shoes for women, the numerals mentioned, or the catch phrase "With the character of the woman," or any other phrase in simulation of the phrase "A shoe as good as its name;" and also to an accounting as before stated.

The decree of the Circuit Court is reversed with directions to enter a decree in accordance herewith.

Filed November 17, 1908.

Sanborn, Circuit Judge, dissenting.

If the alleged trade-mark were the "American Shoe" it would be invalid, because that term would constitute a geographical name of the shoe, but the title, "The American Girl" when applied to a shoe is, in my opinion, an arbitrary and fanciful name and hence constitutes a valid trade-mark when it comes to designate the origin or manufacture of the shoe. It was not a geographical description of the shoe because it does not state or indicate that it was made, or sold, or used, in America. It was not when first applied by the complainant to the shoe and before he had taught the trade its meaning descriptive of the shoe or of its materials or characteristics (and that is the true test, Wellcome vs. Thompson & Capper, 1 L. R. Chan. Div. 1904, pages 736, 742, 749, 750, 754; Keasbey vs. Chemical Works, 142 N. Y. 467, 471, 474, 475, 476), because it described nothing but a girl and the term "American Girl" was just as

descriptive of a coat, or a hat, or a glove, or a car, or an
516 engine, or any other manufactured article, as it was of a shoe, that is to say it was not decriptive of a shoe in any way whatever. It was nothing but an arbitrary fanciful term which the complainant, by means of its advertisements and its use, caused to indicate to the trade that the shoe to which it was applied originated in the complainant's shops and was made by it. For these reasons I am of the opinion that the term "American Girl" when applied to a shoe constitutes a valid trade-mark, that the defendant infringed upon the right of the complainant thereto by the use of the term the "American Lady" to designate a class of shoes which it sold, that on account of that infringement it should be enjoined from the use of that term and should account to the complainant from the date of the filing of the bill.

Filed November 17, 1908.

(Decree.)

And on the seventeenth day of November, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1908.

Tuesday, November 17, 1908.

Wolf Brothers & Company, Appellant,
No. 2811. vs.
Hamilton-Brown Shoe Company.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed
517 with costs; and that Wolf Brothers & Company have and recover against the Hamilton-Brown Shoe Company the sum of Three Hundred Nine and 50-100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter a decree in accordance with the opinion of this Court.

November 17, 1908.

(Motion of Mr. James L. Hopkins and Mr. Alfred A. Eicks for leave to withdraw appearance for appellant.)

And on the twenty-third day of December, A. D. 1908, the motion of Mr. James L. Hopkins and Mr. Alfred A. Eicks for leave to withdraw appearance for appellant was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

Wolf Brothers & Company, Appellant,
No. 2811. vs.
Hamilton-Brown Shoe Company, Appellee.

(Withdrawal.)

Subject to the approval of this Honorable Court, we, the undersigned, hereby withdraw as solicitors and of counsel for the appellant.

Dated at St. Louis, Missouri, this 23d day of December, 1908.

JAMES L. HOPKINS,
ALFRED A. EICKS.

Endorsed: No. 2811. United States Circuit Court of Appeals for the Eighth Circuit. The Wolf Brothers & Co. vs. Hamilton-Brown Shoe Company. Motion of Mr. James L. Hopkins and Mr. Alfred A. Eicks for leave to withdraw appearance for appellant. Filed Dec. 23, 1908, John D. Jordan, 518 Clerk. Hopkins & Eicks, Attorneys at Law, St. Louis.

(Record entry of withdrawal of appearance of Messrs. Hopkins & Eicks for appellant.)

And on the twenty-third day of December, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is an entry of withdrawal of the appearance of Messrs. Hopkins & Eicks for appellant, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1908.

Wednesday, December 23, 1908.

Wolf Brothers & Company, Appellant,
No. 2811. vs.
Hamilton-Brown Shoe Company.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This cause came on this day to be heard upon the motion of Mr. James L. Hopkins and Mr. Alfred A. Eicks for leave to withdraw their appearance as counsel for the appellant. Upon consideration whereof, it is now here ordered by the court that said motion be, and the same is hereby granted, and the appearance of the said James L. Hopkins and Alfred A. Eicks as counsel for the appellant in this cause is accordingly withdrawn.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit (except the transcript of the record
519 from the Circuit Court of the United States for the Eastern District of Missouri), in a certain cause in said court wherein Wolf Brothers & Company is Appellant and Hamilton-Brown Shoe Company is Appellee, No. 2811, as full, true and complete as the originals of same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of January, A. D. 1909.

Seal
United States
Circuit Court of Appeals,
Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States
Circuit Court of Appeals
for the Eighth Circuit.

520 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record contains the transcript from the Circuit Court of the United States for the Eastern District of Missouri in the case of The Wolf Brothers and Company, Appellant, vs. Hamilton-Brown Shoe Company, No. 2811, upon which said cause was heard and determined in the United States Circuit Court of Appeals for the Eighth Circuit and also the supplemental proceedings had in said Circuit Court of Appeals and added to said printed record for use in connection with an application to the Supreme Court of the United States for a writ of certiorari.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourteenth day of October, A. D. 1913.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

a Original.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Eighth Circuit.

No. 3758.

THE WOLF BROTHERS AND COMPANY, Appellant,
vs.
HAMILTON-BROWN SHOE COMPANY, Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

Filed March 28, 1912.

b Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1913, of said Court, before the Honorable William C. Hook and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Arba S. Van Valkenburgh, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twenty-eighth day of March, A. D. 1912, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein The Wolf Brothers and Company is Appellant and the Hamilton-Brown Shoe Company is Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 *Citation.*

The United States of America to Hamilton-Brown Shoe Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to [a] an order allowing appeal, filed in the Clerk's

office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein The Wolf Brothers and Company is appellant and you are appellee, to show cause, if any there be, why the final decree rendered against the said appellant as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable David P. Dyer, Judge of the District Courts of the United States within and for the Eastern District of Missouri, this 3″ day of February in the year of our Lord one thousand nine hundred and twelve.

DAVID P. DYER,
United States District Judge for the Eastern District of Missouri.

Due service of foregoing Citation is hereby acknowledged this February 3″ 1912.

PAUL BAKEWELL,
Solicitors for Defendants, Appellee.

Filed in the District Court on Feb. 3, 1912.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

Be it remembered, That heretofore, to-wit: on the 21st day of February A. D. 1912, in a cause pending in the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, entitled The Wolf Brothers and Company, Complainant, versus Hamilton, Brown Shoe Company, Defendant, In Equity No. 5262, there was filed by said defendant a designation of parts of the record to be included in the transcript on the appeal of the said cause to the United States Circuit Court of Appeals for the Eighth Circuit, which said designation is in words and figures, as follows, to-wit:

2 *(Defendant's Designation of Parts of Record to be Included in Transcript on Appeal.)*

Bakewell and Church.
Patent, Trade-mark, and Copyright Causes.

ST. LOUIS, MO., Feb. 21, 1912.

THE WOLF BROTHERS & COMPANY
v.
HAMILTON, BROWN SHOE COMPANY.

Percy Werner, Esq., Solicitor for Complainant-Appellant, Rialto Bldg., City.

DEAR SIR: In the above case, on my return to my office from Kansas City to-day I find on my desk the ribbon copy and a carbon

copy of the præcipe of Complainant-Appellant in this case, together with a notice etc.

It seems to me the præcipe which you made out is a little general in its terms and is not sufficiently specific. Therefore I have accepted it subject to my notice of this date to the Clerk of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri. So far as I am concerned, I shall not be satisfied with anything less than a complete transcript not only of the old record but of the record in the District Court from and including the interlocutory decree in this case, and I insist upon every printed exhibit that was introduced in evidence being reproduced, such, for instance, as the copy of your petition for certiorari to the Supreme Court of the United States, which is one of our exhibits before the Master, and the six briefs which are exhibits attached to defendant's additional exceptions to the Master's report, as well as the stipulation- made before the Master, one of which is dated June 4, 1910, and the other — which is dated January 11, 1911, and that the exhibits attached to the last-named stipulations be reproduced. No doubt you intended this in your præcipe but it is not as clear as it might be in these respects.

I accept service of your præcipe subject to these terms and subject to my notice of this date to the Clerk of the Court.

Yours Very Truly,

PAUL BAKEWELL,
Solicitor for Hamilton, Brown Shoe Co., Defendant-Appellee.

P. B.
Copy for Clerk of Court.

3 In the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5262. In Equity.

THE WOLF BROTHERS & COMPANY, Complainant,
vs.
HAMILTON, BROWN SHOE COMPANY, Defendant.

To the above-named Defendant, Appellee, or Its Counsel:

Please take notice that we have delivered to the Clerk of the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri a præcipe, of which the attached is a copy. If you desire additional parts of the record printed, please designate in writing and file with the clerk a memorandum of such additional parts of the record as you desire certified.

LAWRENCE MAXWELL,
SIMEON M. JOHNSON,
PERCY WERNER,
Solicitors and of Counsel for Complainant.

Service of the above and foregoing præcipe and notice hereby acknowledged, this 21st day of February 1912, subject to my attached letter to Mr. Percy Werner of this date and my attached notice of this date to Clerk of U. S. District Court for Eastern Division of Eastern District of Missouri.

PAUL BAKEWELL,
Solicitor for Defendant.

In the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5262. In Equity.

THE WOLF BROTHERS & COMPANY, Complainant,
vs.
HAMILTON, BROWN SHOE COMPANY, Defendant.

To the Clerk of said Court:

Counsel for The Wolf Brothers & Company, Complainant-Appellant, have just served me with a copy of a præcipe in this case which is in the following words.

4 "In preparing the transcript of record in the appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit in the above Case, you will include the following items only:

1. The original record in this case, as per transcript prepared on the first appeal of this case to the United States Circuit Court of Appeals, Eighth Circuit, and filed there March 12, 1908.

"2. The mandate of the Circuit Court of Appeals.

"3. The record in this case subsequent to the entering of the mandate of the Circuit Court of Appeals, including all of the testimony and proceedings before the master, excepting catalogues and other physical Exhibits, which are to be separately transmitted to the Marshal of the Court of Appeals under the order of this Court.

"4. The Master's Report in this case, together with the exceptions of both parties to the said Master's Report, and the Master's ruling on the said exceptions, and all exceptions filed in the Circuit Court by either party to said Report.

"5. The opinion of the Circuit Court.

"6. The decree.

"7. The petition for appeal and assignment of errors, and all appeal papers, including order for transmission of catalogues, shoes and other physical exhibits to said Circuit Court of Appeals for the Eighth Circuit.

"You will also please certify that you have transmitted all exhibits, including catalogues, shoes and boxes forming part of the proof which are on file in your office."

Accompanying the Said Præcipe counsel for the Wolf Brothers & Company, Complainant-Appellant, give me the following notice.

"Please take notice that we have delivered to the Clerk of the

United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri a præcipe, of which the attached is a copy. If you desire additional parts of the record printed, please designate in writing and file with the Clerk a memorandum of such additional parts of the record as you desire certified."

The language of the præcipe of Complainant's counsel is not entirely clear to me. I insist upon the entire record as it appears in this Court going up to the Court of Appeals and that it shall include not merely the record "on the first appeal of this case to the United States Circuit Court of Appeals Eighth Circuit, and filed there March 12, 1908," and the things specifically mentioned in the said præcipe, but also the interlocutory decree entered in this Court in pursuance of the mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the said first appeal and the order or decree of this Court overruling the Master's Report, overruling Complainant's exceptions to the Master's Report, and sustaining [Defendant's] exceptions to the Master's report; also, not only the [defendant's] printed exception to the Master's report, which are on file in this Court, but also Defendant's additional exceptions to the [Master's] report, and the affidavits in support thereof, as well as the six printed brief exhibits forming part of said additional exceptions to the Master's report and which form part thereof, the said additional exceptions to the Master's report having been filed in this Court and by leave of this Court, heretofore, to wit, on November 1, 1911.

I also insist that the stipulations filed before the master and the exhibits forming part of said stipulations be made part of the record printed. One of these stipulations before the Master is the stipulation of June 4, 1910, and the exhibits attached to same, and the other is the stipulation of January 11, 1911, and the exhibits attached to same, also Complainant's petition for certiorari to [Supreme] Court of the United States, an exhibit filed by defendant before the Master and which must go up and be reproduced in printed form, not as a physical exhibit.

If my recollection serves me correctly, the above-named stipulations were filed in this Court by the Master with his report and with a copy of the testimony taken before him.

It may be that the third clause of the said Præcipe made out by counsel for Complainant is broad enough in its terms and intended to cover these matters; but inasmuch as they are not specifically named in said Præcipe I call your attention to them. I desire that all the matters which I have named herein and which may come within the general terms of clause 3 of the præcipe of Complainant be sent up to the United States Court of Appeals for the Eighth Circuit in connection with this appeal and printed. I do not understand, under the rules of this Court or under the rules of the Court of Appeals, that any matter which can be reproduced in printed form, such as the exhibits herein referred to and such as the six exhibit briefs forming part of Defendant's additional exceptions to the Master's report and form part of the same (said

additional exceptions and exhibits having been filed by leave
6 of Court heretofore, to wit, November 1, 1911) are physical exhibits which will go up to the United States Circuit Court of Appeals without being printed.

PAUL BAKEWELL,
Solicitor for Hamilton, Brown Shoe Co., Defendant-Appellee.

St. Louis, February 21, 1912.

(Præcipe of Complainant for Transcript on Appeal.)

And afterwards, to-wit: on the 23rd day of February A. D. 1912, there was filed by said complainant a præcipe designating the parts of the record to be included in the afore-mentioned transcript of the same, which said præcipe is in words and figures, as follows, to-wit:

In the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5262. In Equity.

THE WOLF BROTHERS & COMPANY, Complainant,
v.
HAMILTON, BROWN SHOE COMPANY, Defendant.

To the Clerk of said Court:

Præcipe.

In preparing the transcript of record in the appeal *of* the United States Circuit Court of Appeals for the Eighth Judicial Circuit in the above case, you will include the following items only.

1. The original record in this case, as per transcript prepared on the first appeal of this case to the United States Circuit Court of Appeals, Eighth Circuit, and filed there March 12, 1908.

2. The mandate of the Circuit Court of Appeals.

3. The record in this case subsequent to the entering of the mandate of the Circuit Court of Appeals, including all of the testimony and proceedings before the Master, excepting catalogues and other physical Exhibits, which are to be separately transmitted to the Marshal of the Court of Appeals under the order of this Court.

4. The Master's Report in this case, together with the exceptions of both parties to the said Master's Report, and the Master's ruling on the said exceptions, and all exceptions filed in the Circuit Court by either party to said Report.

7 5. The opinion of the Circuit Court.

6. The decree.

7. The petition for appeal and assignment of errors, and all appeal papers, including order for transmission of catalogues, shoes

and other physical exhibits to said Circuit Court of Appeals for the Eighth Circuit.

You will also please certify that you have transmitted all exhibits, including catalogues, shoes and boxes forming part of the proof which are on file in your office.

[Dates] February —, 1912.

LAWRENCE MAXWELL,
SIMEON M. JOHNSON,
PERCY WERNER,
Solicitors and Counsel for Complainant.

Which said original record in this case, as per transcript prepared on the first appeal of this case to the United States Circuit Court of Appeals, Eighth Circuit, and filed there March 12th, 1908, and including the proceedings in the said Circuit Court of Appeals as printed upon the application to the United States Supreme Court for a writ of certiorari, is in words and figures, as follows, to-wit:

(Printed Record.)

* * * * * * *

(Here follows a copy of the printed record upon the former appeal of Wolf Brothers & Company, Appellant, v. Hamilton-Brown Shoe Company, No. 2811, which record is omitted pursuant to the order of the Circuit Court of Appeals of date April 2, 1912.)

(*Mandate of U. S. Circuit Court of Appeals.*)

And on the 18th day of January, A. D. 1909 there was filed in said cause a mandate from the U. S. Circuit Court of Appeals for the Eighth Circuit, which is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Missouri, Greeting:

[SEAL.]

Whereas, lately in the Circuit Court of the United States for the Eastern District of Missouri, before you, or some of you, in a cause between The Wolf Brothers and Company, a corporation,
8 complainant, and the Hamilton Brown Shoe Company, defendant, wherein the decree of the said Circuit Court in said cause, entered on the 3rd day of February, A. D. 1908, is in the following words, viz:

"This cause having come on to be heard at the present term, and having been duly submitted to the Court upon the pleadings and proofs adduced, and the argument of counsel for the respective parties, the court being now fully advised in the premises, doth Order, Adjudge and Decree that the bill of complaint in this

cause be and the same is hereby dismissed at the costs of said complainant, for which let execution issue as at law.

February 3rd, 1908.

DAVID P. DYER, *Judge.*"

as by the inspection of the transcript of the record of the said Circuit Court which was brought into the United States Circuit Court of Appeals for the Eighth Circuit, by virtue of an appeal agreeably to the Act of Congress, in such case made and provided, fully and at large appears,

And whereas, in the present term of September, in the year of our Lord one thousand nine hundred and eight, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of record from said Circuit Court, and was argued by counsel.

On consideration, whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause, be, and the same is hereby reversed with costs; and that Wolf Brothers and Company have and recover against the Hamilton Brown Shoe Company the sum of Three Hundred Nine and 95/100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court with directions to enter a decree in accordance with the opinion of this Court.

November 17, 1908.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

9 Witness, the Honorable, Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the eighteenth day of January, in the year of our Lord one thousand nine hundred and nine.

JOHN D. JORDAN,
Clerk of the United States Circuit,
Court of Appeals, Eighth Circuit.

Costs of Appellant.

Clerk	$28.90
Printing record	261.05
Attorney	20.00
	$309.95

(*Interlocutory Decree.*)

And afterwards, to-wit: on the 15th day of November, A. D. 1909 the following among other proceedings were had and appear of record in said cause, to-wit:

Circuit Court of the United States, Eastern District of Missouri, Eastern Division, September Term, 1909.

In Equity. No. 5262.

THE WOLF BROTHERS & COMPANY
vs.
HAMILTON, BROWN SHOE COMPANY.

Interlocutory Decree on the Mandate of the Court of Appeals.

The mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the appeal of the plaintiff from the decree entered herein on February 3, 1908, and the opinion of said Court of Appeals having been filed in this court, it is now, in pursuance of said mandate and opinion, ordered, adjudged and decreed as follows:

1. Said decree entered herein on February 3, 1908, is set aside.

2. The defendant, Hamilton, Brown Shoe Company, its servants, agents, officers and employees, are perpetually enjoined from using the name "The American Lady," as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Brothers & Company, and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408 or 397, or the catch-phrase "With the character of the woman" or any other phrase in simulation of the Phrase "A shoe as good as its name."

3. The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded.

4. This case is referred to H. H. Denison, Esq., as Master upon the evidence already taken in this case and the exhibits in evidence in this case, and such further evidence as may be offered before the Master by the parties to this action, to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits, since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case and which were marked with the name "The American Lady" and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton, Brown Shoe Company.

Nov. 15" 1909.

DAVID P. DYER, *Judge.*

(*Complainant's Exception to Form of Interlocutory Decree. Filed Nov.* 19, 1909.)

Now this day comes the complainant in the above-entitled cause, and files its formal exception to the form of the interlocutory decree ordered by the court to be entered in said cause, and which was

entered in said cause on November 15, 1909, on the ground that said interlocutory decree is not in accordance with the mandate of the United States Court of Appeals in this cause.

LAWRENCE MAXWELL,
BURCH & JOHNSTON,
E. W. PATTISON,
PERCY WERNER,
Attorneys for Complainant.

Stipulation Acknowledging Tender of One Dollar in Full Settlement of Damages and Profits on Accounting. Filed February 1, 1910.

It is hereby stipulated and agreed by and between the parties to this cause that after the mandate from the United States
11 Circuit Court of Appeals in this cause was filed in the United States Circuit Court, and before the order was entered by the United States Circuit Court referring this cause to the Special Master for an accounting, the defendant, Hamilton, Brown Shoe Company, did make due and lawful tender of the sum of one dollar, lawful money of the United States, to the complainant, The Wolf Brothers and Company, in full settlement of all damages and profits which the complainant may be entitled to recover upon said accounting.

THE WOLF BROTHERS AND COMPANY, *Complainant.*
By PERCY WERNER & SIMON N. JOHNSON,
Solicitors for Complainant.
HAMILTON, BROWN SHOE COMPANY, *Defendant,*
By PAUL BAKEWELL,
Solicitor for Defendant.

St. Louis, Mo., January 31, 1910.

Motion on behalf of Hamilton, Brown Shoe Company, Defendant, That the Special Master in this Cause, Henry H. Denison, be Ordered not to Proceed with the Accounting in this Case in Respect to Any Shoes Sold by said Defendant Since the Filing of the Bill (January 29, 1906) Marked with the Name Hamilton, Brown Shoe Company and with the words American Lady, or Marked as Just Stated and also Packed, as Sold by Defendant from the Date Aforesaid, in Cartons Plainly Bearing the Name of the Defendant Thereon, Thus Clearly Indicating that the Shoes so Sold by Defendant since the Date Aforesaid are Shoes Emanating from the Hamilton, Brown Shoe Company, Defendant, and not "The American Girl" Shoes Emanating from the Wolf Brothers & Company, Complainant, also Motion for Security for Costs.

(Filed in the Circuit Court on Feb. 21, 1910.)

As the grounds for its motion set forth in the above title, defendant, Hamilton, Brown Shoe Company, states:

That the interlocutory decree heretofore entered in this case, to-wit, on November 15, 1909, (which is the Master's warrant in this case) must be interpreted in the light of the majority opinion of the United States Court of Appeals for this Circuit, rendered by Munger, J., concurred in by Van Devanter, J., reported in 165 Fed. 413, and in the light of the decisions of the United States Supreme Court specifically referred to in that opinion, at page 418 of 165 Fed., said decisions being: Howe Scale Co. v. Wycoff, 198
12 U. S. 118 and Donnell v. Herring etc. Co., 208 U. S. 267.

That so interpreted the following things are clear:

That the defendant does not have to account before the Master in respect to any shoes sold by it since the date of the filing of the bill, marked with the name American Lady and also marked with the name Hamilton, Brown Shoe Company, because shoes so marked "plainly indicate that it" (the name "American Lady") "was not being used with the secondary signification" (to use the language of said opinion in this case) which the majority opinion of the Court of Appeals attached to the words "The American Girl" as applied to shoes, i. e., was not "indicative" that defendant's shoes, so marked and sold are "of the origin and manufacture of" The Wolf Brothers & Company, complainant.

That in the said majority opinion of the Court of Appeals in this case it was distinctly held (see 165 Fed. 417, 418).

(*a*) That the name "The American Girl" used by complainant "as applied to women's shoes is descriptive merely, viz., shoes manufactured in America and to be worn by women, and not an arbitrary or fanciful name to indicate maker; hence the name 'The American Girl,' as applied to shoes, is not the subject of a valid trade mark."

(*b*) That therefore defendant only had to account for such of its shoes, sold since the filing of the bill, as it might be shown to have sold which were marked with the words American Lady and not accompanied with such distinguishing marks or matter (such as defendant's name thereon) as would plainly indicate that the shoes so marked emanated from the Hamilton, Brown Shoe Company.

That it was plainly decided by the said majority opinion of the Court of Appeals in this case, as appears from its said opinion as well as from the two said decisions of the United States Supreme Court (see 165 Fed. 418), which it cites, that if this defendant marked its American Lady shoes, or accompanied them, with defendant's name, then, as to such shoes, so marked, defendant did not have to account in any way to the complainant—that such shoes, so marked, were beyond and outside of any decree that could be lawfully entered in this case.

That this is plain not only from said majority opinion of the Court of Appeals in this case, but because both of the said decisions of the United States Supreme Court upon which the majority
13 opinion of the Court of Appeals rests in this case, as a reference to these decisions will show, held, as did the majority of the Court of Appeals in this case:

(*a*) That the name in question was not a valid trade mark, and therefore that the complainant had not the exclusive right to use it.

(*b*) That the defendant might use that name, as applied to the

articles in question, when it also applied its own name to the goods in question; for, in such a case, the name of defendant on defendant's article would indicate that they were the goods of defendant, and thus there could be no question of selling the goods of defendant "as and for" the goods of complainant—the essential prerequisite of "Unfair Trade" as distinguished from a strict "trade mark" case.

That in the first of said cases cited in the majority opinion of the Court of Appeals in the case at bar, at page 418 of 165 Fed., that is to say, the case of Howe Scale Co. v. Wycoff, 198 U. S. 118, it appeared (see page 123 of 198 U. S.) that each one of defendant's articles, like defendant's said shoes in the case at bar, were plainly marked with the name of the defendant company.

That in view of that fact and of the fact that the Supreme Court held that the complainant had no exclusive right in the name there in question as a trade name (the name Remington), the Supreme Court held that the defendant could not be prevented from continuing to use the name Remington on its machines, because the mere name of the defendant on its machines plainly and sufficiently indicated, within the meaning of the law applied to cases of "Unfair Competition" that the goods of defendant were not the goods of the complainant.

That in the second of said cases cited by the majority of the Court of Appeals at page 418 of 165 Fed., that is to say, Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, the Supreme Court held:

(*a*) That the name "Hall" there in question was not a name to which either party could hold the exclusive right.

(*b*) That the name "Hall" could be used by both parties as part of their corporate names.

(*c*) That all that the other party could be enjoined from doing was from representing in any way that it was the successor of the original Company, or that its goods were the product of the original Company.

14 That in said last-named decision of the Supreme Court in Donnell v. Herring-Hall-Marvin Safe Co., relied upon by the Circuit Court of Appeals in the case at bar, the only other case cited by the Supreme Court other than the said case of Howe Scale Co. v. Wycoff, 198 U. S. 118, already considered, is the decision of the Supreme Court in Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169 In the Singer case the Supreme Court held (see page 203 of 163 U. S.) that complainant had no exclusive right to the use of the name "Singer," and therefore the defendant had a right to use the word "Singer" on its sewing machines, and that infringement only resulted from the failure of the defendant to plainly mark its machines with the full name of the defendant company. It appears from the statement of facts in this case, at pages 175 and 176 of 163 U. S., that the defendant, whose name originally was Standard Manufacturing Company, was afterwards changed to June Manufacturing Company, but that the defendant had never used its full name on its machines, on which machines it had also placed the name "Singer," but that it had used on its machines an oval brass plate of exactly the same shape as the one found on complainant's machines and at-

tached at the base of the arm, in the same position as the Singer Company had placed its plates; and that on this brass plate, in close imitation of the brass plate of the Singer Company, the defendant had first used the initials "S. M. Co.," which might readily have been taken for "Singer Mfg. Co." and afterwards used the initials "J. Mfg. Co." This clearly indicated fraud, and no-where on the defendant's machine did the full name of the defendant company appear. It was under such circumstances that the Supreme Court found that while the defendant had the right to use the name "Singer" as the name for its machine, it had been guilty of fraud in connection with the circumstances above detailed, and that thereafter it must be enjoined from using the word "Singer" on its sewing machines, without clearly and unmistakably specifying on said machines that defendant's machines marked with the name "Singer" were the product of the defendant Company.

That the majority of the Court of Appeals for the Eighth Circuit, composed of the same Judges who rendered the majority opinion in the [cas-] at bar, that is to say, Judges Munger and Van Devanter, in the case of Rice, Stix Dry Goods Co. v. Scriven, 165 Fed. 639, a case decided November 19, 1908 (two days after the decision of the same Judges in the case at Bar), held that the complainant had no exclusive right to the name "Elastic Seam" as applied to drawers, and that the defendant, who sold drawers made by the Premium Mfg. Company, which drawers bore upon them the words "Elastic Jean Drawers" did not infringe the good-will of the complainant because:

(*a*) Complainant had no exclusive right to the word "elastic" or to the words "Elastic Seam."

(*b*) That on defendant's drawers, upon which appears the words "Elastic Jean Drawers" also appeared the word "Premium," which sufficiently indicated that the defendant's drawers were made by the Premium Mfg. Company and not by the Scriven Company, the complainant. Besides marking its drawers as above stated, and in the manner illustrated at page 647 of 165 Fed., the defendant placed its drawers in cartons, as did the complainant, and the cartons of the defendant did not bear the defendant's name or state in express terms, any more than did the drawers themselves, that they were made by the defendant, but these cartons, as did the drawers themselves, bore upon them the word "Premium" in addition to the words "Elastic Jean Drawers." In that case the majority opinion of the Court of Appeals for this Circuit held that there was no infringement and that the defendant had sufficiently marked its drawers and the cartons containing them so as to "indicate" that they were not the product of the Scriven Company, the complainant; and in the latter case the same Judges constituting the majority of the Court of Appeals as constituted the majority of the Court of Appeals in the case at bar, by specific reference to the case of Singer Mfg. Co. v. June Mfg. Co., showed that the defendant, by putting the word "Premium" on its drawers and on the cartons containing the same, which word was the characteristic word [of the characteristic word] of the defendant's name, had thereby [sufficiently] "indicated" that

its "Elastic Jean Drawers" were not "Scriven's Elastic Seam" drawers.

That the interlocutory decree in the case at bar, as appears from the decree itself, is in the following words:

"The mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the appeal of the plaintiff from the decree entered herein on February 3, 1908, and the opinion of said Court of Appeals having been filed in this court, it is now, in pursuance of said mandate and opinion, ordered, adjudged and decreed as follows:

1. Said decree entered herein on February 3, 1908, is set aside.

2. The defendant, Hamilton, Brown Shoe Company, its
16 servants, agents, officers and employees, are perpetually enjoined from using the name 'The American Lady,' as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Brothers & Company, and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408 or 397, or the catch-phrase, 'With the character of the woman' or any other phrase in simulation of the phrase 'A shoe as good as it name.'

3. The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded.

4. This case is referred to H. H. Denison, Esq., as Master, upon the evidence already taken in this case and the exhibits in evidence in this case, and such further evidence as may be offered before the Master by the parties to this action, to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits, since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case and which were marked with the name 'The American Lady' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton, Brown Shoe Company."

That notwithstanding the terms of the said decree, construed as this decree must be by the decision of the majority opinion of the Court of Appeals in the case at bar hereinafter referred to and reported in 165 Fed. 413-418, and by the decisions of the Supreme Court of the United States hereinbefore referred to, as well as by the decision of the same Judges constituting the same United States Circuit Court of Appeals for this Circuit in the case of Rice, Stix Dry Goods Co. v. Scriven, 165 Fed. 639, hereinbefore referred to; nevertheless, the Master in this case, H. H. Denison, Esq., has exceeded his authority under the said decree, and notwithstanding the objections of record made by the defendant's counsel, proposes to allow the complainant to inquire into, and compel the defendant to account to the complainant for, the profits that the defendant has made on shoes sold by the defendant since the filing of the bill of complaint in this case with the name American Lady, even though each of said shoes, as well as the cartons containing every pair of said

shoes, bear plainly marked thereon, in connection with the
17 words "American Lady," the name "Hamilton, Brown Shoe Co." That this threatened action on the part of said Master is contrary to the law applicable in this case, and contrary to the terms of the interlocutory decree in this case, when the said decree is construed, as it must be, in the light of the decision of the majority of the Court of Appeals in this case, and in the light of the decisions to which we have referred, which are exclusively decisions of the United States Court of Appeals for this Circuit or decisions of the Supreme Court of the United States, two of which are cited in the opinion of the majority of the United States Court of Appeals in the case at bar, as warrant for the conclusion reached by the majority of the United States Court of Appeals in the case at bar in its ultimate conclusion that the defendant might not use the name American Lady on its shoes unless it also used its own name thereon; for this, as we contend, is the only lawful interpretation that can be placed upon the majority opinion of the Court of Appeals in the case at bar, and is clearly what the majority of the United States Court of Appeals in the case at bar meant to decide and did decide, so far as the question here at issue is concerned.

Defendant herewith presents, in connection with this motion, a pair of its shoes such as exhibited before the Master in the taking of the testimony already had before the Master, each of which is plainly marked on the sole thereof with the name American Lady and with the name Hamilton, Brown Shoe Company, as well as the carton marked "Defendant's Exhibit, American Lady Shoe carton, January 31, 1910. H. H. Denison, Master," referred to in this motion, which carton plainly bears on the lid thereof the words "Hamilton, Brown Shoe Co.'s American Lady," and which carton bears at the front end thereof, among other things, the words American Lady and the name Hamilton, Brown Shoe Company; and defendant also presents to the Court, in connection with this motion, a copy of the transcript of the record of testimony already taken before the Master, that the Court may see for itself what has already taken place before the Master, and that the Master does propose to proceed with this accounting, unless otherwise ordered by this Court, and to compel the defendant to account for all its American Lady shoes sold since the date of the filing of the bill in this case, which are marked as the aforesaid pair of shoes is marked, and each of which pair of American Lady shoes,
as sold by the defendant since the filing of the bill in this case,
18 were placed in a carton like the said carton hereinbefore referred to.

To illustrate these matters in a more simple form, defendant attached to this motion as an exhibit, marked Exhibit A, a reproduction of the mark on the sole of the pair of defendant's American Lady shoes put in evidence by the complainant before the Master, said mark showing the strap trade mark of Hamilton Brown Shoe Company and on said strap trade mark the words Hamilton, Brown Shoe Company and the words American Lady in the center of said strap trade mark. Also, an exact duplicate of the label on the lid of the carton put in evidence before the Master, hereinbefore referred to and

marked "Defendant's Exhibit, American Lady Shoe Carton, January 31, 1910, H. H. Denison, Master," the said label here attached and being a duplicate of the label on the lid of said carton being marked Exhibit B. Also, a label showing the matter which appears on the end of said carton bearing the name American Lady, the picture of Martha Washington, the strap trade mark of Hamilton, Brown Shoe Company bearing the words Hamilton, Brown Shoe Company on the strap, and also in the center of the strap, on a red background, the word "Makers," and said label (a duplicate of the label on the end of said carton) is hereto attached and marked Exhibit C.

Defendant moves the Court, under the circumstances, and in view of the fact that *of* the Master be permitted to proceed with the accounting as herein indicated the defendant will not only be put to large and unnecessary expense but that its private affairs, outside of the scope of this accounting, will be inquired into, under the extraordinary and unusual circumstances of this case, to order:

That the Master be instructed not to permit this accounting to proceed in respect to any American Lady shoes sold by the defendant since the filing of the bill of complaint in this case which shoes were marked with the name Hamilton, Brown Shoe Company; and not to proceed with the accounting in this case as to shoes so marked and sold by the defendant since the date of the filing of the bill of complaint in this case, which shoes, as sold by the defendant since the date aforesaid were placed in cartons bearing upon said cartons the name American Lady and the name Hamilton, Brown Shoe Company, or the words Hamilton, Brown Shoe Co.'s "American Lady."

Defendant further states that before the first hearing be-
19 fore the Master was commenced on the morning of January 31, 1910, a stipulation was made between the counsel for complainant and counsel for defendant in this case, which was duly filed in this Court and appears of record, which is in the following words:

"It is hereby stipulated and agreed by and between the parties to this cause that after the mandate from the United States Circuit Court of Appeals in this cause was filed in the United States Circuit Court, and before the order was entered by the United States Circuit Court referring this cause to the Special Master for an accounting, the defendant, Hamilton, Brown Shoe Company, did make due and lawful tender of the sum of one dollar, lawful money of the United States, to the complainant, The Wolf Brothers and Company, in full settlement of all damages and profits which the complainant may be entitled to recover upon said accounting."

Defendant also states that, as appears from the record in this case, the complainant in this case is a citizen of the State of Ohio, being a corporation duly created and existing under and by virtue of the laws of the State of Ohio, and therefore is a non-resident complainant and a citizen of another State; that the Master's fees and expenses incident to the accounting, as already had, will amount to a considerable sum; that notwithstanding the offer and tender made by the defendant to the complainant before this accounting was commenced (evidenced by the stipulation set forth above), the complainant has refused to accept the same and insists upon continuing this expensive

accounting. For these reasons the defendant respectfully asks that this Court make an order now on the complainant that the complainant, within five days of the order of this Court, shall give security, satisfactory to the Court, to pay all the costs and expenses incident to this accounting, including the Master's fees; and to that end the defendant respectfully prays that this Court make an order now requiring the complainant to deposit with the Clerk of this Court at least the sum of Two Thousand Dollars, or in lieu thereof good and sufficient bond, with sureties to be approved by this Court, in the sum of Four Thousand Dollars, said security or said bond for costs to be increased, within the discretion of this Court and upon proper application made by the defendant, from time to time as to this Court may seem meet and proper; or for such order as this Court may deem just in the premises.

20 Defendant also prays that pending the decision of this Court on this motion the Master be ordered to stay all further proceedings on this accounting. And defendant will ever pray.

PAUL BAKEWELL,
Solicitor for Defendant,
Hamilton, Brown Shoe Company.

St. Louis, Feb. 21, 1910.

(Here follow Exhibits A, B, C, marked page 21.)

HAMILTON-BROWN SHOE CO.
MAKERS
"KEEP THE QUALITY UP"

American Lady
Special

22 (*Defendant's Motion for Order on Special Master and for Security for Costs. Argued and Submitted Feb.* 23, 1910.)

Defendant's motion that Special Master in this cause be ordered not to proceed with accounting in respect to any shoes sold by said defendant since the filing of the bill marked with the name Hamilton Brown Shoe Company and with the words American Lady or marked as just stated and also packed as sold by defendant from the date aforesaid, in cartons plainly bearing the name of defendant, also motion for security for costs is this day argued by counsel for both parties and submitted to the Court.

(*Order Overruling Motion that Special Master be Ordered Not to Proceed with Accounting and Sustaining Motion for Security for Costs, Feb.* 28, 1910.)

The Court having fully considered the [defendant's] motion that the Special Master in this case, Henry H. Denison, Esq., be ordered not to proceed with the accounting in this case in respect to any shoes sold by said defendant since the filing of the bill (January 29th, 1906) which do not clearly indicate that Hamilton-Brown Shoe Company are the makers, and for security of costs, doth Order that the motion that Special Master proceed no further with the accounting, as specifically stated in said motion, be and the same is hereby overruled, and that the motion for security of costs be and the same is hereby sustained, and the Complainant is hereby ruled to give a bond for costs, which have or may accrue by reason of the accounting, in the penal sum of Four Thousand Dollars, within ten days from this date, said bond to be approved by the Court.

February 28, 1910.

DAVID P. DYER, *Judge.*

To the Honorable the Judges of the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri:

Petition on the Part of Hamilton, Brown Shoe Company (Filed by leave of Court March 3, 1910) that this Court set aside so much of its order in this case entered February 28, 1910, as overrules Defendant's Motion that the Special Master in this case, Henry H. Denison, Esq., be ordered to proceed no further in the Accounting in respect to Shoes sold by the Hamilton, Brown Shoe Co., since
23 the filing of the Bill of Complaint in this case, and which Shoes were marked with the name "American Lady" and with the name "Hamilton, Brown Shoe Co.," and which Shoes, as sold by Defendant, since the filing of the Bill, were placed in Cartons plainly bearing the name "Hamilton, Brown Shoe Co." On the Lid of said Cartons, and on the end of said Cartons plainly bearing the words "Hamilton, Brown Shoe Co. Makers:" and for a reconsideration, before more than one of the Judges of this Court if possible, on Defendant's Motion so far as the above matter is concerned, which

Motion of Defendant was filed in this Court heretofore, to-wit, on February 21st, 1910:

For grounds of this petition, defendant states:

That on the argument of the settlement of the decree in this case the complainant's counsel presented a form of interlocutory decree, an exact copy of which is hereto attached and marked "Exhibit A;" and that at the same time the defendant's counsel presented a form of interlocutory decree, an exact copy of which is hereto attached and marked "Exhibit B," the said form of the said last named decree having been based, as defendant's counsel believes, upon that part of the decision of the majority of the Court of Appeals in this case (see 165 Fed. pp. 417-418) which is in the following words:

"In some respects the markings upon the bottom of defendant's shoes and upon the cartons and boxes in which the shoes were placed were in simulation of those of complainant; but, as the simulation in these respects was discontinued by defendant upon the bringing of this suit, we will not extend this opinion by pointing out the similarity.

Legitimate competition in trade is not only the right of every person, but to be commended, when of public benefit. It is only when competition is deceptive that it is condemned by the law. While the term 'The American Girl,' as applied by complainant and its predecessors, was not subject to exclusive appropriation by them, it had, nevertheless, by their long continued use of it, come to have a secondary meaning, indicative of the origin and manufacture of the shoes to which it was applied, and had come to be recognized in the trade as meaning that such shoes were those of the complainant and its predecessors. Whatever of good will and advantage resulted from this was the property of the complainant, and, while others were entitled to use the same or any similar term, because of its being common property, they could do so only on condition that they accompanied it with such distinguishing marks or matter as would plainly indicate that it was not being [use-] with its secondary signification;
that is, as pointing to the complainant as the manufacturer
24 of the goods to which it was applied. Howe Scale Co. v. Wycoff, 198 U. S. 118, 25 Sup. Ct. 609; 49 L. Ed. 97; Donnell v. Hering-Hall-Martin Safe Co., 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481.

Complainant is not guilty of such laches as to deprive it of an injunction; but we think an accounting should be limited to the time since the commencement of this suit.

Complainant is entitled to a decree enjoining the defendant from using the name 'The American Lady,' as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's, and from using, in connection with such name, as applied to its shoes for women, the numerals mentioned, or the catch phrase 'With the character of the woman,' or any other phrase in

simulation of the phrase 'A shoe as good as its name,' and also to an accounting as before stated.

The decree of the Circuit Court is reversed, with directions to enter a decree in accordance herewith."

That after argument of counsel for complainant and counsel for defendant on the settlement of the decree, heretofore, to-wit, on November 15, 1909, the interlocutory decree in this case was entered, which interlocutory decree, except as to filling out the name of the Master (the name of the Master having been agreed to by counsel for complainant and counsel for defendant) is exactly like the form of decree presented by defendant's counsel and attached hereto as "Exhibit B."

This petition is presented by defendant, because defendant and its counsel verily believe that if the order made herein on February 28, 1910, stand, and in pursuance thereof the Master be permitted to proceed with the accounting in respect to shoes sold by defendant since the filing of the bill in this case, marked as to the shoes themselves and as to the cartons containing every pair of such shoes as hereinbefore stated, the result will be a miscarriage of justice and an irreparable injury will be done to the defendant before defendant can have remedy, by appeal, in the United States Circuit Court of Appeals for the Eighth Circuit; that in the meantime, if the Master be permitted to proceed with this accounting in respect to the defendant's shoes marked as hereinbefore stated, the private affairs of the defendant company, which are its trade secrets entitled to protection under the law, will be gone into by evidence which is irrelevant or immaterial to any inquiry which it was intended by
25 the majority opinion of the U. S. Court of Appeals in this case should be inquired into on any accounting ordered in pursuance of the mandate and majority opinion of the said Court, this inquiry into the private affairs of the defendant company, irrelevant and immaterial to the proper inquiry before the Master, being matters of privilege and privacy and in the nature of trade secrets, which, under the decisions of the U. S. Court of Appeals for this Circuit in the cases of Dowagiac v. Lochren, 143 Fed. 214; Electric Co., v. Hamilton, Brown Shoe Co., 165 Fed., 285; and First National Bank v. Abbott, 165 Fed. 855, cannot be gone into on this accounting.

This petition is also presented because if the Master be permitted to proceed with this inquiry and compel the defendant to account for all the profits made by defendant, since the filing of the bill, on shoes sold by defendant marked with the name "American Lady" and also plainly marked on the shoes themselves, as well as on the cartons containing every pair of such shoes, with the name Hamilton, Brown Shoe Company, contrary, as defendant and its counsel believes, to the intention of the majority of the Court of Appeals in its decision in the case at bar when that decision is interpreted in the light of the facts and of the decisions of the United States Supreme Court in Howe Scale Co., v. Wycoff, 198 U. S. 118, and Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267,

the result will be a miscarriage of justice in this case. That the probable and almost necessary result will be that the Master will report and recommend a judgment for a large amount against defendant for shoes sold since the filing of the bill and marked as above stated; and if this Court should adhere toits ruling made on February 28, 1910, in overruling the part of defendant's motion hereinbefore referred to, this Court would then confirm the Master's report, with the probably inevitable result that a judgment of this Court would be rendered against this defendant for profits made on its shoes marked as hereinbefore stated, since the filing of the bill in this case, amounting to a very large sum of money.

Therefore under the conditions stated above, not only would the private affairs of the defendant have in the meantime been inquired into, in respect to privileged matters irrelevant and immaterial to the proper scope of the inquiry on the accounting, as defendant and its counsel firmly believe, which injury to the defendant would have been accomplished and could not be remedied on appeal, but also if a final judgment and decreo were entered as hereinbefore stated, before the defendant could perfect its appeal to the United States Circuit Court of Appeals for this Circuit,
26 it would be compelled to give a bond for a very large sum in respect to profits improvidently inquired into.

For these reasons, defendant respectfully petitions this Court as hereinbefore prayed, and also asks this Court, in view of the importance of the questions arising, not only in respect to the large amount involved but in respect to the privileged matter, affecting the defendant, which the Master must needs [inquiry] into, if the order of this Court made on February 28, 1910, hereinbefore complained of, stand, that more than one of the Judges of this Court sit in the consideration of this petition, and in the reconsideration of defendant's motion heretofore filed in this cause, to-wit: on February 21, 1910, and in this connection defendant invokes all that it has stated in its said motion filed herein on February 21, 1910.

Defendant also files herewith a memorandum of the remarks or opinion of this Court rendered herein on February 28, 1910, in passing upon defendant's said motion filed herein on February 21, 1910, and marks the same "Exhibit C"; and in that connection defendant states, in respect to the remarks of this Court in its said opinion to the effect:

"The exhibits before the Court of Appeals when it decided this case had upon the bottom of the shoes the words 'Hamilton-Brown Shoe Company, American Lady,' and on the inside of the shoes were marked the numbers, and the words 'American Lady—Hamilton-Brown Shoe Company, Makers.'." that said pair of shoes, so far as the record before the United States Court of Appeals for the Eighth Circuit shows, were not shoes shown to have been sold by defendant until after the filing of the bill in this case.

Therefore, defendant prays as hereinbefore stated, and will ever pray and prays the Court that until this petition is disposed of the

Master be ordered to suspend any proceedings on this accounting until the further order of this Court.

PAUL BAKEWELL,
Solicitor for Hamilton, Brown Shoe Company, Defendant.

March 1, 1910.

UNITED STATES OF AMERICA,
State of Missouri, City of St. Louis, ss:

Paul Bakewell, being first duly sworn, on his oath states: That he is the solicitor for the defendant in this case; that he has
27 prepared and read the foregoing petition; that the said petition is made in the utmost good faith; that, so far as said petition relates to matters stated on information and belief, or matters of opinion, he verily believes it to be true; and that, so far as said petition relates to matters of fact, it is true in point of fact.

PAUL BAKEWELL.

Sworn to and subscribed before me, this 1st day of March, 1910.

[SEAL.] GEORGE BAKEWELL,
Notary Public.

My term expires February 5, 1913.

EXHIBIT A.

[SEAL.] George Bakewell, Notary Public.

(Form of Interlocutory Decree on the Mandate of the Court of Appeals, Presented by Complainant.)

The mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the Appeal of the plaintiff from the decree entered herein on February 3, 1908, and the opinion of said court of appeals having been filed in this court, it is now, in pursuance of said mandate, ordered, adjudged and decreed as follows:

1. Said decree entered herein on February 3, 1908 is set aside.

2. The defendant Hamilton-Brown Shoe Company its servants, agents, officers and employees, are perpetually enjoined from using the name "The American Lady," as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Bros. & Company, and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408, or 397 or the catch phrase, "With the Character of the Woman" or any other phrase in simulation of the phrase "A shoe as Good as its Name."

3. The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded.

4. The case is referred to —— —— upon the evidence
28 already taken and such further evidence as may be offered by the parties to ascertain and report the damages, since the commencement of this suit, to which the plaintiff is entitled and the profits for which the defendant is liable under the ruling and opinion of the Circuit Court of Appeals in this case.

EXHIBIT B.

[SEAL.] George Bakewell, Notary Public.

(Form of Interlocutory Decree on the Mandate of the Court of Appeals, Presented by Defendant.)

The mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the appeal of the plaintiff from the decree entered herein on February 3, 1908, and the opinion of said Court of Appeals having been filed in this court, it is now in pursuance of said mandate and opinion, ordered, adjudged and decreed as follows:

1. Said decree entered herein on February 3, 1908, is set aside.

2. The defendant, Hamilton, Brown Shoe Company, its servants, agents, officers and employees, are perpetually enjoined from using the name "The American Lady", as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Brothers & Company, and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408 or 397, or the catch-phrase "With the character of the woman" or any other phrase in simulation of the phrase "A shoe as good as its name."

3. The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded.

4. This case is referred to — ——, as Master, upon the evidence already taken in this case and the exhibits in evidence in this case, and such further evidence as may be offered before the Master by the parties to this action, to ascertain and report *to* damages, since the commencement of this suit, which the plaintiff has suffered, and the profits, since the commencement of this suit, for which the defendant may be liable, said accounting of damages
29 and profits to be limited to shoes sold by the defendant since the filing of the bill in the case, and which were marked with the name "The American Lady" and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton, Brown Shoe Company.

(Signed) DAVID P. DYER, *Judge.*

Nov. 15, 1909.

EXHIBIT C.

(SEAL.) George Bakewell, Notary Public.

Memorandum of Opinion Delivered from the Bench in the Above-entitled Cause by Hon. David P. Dyer, U. S. District Judge, on Monday, February 28th, 1910.

This is a motion on behalf of the defendant to direct the Special Master in this case, heretofore appointed by this Court not to proceed with the accounting in respect to any shoes sold by the defendant since the filing of the bill, and marked with the name "Hamilton-Brown Shoe Company" and "American Lady," and also packed in cartons so marked, sold by the defendant from the time of the making of the order.

This was a proceeding originally brought by Wolf Brothers against the Hamilton-Brown Shoe Company for an alleged infringement of what they claimed to be a trade-mark. When the bill was presented to me in the Circuit Court it was dismissed. The case then went to the Circuit Court of Appeals, where the decision of this court was reversed, by a divided court. When this mandate of the Court of Appeals was received here, a Master was appointed to take an accounting of the profits on all shoes sold after the filing of the bill, not bearing the mark of the manufacturer thereof. The Master is now proceeding to take testimony under this reference.

It is claimed by the defendant in this motion that the name "Hamilton-Brown Shoe Company" stamped on the bottom of the shoes is sufficient to indicate that they are the product of the Hamilton-Brown Shoe Company, and that this mark does not in any wise indicate that they are the complainant's shoes.

I have gone over the case with the view of trying to reach a conclusion as to what the Circuit Court of Appeals meant by its finding. In that connection I have compared the shoes filed as exhibits by Complainant in this motion with the shoes filed as exhibits in the original case, and which were before the Court of Appeals, together with the boxes filed as exhibits in these cases. The shoes on the bottom show the words "Security Welt—Hamilton-Brown
30 Shoe Company—American Lady". On the boxes appear the words "American Lady Special" on the outside, and on the inside the words "Hamilton-Brown Shoe Company, Makers." The exhibits before the Court of Appeals when it decided this case had upon the bottom of the shoes the words "Hamilton-Brown Shoe Company, American Lady", and on the inside of the shoes were marked the numbers, and the words "American Lady,—Hamilton Brown Shoe Company, Makers."

The Court held, as I understood it and now understand it, that the defendant company could make the shoe and use the words "American Lady" as distinguished from the words 'American Girl", used by the complainant, provided it was shown from the shoe thus made that it was the manufacture of the Hamilton-Brown Shoe

Company. The shoes now offered do not show nor indicate that the Hamilton-Brown Shoe Company was the manufacturer thereof.

I am satisfied that the Court of Appeals meant by that decision that the Hamilton-Brown Shoe Company could sell the shoe bearing the words "American Lady," provided it was accompanied by a clear indication that it was the manufacture of the Hamilton-Brown Shoe Co.

The motion will be overruled.

Complainant's Cost Bond.

Filed March 4, 1910.

We, the undersigned, stand indebted for and undertake to pay all costs that have accrued, or may hereafter accrue, by reason of the accounting, not to exceed the sum of Four thousand dollars in the above entitled case; and hereby stipulate and agree that execution may issue against use, and each of us, for any costs taxed against the plaintiff herein in favor of the opposite party, or Court officers, or that may be created by the plaintiff in the course of any proceeding in this case.

Signed with our names and sealed with our seals, and dated this 3rd day of March A. D. 1910.

[SEAL.] THE WOLF BROTHERS & COMPANY,
By SAMUEL B. WOLF, *Pres.*
[SEAL.] THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By MARK CRAWLEY, *Attorney in Fact.*

Approved:
DAVID P. DYER, *Judge.*

March 4" 1910.

31 (*Order Denying Motion to Reconsider Motion that Special Master be Ordered Not to Proceed With Accounting, etc., March* 14, 1910.)

The Court having fuly considered the said defendant's application for reconsideration of so much of the Court's order of February 28th, 1910, as overruled [defendant's] motion of February 21st, 1910, in respect to the Master etc., heretofore submitted herein, doth Order that said application be and the same is hereby denied.

March 14th, 1910.

DAVID P. DYER, *Judge.*

(*Order of Allowance to Special Master for Services, etc., June* 14, 1910.)

By consent of the parties hereto, it is Ordered that Henry H. Denison Esq., Special Master in this cause be, and he is hereby allowed the sum of Fire Hundred ($500.00) [—] for his services as such Special Master, and that the same be taxed as costs.

It Is Further Ordered that said Complainant and Defendant each advance and pay one half of the said sum of $500.00, to the Clerk of this Court for the use of said Special Master. The said sum so advanced by said parties at this time shall not be considered however as determining which party shall ultimately be taxed with the said sum as a part of the costs in this case.

June 14th, 1910.

DAVID P. DYER, *Judge.*

(*Stipulation as to Payment of Certain Fees to Master, etc. Filed Oct.* 27, 1910.)

On Accounting Before the Master.

Whereas, on June 14, 1910, the following order was made and appears of record in this cause:

"By consent of the parties hereto, it is ordered that Henry H. Denison, Esq., Special Master in this cause, be and he is hereby allowed the sum of Five Hundred Dollars ($500.00) for his services as such Special Master, and that the same be taxed as costs.

32 It is further ordered that said complainant and defendant each advance and pay one-half of the said sum of $500.00, to the clerk of this court for the use of said Special Master. The said sum so advanced by said parties at this time shall not be considered however as determining which party shall ultimately be taxed with the said sum as a part of the costs in this case."; and

Whereas, heretofore, to-wit, on March 26, 1910, a stipulation was made between the parties to this cause, which stipulation reads as follows:

"It is stipulated by and between counsel for complainant and counsel for defendant in the above-entitled cause that complainant may now pay the Master $300, said sum to be paid on account of the Master's fees and expenses earned or to be earned in this cause, credited to the complainant and taxed as costs on this accounting, subject to the final order that may be made in this case in respect to the allowance of Master's fees;" and

Whereas, in pursuance of the said order of June 14, 1910, and said stipulation of March 26, 1910, the Master has been paid $800.00 in the matter of this accounting, the complainant (The Wolf Brothers & Company) having paid the Master altogether up to this date $550, and the defendant (Hamilton, Brown Shoe Company) having paid the Master up to date $250.00; and

Whereas, the Master is desirous of receiving $300.00 more on this accounting;

Now Therefore, it is stipulated and agreed by and between counsel for complainant and counsel for defendant, without any admission by either party to this cause that the Master has as yet earned in fees the sum of $1100, that the defendant, Hamilton, Brown Shoe Company, shall pay the Master, Henry H. Denison, Esq., the sum of Three Hundred Dollars ($300.00), so that when said sum has been

paid each party to this cause shall have paid the Master the sum of $550.00. When this sum of $300.00 has been paid to the Master by the defendant, the same shall be credited to the defendant and shall be taxed as costs in this cause on account of Master's fees on this accounting, and shall abide the final order made by the court
33 in this cause on this accounting.

PERCY WERNER,
Solicitor for Complainant.
H. S. PRIEST &
PAUL BAKEWELL,
Solicitor- for Defendant.

St. Louis, October 27, 1910.

(*Receipt of Master to Hamilton, Brown Shoe Company.*)

ST. LOUIS, October 27, 1910.

This Receipt executed in duplicate this 27th day of October, 1910, acknowledges that the Special Master in this cause, Henry H. Denison, Esq., has this day received from Hamilton, Brown Shoe Company the sum of Three Hundred Dollars ($300.00) in pursuance of the stipulation entered into between the parties hereto, by their respective solicitors, and bearing date October 27, 1910.

HENRY H. DENISON.

(*Order that Complainant Pay to Special Master Further Sum of $500.00.*)

By consent of parties hereto pursuant to their stipulation this day filed herein, it is Ordered that the Complainant pay to H. H. Denison Special Master the further sum of five Hundred ($500.00) dollars, said sum to be on account of Master's fees and expenses earned or to be earned in this case, to be credited to the complainant and taxed as costs on this accounting, subject to the final order that may be made in this case in respect to the allowance of the Master's fees.

June 22nd. 1911.

DAVID P. DYER, *Judge.*

The stipulation referred to in the above order is in words and figures as follows, to-wit:

(*Stipulation as to Allowance to Master, etc.*)

On Reference Before H. H. Denison, Special Master.

It is hereby stipulated, by and between counsel for complainant and counsel for defendant in the above-entitled cause, that,
34 upon entry of appropriate order by the court, complainant shall pay to the Master the further sum of Five Hundred Dollars ($500.), said sum to be on account of Master's fees and expenses earned or to be earned in this cause, to be credited to the complainant and taxed as costs on this accounting, subject to the final order that may be made in this case in respect to the allowance of the Master's fees.

PERCY WERNER,
Complainant's Solicitor.
H. S. PRIEST &
LUKE E. HART,
Defendant's Solicitors.

(*Stipulation of March 26, 1910, for Payment by Complainant of $300.00 to Master. Filed Aug. 31, 1911.*)

On Reference Before H. H. Denison, Special Master.

St. Louis, March 26, 1910.

It is stipulated by and between counsel for complainant and counsel for defendant in the above entitled cause that the complainant may now pay the Master $300.00, said sum to be on account of Master's fees and expenses earned or to be earned in this case, to be credited to the complainant and taxed as costs on this accounting, subject to the final order that may be made in this case in respect to the allowance of the Master's fees.

PERCY WERNER,
Complainant's Solicitor.
PAUL BAKEWELL,
Defendant's Solicitor.

(*Stipulation of Dec.* 10, 1910, *for Payment by Complainant of* $500.00 *to Master. Filed Aug.* 31, 1911.)

On Reference Before H. H. Denison, Special Master.

ST. LOUIS, December 10, 1910.

It is stipulated by and between counsel for complainant and counsel for defendant in the above entitled cause that the complainant may now pay the Master the further sum of $500.00, said sum to be on account of Master's fees and expenses earned or to be earned in this case, to be credited to the complainant and taxed as costs on this accounting, subject to the final order that may be made in this case in respect to the allowance of the Master's fees.

PERCY WERNER,
Complainant's Solicitor.
H. S. PRIEST,
Defendant's Solicitor.

I consent to this, only on H. S. Priest, of Counsel for Defendant, signing this stipulation also.

PAUL BAKEWELL,
Solicitor and of Counsel for Defendant.

Dec. 10, 1910.

(*Stipulation of March* 8, 1911, *for Payment by Complainant of* $500.00 *to Master.. Filed Aug.* 31, 1911.)

On Reference Before H. H. Denison, Special Master.

ST. LOUIS, March 8, 1911.

It is stipulated by and between counsel for complainant and counsel for defendant in the above-entitled cause that the complainant may now pay the Master the further sum of $500.00, said sum to be on account of Master's fees and expenses earned or to be earned in this case, to be credited to the complainant and taxed as cost on this accounting, subject to the final order that may be made in this case in respect to the allowance of the Master's fees.

PERCY WERNER,
Complainant's Solicitor.
PAUL BAKEWELL,
H. S. PRIEST,
Defendant's Solicitors.

And afterwards, to-wit: on the 4th day of October, A. D. 1911 there were filed in said cause a report of Special Master, two volumes of testimony, thirty-three exhibits and complainant's and Defendant's exceptions to report of Special Master. Of the said thirty-three exhibits all are physical, (and are transmitted herewith to the Clerk of the U. S. Circuit Court of Appeals for the Eighth Circuit), with the exception of two of said exhibits, to-wit: Complainant's Exhibit AA and Defendant's Exhibit A, which are set forth on pages
36 1240 et seq. and 765 et seq., respectively, of this transcript; and the said Master's report, two volumes of testimony and Complainant's and Defendant's exceptions to said Master's report, are respectively in words and figures as follows, to-wit:

(Report of Special Master.)

IN THE

CIRCUIT COURT OF THE UNITED STATES

IN AND FOR

The Eastern Division of the Eastern Judicial District of Missouri.

IN EQUITY NO. 5262.

THE WOLF BROTHERS & COMPANY,
Complainant,

vs.

THE HAMILTON BROWN SHOE COMPANY,
Defendant.

REPORT OF

HENRY H. DENISON,
Master.

In the above entitled cause this Honorable Court on the 15th day of November, A. D. 1909, entered the following interlocutory decree:

CIRCUIT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF MISSOURI.

Eastern Division.

September Term, A. D. 1909.

THE WOLF BROTHERS & COMPANY
vs.
HAMILTON-BROWN SHOE COMPANY,
In Equity.
No. 5,262.

INTERLOCUTORY DECREE ON THE MANDATE OF THE COURT OF APPEALS.

The mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the appeal of the plaintiff from the decree entered herein on February 3, 1908, and the opinion of said Court of Appeals having been filed in this court, it is now, in pursuance of said mandate and opinion, ordered, adjudged and decreed as follows:

1. Said decree entered herein on February 3, 1908, is set aside.

2. The defendant, Hamilton-Brown Shoe Company, its servants, agents, officers and employees, are perpetually enjoined from using the name "The American Lady," as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Brothers & Company, and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408 or 397, or the catch-phrase "With the character of the woman" or any other phrase in simulation of the phrase "A shoe as good as its name."

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3. The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded.

4. This case is referred to H. H. Denison, Esq., as Master, upon the evidence already taken in this case and the exhibits in evidence in this case, and such further evidence as may be offered before the Master by the parties to this action, to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits, since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case and which were marked with the name "The American Lady" and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company.

DAVID P. DYER, *Judge.*

Nov. 15, 1909.

NOW, THEREFORE, I, the undersigned Henry H. Denison, in obedience to said decree and order of reference, come and respectfully report to this Honorable Court all and singular the proceedings had before me under and by virtue thereof, together with my conclusions and findings thereunder.

The following notice was served by me upon the solicitors for the complainant and defendant, respectively:

UNITED STATES OF AMERICA.

EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DIVISION OF SAID DISTRICT.

The Wolf Brothers & Co.,
Complainant,
vs.
Hamilton-Brown Shoe Co.,
Defendant.

In Equity.
No. 5262.

To the above named Complainant, or to Mr. Percy Werner, its Solicitor.

To the above named defendant, or to Mr. Paul Bakewell, its Solicitor.

You and each of you are hereby notified that on Monday, the 31st day of January, 1910, at the office of Mr. Percy Werner, in the Rialto Building, on the corner of Fourth and Olive streets, in the City of St. Louis and State of Missouri, and at 2 o'clock p. m. of said day, I will proceed with the taking of the testimony in said cause under the reference to me as Special Master, made and entered of record in said Court on the 15th day of November, 1909, when and where you will appear; and each and every of you are further notified to produce before me on said hearing, at said time and place, all books, papers, vouchers, documents and exhibits in any manner pertaining to or relating to the matter in controversy.

HENRY H. DENISON, *Special Master.*

In pursuance thereof I met Messrs. Percy Werner, of the City of St. Louis, and Simeon M. Johnson, of Cincinnati, Ohio, solicitors for the complainant, and Messrs. Paul Bakewell and Luke E. Hart, of the City of St. Louis, solicitors for the defendant, at the time and place specified in said notice.

Mr. Lawrence Maxwell, of Cincinnati, Ohio, also appears on the briefs as counsel for complainant.

Hon. Henry S. Priest entered his appearance as counsel for defendant June 2, 1910. (Record, p. 430.)

Mr. Bakewell, on behalf of the defendant, filed with me a return to said notice as follows:

"CIRCUIT COURT OF THE UNITED STATES, EASTERN DIVISION OF EASTERN JUDICIAL DISTRICT OF MISSOURI.

The Wolf Brothers & Company,
Complainant,

vs.

Hamilton-Brown Shoe Company,
Defendant,

No. 5262.
In Equity.

Before Henry H. Denison, Master.

RETURN OF DEFENDANT TO THE NOTICE SERVED BY THE MASTER.

The Master has served on the complainant's counsel and on the defendant's counsel the following notice in this case:

"*To the above named complainant, or to Mr. Percy Werner, its Solicitor;*

"*To the above named defendant, or to Mr. Paul Bakewell, its Solicitor*:

"You and each of you are hereby notified that on Monday, the 31st day of January, 1910, at the office of Mr. Percy Werner, in the Rialto Building, on the corner of Fourth and Olive streets, in the City of St. Louis and State of Missouri, and at 2 o'clock p. m. of said day, I will proceed with the taking of the testimony in said cause under the reference to me as Special Master, made and entered of record in said court on the 15th day

of November, 1909, when and where you will appear, and each and every of you are further notified to produce before me on said hearing, at said time and place, all books, papers, vouchers, documents and exhibits in any manner pertaining to or relating to the matter in controversy.

Henry H. Denison,
Special Master."

Before the interlocutory decree in this case was entered by the Circuit Court, in pursuance of the mandate of the Court of Appeals, the question of the proper form of decree to be entered in the case was threshed out before the United States Circuit Court, the form submitted by the complainant being as follows:

"The mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the appeal of the plaintiff from the decree entered herein on Feb. 3, 1908, and the opinion of said Court of Appeals having been filed in this court, it is now, in pursuance of said mandate, ordered, adjudged and decreed as follows:

1. Said decree entered herein on Feb. 3, 1908, is set aside.

2. The defendant, Hamilton-Brown Shoe Company, its servants, agents, officers and employes, are perpetually enjoined from using the name 'The American Lady,' as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Bros. & Company, and from using in connection with such name as applied to its shoes for women, the numerals 403, 404, 407, 408 or 397, or the catchphrase 'With the Character of the Woman,' or any other phrase in simulation of the phrase 'A Shoe as Good as its Name.'

3. The costs up to and including the entry of this decree are adjudged against the defendant and execution therefor is awarded.

4. The case is referred to _____upon the evidence already taken and such further evidence as may be offered by the parties to ascertain and report the damages, since the commencement of this suit, to which the plaintiff is entitled, and the profits for which the defendant is liable under the ruling and opinion of the Circuit Court of Appeals in this case."

On the other hand, the form submitted by the defendant is the form adopted by the Circuit Court by its decree entered herein on November 15, 1909, under which the present Master is empowered to act.

It will be noticed that *by the form of decree as actually entered* by the Circuit Court the Court expressly limits the accounting to "*shoes sold by the defendant, since the filing of the bill in this case, and which were marked with the name "The American Lady" and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of Hamilton-Brown Shoe Company.*" Therefore, the notice which has been served upon the defendant's counsel by the Master must be construed in the light of the present decree and its history, and the inquiry must be limited to "the matter in controversy."

Under the Court's decree appointing the Master this inquiry is necessarily "*limited to shoes sold by the defendant, since the filing of the bill in this case, and which were marked with the name 'The American Lady' and not accompanied by any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company.*"

Furthermore, the complainant is not entitled to have produced, and the Master, under this decree, is not entitled to order the defendant to produce, any books, papers, vouchers, etc., generally, but only such as re-

late to the above limited inquiry; and, furthermore, under the decisions, the particular books, etc., should be specifically limited by naming what books and papers the complainant may claim are in the possession of the defendant which will show any matter *relevant to* this *limited inquiry.*

The defendant's return is: That, since the filing of the bill in this case, the defendant has sold no shoes marked with the name "The American Lady," which shoes were not accompanied with other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company; and, therefore, the defendant has no books, papers, vouchers, or documents "in any manner pertaining to or relating to the matter in controversy"; and the defendant, for the reasons more particularly pointed out herein, and under the authorities herein cited, and in the light of the specific terms of the interlocutory decree in this case, submits that this is a complete and proper return, and that it should not be compelled to produce here any books, papers, vouchers or documents relating to its general business, and which, under the law, and in view of the terms of the decree in this case, it cannot be lawfully compelled to produce.

Therefore, it is plain that upon this accounting under that decree the complainant has no right to make a general inquiry as to the American Lady shoes manufactured and sold by the defendant nor to a production of the books and records of the defendant for the purpose of such a general inquiry, and it is also plain that the accounting must be limited to American Lady shoes sold by the defendant since the filing of the bill which were not accompanied with matter clearly indicating that such shoes were of the manufacture of Hamilton-Brown Shoe Company, and that the complainant is only entitled to have produced at the hearings upon this accounting books and records of the defendant which show that since the filing of the bill

in this cause the defendant has sold shoes *"marked with the name 'American Lady' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company."*

An examination of the authorities shows clearly that the complainant is not entitled to the production of the defendant's books, etc., for the purposes of the general inquiry which it desires to make upon this accounting. As already pointed out, the interlocutory decree under which this accounting is being taken expressly limits the inquiry to shoes sold by the defendant, since the filing of the bill marked with the name "American Lady" and not accompanied with other matter clearly indicating that such shoes were manufactured by Hamilton-Brown Shoe Company. The complainant does not claim nor pretend that the books, papers, etc., which it desires to have produced *do* contain such evidence, but it claims, as we understand it, that those books, etc., *may* contain such evidence, and if produced *may* show such facts. In other words, it is a mere fishing expedition which the complainant desires to make and it is well settled that such an inquisition will not be tolerated.

In the case of Bischoffsheim vs. Brown, 29 Fed. 341, an equity suit, "the only issue between the defendants and the plaintiff" was "whether a trust fund was appropriated by them." Judge Wallace in passing upon a motion to compel the production of books, papers, etc., in that case said:

> "This is a motion on behalf of the defendants Seligman & Brown to compel production by the plaintiff for inspection of books, papers, and documents described in Exhibit A annexed to moving papers. The proofs in the cause are being taken orally before an examiner, and certain witnesses for the plaintiff have testified that the papers and documents are under the control of the

plaintiff. The papers specified in Exhibit A are not any particular book, document, or writing, but comprise all or a great number of several classes of papers, some of which may possibly be found when examined to contain evidence advantageous to the defendant in controverting the plaintiff's case, or supporting their own case. The motion seems to have been made and has been argued upon the theory that either party to a suit in equity may call upon his adversary to exhibit for inspection anything and everything in writing under the latter's control which may assist the party who makes the call. The case of Coit vs. North Carolina Gold Amalgamating Co., 9 Fed. Rep. 577, is cited as an authority in this direction. Notwithstanding this authority it must be held that such practice cannot be sanctioned. Courts of equity and courts of law have always been solicitous to protect parties and witnesses against any unnecessary inquisition into the contents of their private papers by those who have no interest in that."

In the case of Bloede vs. Bancroft & Sons, 98 Fed. 186, 189, the plaintiff asked for an order under section 724 of the revised statutes to inspect "all books, papers," etc., of the defendant. The Court held that the plaintiff was not entitled to such an order and said:

"It will not be awarded to gratify mere curiosity or to enable one party to make undue inquisition into the affairs of another. Nor will the Court extend discovery beyond the legitimate requirements of the case to be aided thereby. So under section 724 production of books or writings is authorized only so far as they contain *evidence pertinent to the issue.* An exposure of business details and secrets, not pertinent to the issue, to enable one to discover clues to guide him in conducting an investigation of possible claims or defenses against an adversary is not to be tolerated."

In the case of West. Pub. Co. vs. Edward Thompson Co., 151 Fed. 138, an action to restrain infringement of a copyright, the defendant alleged, on information and belief, that an examination of the books and records of the complainant would show that the complainant had failed to comply with the copyright law requiring the first two copies of its books to be placed in the mail addressed to the Librarian of Congress. Judge Chatfield, in denying the motion to compel a production of the books, etc., pointed out that the production was desired for the purpose of ascertaining if the books, etc., did contain such evidence, and it was not alleged that such facts *would appear* from an examination of those books, etc.

In the case of Oro Water, Light & Power Co. vs. City of Oroville, 162 Fed. 975, complainant sought to restrain defendant from enforcing an ordinance fixing a maximum rate to be charged for electricity. The defendant answered and then asked for an order to permit it to examine the books, papers, etc., of the complainant. In denying the order Judge Farrington said:

> "The Federal courts have no power to grant, and the litigant in the Federal Court has no right to expect, an order which will compel his adversary to exhibit for inspection anything and everything in writing under the latter's control which may assist the party who makes the demand. The theory upon which this court and courts of equity have always proceeded is that the party against whom discovery is sought has rights which must be protected. The Court cannot lend itself to any scheme to conceal evidence, neither can it compel a party to disclose evidence which, for instance, would subject him to criminal prosecution. *Neither party has a legal right to examine all records and documents in his adversary's possession simply for the purpose of discovering whether they contain something which might benefit him,* or to see in advance of the trial what evidence will be

produced on the other side. Again, a court of equity should make no order blindly. It should command of no man anything which he has a legal right to refuse, and, when issued, its order should be specific and certain, leaving as little as possible to the discretion of the person or persons against whom it is directed. In cases of this kind, there should be no uncertainty as to what documents are in possession of the party against whom discovery is sought, and just what portion of them he should exhibit. *The Court should require the production of no evidence which is not competent and material, and within the legitimate issues of the case and in aid of the action or defense of him who seeks it.*"

We also submit herewith to the Master, to assist the Master in interpreting the decree of the Court as actually entered in this case, a copy of defendant's original brief and a copy of defendant's reply brief which defendant submitted to the Circuit Court on the matter of the settlement of the decree in this case, and which tend to show why the Court limited the inquiry on this accounting by its decree.

Respectfully submitted,

HAMILTON-BROWN SHOE CO., *Defendant*,
By Paul Bakewell,
Its Solicitor.

St. Louis, Jan. 31, 1910."

The taking of testimony in said cause then proceeded.

STATEMENT OF THE CASE.

No clearer or better statement can be made than the following in the language of the United States Court of Appeals, taken from the report of the case in 165 Fed. Rep., page 413:

"The record in this case discloses that complainant is a corporation, manufacturing women's shoes, at Cincinnati, Ohio; that in 1896, George F. Dana & Co. were manufacturers of shoes in said city, and adopted as a trademark for women's shoes manufactured by them the words 'The American Girl.' In May, 1898, a co-partnership under the name of Wolf Bros. & Co. acquired said business and trademark, and in 1899 said Wolf Bros. & Co. adopted and used in advertising and selling its American Girl shoes the catch-phrase, 'A shoe as good as its name,' and used, in advertising, upon the top facing of the shoes, the picture of the head of a lady. In 1901 said Wolf Bros. & Co., for the purpose of designating certain styles of its American Girl shoes, adopted and advertised in its catalogues the numerals 403, 404, 407 and 408, and in its catalogue in 1904, for the same purpose, adopted an additional numeral, 397; and in their fall catalogue for 1904 Wolf Bros. & Co. adopted and had printed on its face cover a picture of Uncle Sam and a lady dancing a minuet. In June, 1905, the partnership of Wolf Bros. & Co. incorporated under the name of 'The Wolf Bros. & Company,' under the laws of the state of Ohio, and complainant then acquired all the assets of the partnership, including the good-will and trademarks.

"The defendant is a corporation organized under the laws of the State of Missouri, and a large manufacturer of shoes at St. Louis, in said state. In August, 1900, defendant adopted as a trademark for womens' shoes the words 'The American Lady,' with the picture of a lady. In October, 1903, it advertised with its American Lady shoes the catch-phrase, 'The shoe deserves its name.' The defendant claims that this catch-phrase was used by it in advertising upon one occasion only, and we dismiss it from further consideration. Thereafter, it changed the phrase to the words, 'With the character of the woman.' In its fall catalogue of 1904 the defendant designated certain styles of its American Lady shoes

by the same numerals used by complainant, to-wit, 403, 404, 407, and 408, and in its fall catalogue of 1905 it also adopted the numeral 397. In its catalogue of 1904 defendant placed upon the face cover the picture of George and Martha Washington dancing a minuet.

"This action was brought by complainant, in which it charges the defendant with infringing its trade-mark, 'The American Girl' by the use of the name 'The American Lady' and the portrait of a young woman. It further charges the defendant with infringing the catch-phrase, 'A shoe as good as its name' by using the catch-phrases 'The shoe deserves its name' and 'With the character of the woman.' It also charges the defendant with infringement by adopting its numeral numbers before mentioned for similar styles of shoes. It also charges defendant with unfair trade."

* * * * * * * *

"The record discloses that complainant and its predecessors extensively advertised its shoes under the name 'The American Girl,' with the catch-phrase before referred to, in various trade journals and in newspapers throughout the United States, but largely throughout the Southern States, and established an extensive trade therefor. Defendant is a much larger manufacturer of shoes than complainant, and has advertised much more extensively, expending something over $100,000 in advertising American Lady Shoes after the bringing of this suit."

* * * * * * * *

"The testimony of the vice-president and superintendent of defendant, with reference to adopting the name 'The American Lady,' is that in the latter part of August, or the first of September, 1900, they assembled their traveling salesmen, for the purpose of making a selection of samples for the following season, and it was suggested at such meeting that some name be adopted for that line of women's shoes, and the name 'The American Lady' was selected. He testifies that at that time he had never known or heard of shoes being made by Wolf Bros. & Co. of Cincinnati,

or made and sold by any one, under the name of 'The American Girl.' It is further claimed on the part of the defendant that, when it used the catch-phrases 'The shoe deserves its name' and 'With the character of the woman,' it did not know, and had not heard, of complainant's catch-phrase, 'A shoe as good as its name'; that at the time they adopted the various numerals which had been theretofore adopted by complainant it did not know that complainant used such numerals to designate similar styles of its shoe 'The American Girl.' "

* * * * * * * *

"In January, 1901, Wolf Bros. & Co., on seeing one of defendant's advertisements of its shoes under the designation 'The American Lady,' immediately wrote defendant, calling its attention to the fact that they regarded it as an infringement upon their trade-name 'The American Girl.' To this letter defendant answered, in substance, that it did not regard its use of the words 'The American Lady,' with the picture of a lady, as an infringement. To this Wolf Bros. & Co. replied, suggesting that, if defendant would further consider the matter, they thought it would come to the conclusion that it did constitute an infringement, and expressing a desire that the matter be adjusted between themselves without legal proceedings. To this letter defendant made no reply. Defendant's treasurer upon cross-examination, in answer to the inquiry as to whether the first of the above letters was answered by him merely as a matter of courtesy between one house and another, or because there was merit in the contention set up by complainant in the letters, said:

" 'My answer was prompted solely by a feeling of courtesy and politeness, as I never seriously regarded their claim. In fact, coming from a house relatively obscure, it seemed to me more a joke than a matter of any serious importance.'

"In a question relative to the second of said letters written by complainant to defendant he was asked if the same was answered; if not, why not? To which he answered:

" 'If I did not answer the letter, it was because I did not think it of sufficient importance to waste the time necessary to do so. I do not remember that I did not reply to it, but my impression is that I did not.' "

Upon the foregoing statement of the case the Court of Appeals made the following findings after having ruled that "The name 'The American Girl,' applied to shoes, is not the subject of a valid trade-mark. Nor can numeral numbers, when used to indicate styles rather than origin and manufacture, be the subject of a valid trade-mark."

"While it is true that a geographical name may not be exclusively appropriated as a trade-mark, yet a party, having adopted a geographical name as a designation of its goods, may be protected as against unfair trade. Pillsbury Washburn Flour Mills Co. v. Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; The French Republic v. Saratoga Springs Co., 19 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247. This is clearly illustrated in the case of Pillsbury Washburn Flour Mills Co v. Eagle, supra, wherein it was held that complainants, who were manufacturers of flour at Minneapolis, Minn., and had designated their flour as 'Minnesota,' 'Minneapolis,' etc., were entitled to enjoin a party who sold flour manufactured at Milwaukee, Wis., from designating such flour as 'Minnesota,' 'Minneapolis,' etc. This was done because defendant, in using the names 'Minnesota,' 'Minneapolis,' etc., was expressing a falsehood, and endeavoring to palm off upon the public flour manufactured in Wisconsin as and for flour manufactured at Minneapolis. In this case, while complainant is not entitled to relief upon the ground that the words 'The American Girl,' or the numerals applied to its several styles of shoes, are valid trade-marks, yet it is entitled to protection from their use by the defendant in a manner and under circumstances constituting unfair trade;

the essence of the rule being that one person shall not, in the sale of his goods, so act as to lead the public to believe that they are the goods of another."

* * * * * * * *

"It is plainly obvious, we think, that the words 'The American Girl' and 'The American Lady,' are so similar as to cause confusion, and the evidence fully discloses such to have been the result."

* * * * * * * *

"We cannot believe that, at the time of the adoption by defendant of the name 'The American Lady' for its shoes, it did not know that complainant used the words 'The American Girl' for its shoes, as it appears that the salesmen who were assembled by defendant and adopted the name 'The American Lady' had been traveling through the territory in which complainant's American Girl shoe had been sold and extensively advertised as such. The adoption by defendant of the catch-phrases simulating that of complainant, adopting the same numerals that complainant had adopted, and when complainant went back and adopted the additional numeral 397, then likewise immediately adopting the same, we cannot think took place without knowledge that it was following complainant in this regard. Had it only imitated complainant in one respect, it might well be said that it was innocently done and without knowledge of the previous adoption by the complainant; but the several acts of complainant being followed so closely in imitation by defendant is persuasive, if not conclusive, evidence that it was done with knowledge that it was imitating complainant. Actions of a similar character were held to overcome protestations of innocence and good faith in Fairbanks Co. v. Bell Co., 77 Fed. 869, 23 C. C. A. 554, National Biscuit Co. v. Baker (C. C.), 95 Fed. 135, and Hansen v. Siegel-Cooper Co. (C. C.) 106 Fed. 690.

"That defendant's action in the several respects above enumerated was not taken without knowl-

edge of complainant's rights we think is shown by the following circumstances: In January, 1901, Wolf Bros. & Co., on seeing one of defendant's advertisements of its shoes under the designation 'The American Lady,' immediately wrote defendant, calling its attention to the fact that they regarded it as an infringement upon their tradename 'The American Girl.' "

* * * * * * * *

"Legitimate competition in trade is not only the right of every person, but to be commended, when of public benefit. It is only when competition is deceptive that it is condemned by the law. While the term 'The American Girl,' as applied by complainant and its predecessors, was not subject to exclusive appropriation by them, it had, nevertheless, by their long-continued use of it, come to have a secondary meaning, indicative of the origin and manufacture of the shoes to which it was applied, and had come to be recognized in the trade as meaning that such shoes were those of the complainant and its predecessors. Whatever of good-will and advantage resulted from this was the property of the complainant, and, while others were entitled to use the same or any similar term, because of its being common property, they could do so only on condition that they accompanied it with such distinguishing marks or matter as would plainly indicate that it was not being used with its secondary signification; that is, as pointing to the complainant as the manufacturer of the goods to which it was applied. Howe Scale Co. v. Wycoff, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481."

On the 31st day of January, 1910, at the first hearing had under this order of reference, counsel for defendant filed a paper which they styled "Return of defendant to the notice served by the Master" (Record, page 2), in which it is stated, "That since the filing of

the Bill in this case, the defendant has sold no shoes marked with the name 'The American Lady' which shoes were not accompanied with other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company." See also statement of counsel (Record, p. 35).

On the same day, Mr. Warren F. McElroy, a witness who testified that he was "Superintendent of the Manufacturing Department of the Hamilton-Brown Shoe Company" and had been such for nineteen years and in that capacity had charge of the American Lady Factory, testified in answer to question 62 (record, p. 23), as follows:

> "The record of it is, that we have never sent out any shoes without the name 'Hamilton-Brown Shoe Company' on them, regardless of what the other name was."

This statement was in effect repeated several times by the same witness on pages 173, 174, 175, 197 of the Record, and the witness added:

> "I am the general manager and superintendent of the factory, and my orders are that the goods be stamped that go out of the factories." (See also, p. 283.)

The testimony, in the course of the hearing of the case, completely established the fact that the foregoing statements were untrue, it being proved that 974,016 pairs of American Lady shoes had been sold by the defendant during the period covered by this inquiry, upon which shoes nowhere appeared the name of the Hamilton-Brown Shoe Company, or any other mark indicating by whom the shoes were made. The counsel, of course, had been misled by their client. The superintendent and general manager of the American Lady Shoe factory was of course mistaken upon this point; that it was not explained upon cross-examina-

tion is evidently due to the fact that the stipulations entered into between the parties to shorten the testimony completely covered the matter and made the cross-examination or any explanation of Mr. McElroy's testimony unnecessary.

On page 42 of the record, counsel for the defendant objected to question numbered 114:

> "On the ground that it is an attempt to get into the profits made by the Hamilton-Brown Shoe Company on this 'American Lady' shoe marked with the name 'Hamilton-Brown Shoe Company' and those profits the complainant is not entitled to inquire about on this accounting."

On page 43 appears, in answer to the objection of counsel, the following:

> "The Master: It is in evidence that the Hamilton-Brown Shoe Company makes no 'American Lady' shoes which are not stamped 'Hamilton-Brown Shoe Company.'
>
> "It appears, of course, that the difference between the complainant and the defendant is that the complainant holds that it is *not* a sufficient evidence of the manufacture: and the defendant holds that it *is* sufficient evidence of the manufacture. That is a question which the Master will have to decide."

and upon this question I was asked to rule.

On page 61 of the record, counsel for defendant, Mr. Bakewell, said:

> "I ask that the examination be suspended until the Master has made his ruling."

To which the Master said:

> "This order requires that I pass upon this matter with the testimony which has already been taken in the trial of the cause, and such other testimony as may be taken before me and I have

been unable to get a copy of the record. The Clerk of the Court could not furnish me with one, and I have not had an opportunity to examine this record. I shall have to do so, and I see very clearly that I shall have to examine this record of testimony introduced in the hearing before the Court, with regard to the very matter you are asking me to pass upon now."

At the conclusion of that day's hearing, I adjourned the further taking of testimony until I could examine the testimony taken before the Court in the case, and the exhibits filed therein, all of which were before the Court of Appeals, and all of which were and are before me for my consideration by the special terms of the decree.

Having so examined the evidence and the exhibits which were before the Court the hearing was resumed on the 15th day of February, 1910, at which hearing I dictated the results of my examination with my views, reasons and conclusions, as the same appear in the record of testimony taken before me, from page 69 to page 91.

My conclusion from my examination of the testimony and exhibits, as set forth therein, and the opinion of the Court of Appeals (165 Fed. 413) was:

1. That the Court of Appeals held that shoes which are stamped upon the sole "Hamilton-Brown Shoe Company" in the trade-mark, the belt and buckle, with the words "The American Lady" inside the oval formed by the belt, are not those shoes which the court considered to have been "accompanied with other matter clearly indicating that the shoes were the manufacture of the Hamilton-Brown Shoe Company."

2. That the Court of Appeals held that shoes so marked which were also accompanied with the words "Hamilton-Brown Shoe Company, Makers" upon the silk inside lining at the top of the shoe, or upon the sole of the shoe, *are* shoes which the Court consid-

ered to have been "accompanied with other matter clearly indicating that the shoes were the manufacture of the Hamilton-Brown Shoe Company."

3. That the Court of Appeals did *not* consider that the carton in which the Hamilton-Brown Shoe Company enclosed its American Lady shoes, is such accompanying "other matter clearly indicating that the shoes were the manufacture of the Hamilton-Brown Shoe Co."

The counsel for the defendant believing that I was in error in the foregoing construction of the decision of the Court of Appeals, applied to me to adjourn the further taking of testimony, and to take my record into court and ask for the opinion of the court upon the correctness of my ruling.

This I declined to do for the reason as I stated, that I was perfectly satisfied with the correctness of my ruling and that, to my mind, it would be improper and impertinent for me to go into court and ask for instructions upon a matter in which I was perfectly satisfied that the conclusion I had reached was correct.

At the same time, as counsel for the defendant assured me that he wished to go before the Court and ask the Court to make a rule upon me to return my record into court for the purpose of indicating to me what course I should pursue in the examination, I adjourned the further hearing of the testimony for one week being the period of delay, suggested by the counsel for defendant, necessary for him to prepare his motion for a rule upon me.

The application contemplated was made by the counsel for defendant (Record, p. 106, et seq).

This application was overruled by the Court (Dyer, J.), in a written opinion in which the Court said in part, speaking of the decision of the Court of Appeals in this case:

> "The Court held, as I understood it and now understand it, that the defendant company could

make the shoe and use the words 'American Lady,' as distinguished from the words 'American Girl' used by the complainant, provided it was shown from the shoe thus made that it was the manufacture of the Hamilton-Brown Shoe Company. The shoes now offered do not show nor indicate that the Hamilton-Brown Shoe Company was the manufacturer thereof." (Record, page 107 C.)

Upon the overruling of this motion, the counsel for defendant filed a petition with the Court (Record, p. 107 AA), asking the court to set aside its previous order overruling the motion above referred to.

On the 3d day of March, 1910, in commenting upon the petition, and the reasons alleged by counsel for the defendant, the Court said:

"I can see the scope to which this inquiry goes, and I can see that if the indication upon the shoe sold by the Hamilton-Brown Shoe Company is a compliance with the decision of the Court of Appeals (which I do not think it is), if that is sufficient, I can see the examination ought not to go on." (Record, p. 108B.)

On the 7th day of March, 1910, the petition was dismissed by the Court without any further opinion.

Accordingly on April 7, 1910, the taking of testimony under the order of reference, was resumed.

THE DIFFERENCE BETWEEN THE PARTIES.

The difference between Complainant and Defendant in this case is, primarily, that the complainant claims that the words "Hamilton-Brown Shoe Company" on the American Lady shoes do not "clearly indicate that such shoes are of the manufacture of the Hamilton-Brown Shoe Company."

The defendant, on the contrary, holds that the words "Hamilton-Brown Shoe Company" on the American

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Lady shoes do clearly indicate that the Hamilton-Brown Shoe Company was the maker of such shoes.

On an inspection of the exhibits filed in the main case in the Court of Appeals and of the record of testimony therein, all of which are before me for my consideration by the express terms of the decree, I reached the conclusions set forth on pages 22 and 23 of the report.

The case has been tried before me upon the theory that the defendant must account to the complainant for the profits made upon all shoes marked "The American Lady" which were not accompanied with the word "Makers" in addition to the name "Hamilton-Brown Shoe Company"; that the defendant need not account for the profits on "The American Lady" shoes marked Hamilton-Brown Shoe Company "Makers"; and that the carton or paper box in which The American Lady shoes are sold is not such "other matter clearly indicating that the shoes were the manufacture of the Hamilton-Brown Shoe Company."

Counsel on either side have raised other objections during the progress of the hearing.

COMPLAINANT'S POINTS.

First: That it is entitled to the profits made by the defendant on the entire output of The American Lady shoes.

Second: That the word "Makers" is not sufficient to take shoes so marked out of the accounting.

Third: That the words "Hamilton-Brown Shoe Company" are not sufficient to take shoes so marked out of the accounting.

Fourth: That if the word "Makers" is held sufficient the complainant is entitled to the profits on the entire output of the American Lady Shoes, excepting those marked "Makers."

Fifth: That the complainant is entitled to a finding for interest on the profits from and after each period, or financial year.

Sixth: That complainant is entitled to a decree rejecting the advertising expense, in toto, as an item in the diminution of profits.

Seventh: That if any advertising is allowed in diminution of profits, it should only be the pro rata which defendant has charged as overhead advertising expense on its entire business.

Eighth: That while admitting that The American Lady shoes are packed in cartons, upon which the word "Makers" appears, nevertheless, the carton is not such accompanying "other matter clearly indicating that the shoes were the manufacture of the Hamilton-Brown Shoe Company."

Ninth: That the Hamilton-Brown Shoe Company bought from other manufacturers in the East and jobbed hundreds of styles of shoes upon which it stamped its name and trade-mark before marketing the same in identically the same way in which it marked the shoes actually manufactured by itself.

Tenth: That the complainant is by the decree entitled to damages as well as to the profits.

Eleventh: That in the case of the so-called "Minden" shoe, both the shoe itself, stamped with the Hamilton-Brown trade-mark, and the accompanying carton with the word "Makers" on it, were made by an Eastern manufacturer, shipped to the Hamilton-Brown Shoe Company, and jobbed by the defendant.

DEFENDANT'S POINTS.

First: That the Master cannot consider any of the evidence in the main case, or the exhibits introduced at the hearing on the injunction, unless notice is first given by opposing counsel, pointing out such evidence

as is desired, notwithstanding the fact that the decree referred the matter to the Master, "Upon the evidence already taken in this case, and the exhibits in evidence in this case, and such further evidence, etc."

Second: That the complainant is not entitled to any profits whatever.

Third: That before being entitled to recover any profits the complainant must prove as to each and every sale that the purchaser bought The American Lady shoe as and for the goods of the complainant.

Fourth: That the name Hamilton-Brown Shoe Company stamped upon the shoe is, under the decree of the Court of Appeals, "Matter clearly indicating that such shoes were the manufacture of the Hamilton-Brown Shoe Company."

Fifth: That the carton in which the American Lady shoes are sold, having thereon, among other marks, the word "Makers" is such "other matter clearly indicating that such shoes were the manufacture of the Hamilton-Brown Shoe Company."

Sixth: That the defendant has been guilty of no fraud and that consequently there can be no recovery.

Seventh: That there has been no proof of usage of trade as to selling, or not selling, to the ultimate customer, the carton with the shoe.

Eighth: That the complainant is not entitled to recover any profits unless it be shown that the defendant has done the *sum* of the things prohibited, and that the defendant is not to be held to account for their use *singly*.

Ninth: That the defendant is entitled to charge and has charged against the complainant, in diminution of the profits (if any should be recovered) the pro rata share, which defendant claims should be borne by the

"American Lady" shoe, of certain overhead charges upon the books of the defendant, called "Advance Boston House" and "Allowance to Boston House."

Tenth: That the defendant is entitled, under the stipulation, to charge and has charged against the complainant in diminution of the profits (if any should be recovered) 40 per cent of the amount paid by the defendant for advertising incurred on behalf of its entire business.

Eleventh: That the defendant is entitled to charge and has charged against the complainant in diminution of the profits found due the complainant (if any should be recovered) 6 per cent on the amount of the capital devoted exclusively to the American Lady line of shoes.

Twelfth: That the examination having proceeded upon the theory that the accounting was limited to the period of time between January 29, 1906, the date of the filing of the bill, and November 15, 1909, the date of the entry of the decree, the Master had no authority to hear any testimony regarding alleged infringements occurring after the entry of the decree.

COMPLAINANT'S POINTS.

First: In view of the language of the Court of Appeals in this case (165 Fed. 413) and the interpretations which I feel obliged to place upon that decision after an inspection of the exhibits which were in evidence before said Court, I cannot agree with counsel in the claim made on this point, that complainant is entitled to the profits on the entire output of the American Lady shoes, whether the same be gross or net. I am not in a position to exercise an independent judgment in this matter. I must obey the directions of the Court as I understand them, and I do not believe that the Court, when it sent this case to a reference, intended that the complainant should recover the profits

on the entire output of American Lady shoes. If the claim should be allowed *in gross*, it would mean that *all* overhead charges should be disallowed and the sum would be so vast, upon a position so untenable, according to my opinion, that I have not attempted to fix the amount.

If the claim should be allowed *net*, it would mean that certain improper overhead charges should be deducted and that the balance of the profit on the entire output of American Lady shoes should be awarded to the complainant. This would amount, according to my view, to $669,366.98.

(See totals No. 19 in Tables Nos. 3 and 4.)

This point is overruled.

Second: I do not think that the claim that the word "Makers" in connection with Hamilton-Brown Shoe Company is *not* sufficient to take shoes so marked out of the accounting, can be maintained. In my view, the Court made a clear distinction between shoes having the word "Makers" in the foregoing connection and those which did not bear the word "Makers" and I adhere to the rule which I laid down during the progress of the hearing that the Court of Appeals did not intend that the defendant should be compelled to account for shoes so marked as above.

The point is, therefore, overruled.

If the latest decision of the Supreme Court of the United States seems to tend otherwise, that is a question for the Court to pass upon. I do not think it is within the jurisdiction of the Master to decide.

The latest ruling upon this question of unfair trade is Jacobs vs. Beecham decided by the Supreme Court of the United States on the 15th day of May, ult. There was no question of trade-mark involved. Mr. Justice Holmes, in stating the case, says:

> "The defendant's use of the name is said to be saved from being unfair by the statement underneath *that he made the pills.*"

In dealing with this point the Court says:

> "The statement that the defendant makes them does not save the fraud. That is not what the public would notice or is intended to notice, and, if it did, its natural interpretation would be that the defendant had bought the original business out and was carrying it on."
>
> Supreme Court Reporter for June 15, 1911, Vol. 31, No. 12, p. 556.

Third: During the course of the hearing I held, in accordance with my interpretation of the decision of the Court of Appeals, that the words "Hamilton-Brown Shoe Company" upon the American Lady shoe, without more, was not other matter clearly indicating that the Hamilton-Brown Shoe Company was the manufacturer of the shoes so marked.

I have not seen any reason to change my opinion on this point, and the same is sustained.

That a mere name, without more, cannot be held to mean that the name is the name of the maker, or that an inference cannot be drawn from a mere name that it is the name of the maker, would seem to be sustained in the following decision by Thayer, J., of this circuit:

> "If the phrase found in the advertisement be read as follows: 'Genuine Benedictine Liquor of the Benedictine Monks of the Abbey of Fecamp' that does not necessarily imply that the liquor was made by or that it belongs to the Benedictine Monks of the Abbey of Fecamp."
>
> Societe Anonyme vs. Western Distilling Co., 43 Fed. 418.

Fourth: I am of the opinion that the Complainant is entitled to all the profit on the entire output of

American Lady shoes sold since the filing of the bill, excepting those marked "Makers" and this point is sustained.

> "In my judgment the infringer should at least account for the *entire profits* made upon the goods wrongfully sold with the trade-mark impressed thereon. And this is the rule established, after mature consideration in *Graham vs. Plate*, 40 Cal. 598; Sawyer vs. Kellogg, 9 Fed. 601. * * * The injured party should have at least the whole profit resulting from the wrongful act, and such I understand and hold the rule to be."
>
> Benkert v. Feder, 34 Fed. 534.

In Van Hoboken vs. Mohns & Kaltenbach, 112 Fed. 528, the Court, after considering the case as one of trade-mark, said:

> "If we consider the case as one of unfair competition, the same result must follow."

In the following case the defendants claimed that "They lost on all the lots making up the 900 barrels, except one, $43.00 and on that one made only $7.50." The Court said:

> "All questions as to the weight of conflicting evidence were for the Master. The defendants might get 25 cents per barrel more on account of the trade-mark, and still lose on the whole transaction. The profits due to the trade-mark only, and not the profits of the whole business, were the subject of inquiry. * * * The general loss would be less on account of what the trade-mark brought more.
>
> "It is argued that the evidence does not show that the orator would have made this profit if the defendants had not. This might be true, and not affect the rights of the parties. If the defendants made profit by their invasion of the orator's rights, the orator is entitled to them whether the same profits would have been made by the orator or not."

Atlantic Milling Co. vs. Rowland, 27 Fed. 24.

Fifth: In my opinion the complainant is not entitled to interest on the profits until the coming in of the Master's report, and this point is consequently overruled.

> "We add only that in our opinion the defendant should not have been charged with interest before the final decree. The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages."

Mowry vs. Whitney, 81 U. S. 653.
Quoted with approval in Root vs. Railway Co., 105 U. S. 198.

> "By a uniform current of decisions of this Court, beginning thirty years ago, the profits allowed in equity for the injury that a patentee has sustained by the infringement of his patent, have been considered as a measure of unliquidated damages, which as a general rule, and in the absence of special circumstances do not bear interest until after their amount has been judicially ascertained; and the provision introduced in the patent act of 1870, regulating the subject of profits and damages, made no mention of interest, and has not been understood to affect the rule as previously announced."

Tilghman vs. Proctor, 125 U. S.

Sixth: I am of the opinion that the complainant is not entitled to a decree rejecting the advertising expense in toto.

The complainants in their rebuttal, or *third* brief furnished me, present an elaborate argument in sup-

port of the position that, considering the facts in this case, none of the advertising expense should be allowed in diminution of the profits. I do not think their position is sound.

Advertising is as legitimate an item of expense in the business of a concern as labor, salaries, wages or any other expense necessarily incurred in the ordinary transaction of its business.

Advertising "Has become one of the recognized methods of prosecuting a successful business."

LaBaw vs. Hawkins, 2 Ban. & Ard. 561.

The theory of business is well known to be that generous advertising produces corresponding increase in profits. The presumption is that the profits are greater as the result of the advertising, so that the recovery will be greater for the same reason. The point is overruled.

Seventh: It appears in evidence that the defendant operates seven distinct and separate factories.

1. The American Lady factory with capacity for 7,000 pairs of shoes per day.
2. The American Gentleman factory with capacity for 7,000 pairs per day.
3. The Union factory, 10,000 pairs per day.
4. The Columbia factory, 6,000 pairs per day.
5. The Rugby factory, 2,000 pairs per day.
6. The Security factory, 4,000 pairs per day.
7. The Sunlight factory, 20,000 pairs per day.

This shows that the American Lady factory manufactures 12½ per cent of the entire output. The defendant has carried into its general overhead charges the entire amount expended for advertising its business. Taking no account of the large amount of output handled by the defendant which it bought from Eastern manufacturers, and marketed stamped with its own trademark, the American Lady factory should

only be charged with 12½ per cent of the general cost of advertising, based upon its proportion of the cost.

It is in evidence that the American Lady factory manufactures a very considerable output of shoes of other styles than the American Lady brand, so that something less than 72 per cent of the 12½ per cent is properly chargeable to the total output of the American Lady shoes for the first year involved in this inquiry.

This includes American Lady shoes marked "Makers" concerning which I am of the opinion that the complainant is not entitled to recover the profits on shoes so marked. In that event, the only advertising which could be charged to the American Lady shoe in this controversy would be that proportion which would be charged pro rata against the American Lady shoes *not* marked "Makers."

The proportions of profits and the proportions of advertising are variable. They differ in each period and they seem to bear little relation to each other, heavy advertising expenses being sometimes accompanied with reduced profits.

In my opinion this point should be sustained.

Eighth: Upon an examination of the exhibits which were before the court in the main case, and before the Court of Appeals at the hearing of the appeal, I became convinced that the Court of Appeals did not regard the carton or box in which the defendant packed and sold the American Lady shoes, as being "other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company."

Counsel for defendant on page 91 of the record "Respectfully submits that a careful examination of the carton in the court and introduced in evidence before the final hearing will show that many of them, do bear upon them the word 'Maker.'" is not all

Such being the case and the Court of Appeals having entered its order notwithstanding, I am still of the opinion that the Court of Appeals did not regard the carton, even with the word "Makers" on it as saving the fraud. And this objection should be sustained.

Ninth: It was shown in evidence (Record, pages 35, 36, 37, 561) that the defendant bought from other manufacturers, mainly in the East, shoes made by such manufacturers; that such shoes were jobbed by the defendant after having had stamped upon them the defendant's trade-mark in the same manner as the trade-mark was impressed upon the shoes actually made by the defendant. None of such shoes were marked "American Lady." It was not claimed that any shoes marked "American Lady" were made by any such other manufacturer.

The only relevancy there could be to this line of testimony is that it tends to show that the trade-mark of the Hamilton-Brown Shoe Company impressed upon the soles of shoes jobbed by the defendant, was not proof that shoes so marked were made by the defendant.

Upon the hearing I admitted this testimony for that purpose. I still think my ruling was correct and this point is sustained.

Tenth: Damages as Distinguished from Profits—

In the following language, on page 10, of the first brief furnished me, the complainant asks for an allowance as damages, in addition to the accounting of profits:

"DAMAGES.

"The decree in this case directs the Master to report both damages and profits. Complainant has not attempted to introduce any specific proof as to the amount of its damages, for the very obvious reason that they are practically incapable of exact computation. This is far from admitting

that complainant is not entitled to a substantial allowance for damages. The Court of Appeals having decided that the unfair competition with which defendant stands convicted was of an aggravated nature, amounting to direct piracy or spoliation, punitive damages may and should be allowed. The amount to be allowed for damages is discretionary with the Master, and may be allowed in the absence of specific proof. Pike vs. Doyle, 19 La. Ann. 362; Thompson vs. Winchester, 19 Pick (36 Mass.) 214 (31 Am. Dec. 135); Conrad vs. Jos. Uhrig Brewing Co., 8 Mo. App. 277."

It is perfectly clear that both damages and profits are recoverable by the complainant against the defendant in cases of infringement, whether it be of patent, trade-mark, trade-name, or unfair competition. These all stand upon the same footing in equity, and the same results follow, but I cannot agree with what seems to be the conclusion of complainant's counsel, that damages in addition to profits should be calculated and allowed as a separate and distinct finding, upon some basis of computation, simply because the decree awards both.

Under the English decisions the complainant was required to elect whether he would claim damages or profits. He could not have both—one recovery was at law, the other in equity.

The same practice formerly prevailed here.

"Prior to the passage of the Act of the 8th of July, 1870, two remedies were open to the owner of a patent whose rights had been infringed, and he had his election between the two: he might proceed in equity and recover the gains and profits which the infringer had made by the unlawful use of his invention, the infringer in such case being regarded as the trustee of the owner of the patent as respects such gains and profits; or the

owner of the patent might sue at law, in which case he would be entitled to recover, as damages, compensation for the pecuniary injury he suffered by the infringement, without regard to the question whether the defendant had gained or lost by his unlawful acts, the measure of damages in such case being not what the defendants had gained, but what the plaintiff had lost."

Birdsall vs. Coolidge, 93 U. S. 68-69.

The testimony in the printed record of the hearing of this case upon its merits, taken on December 29, 1906, shows at page 106 that "The trade-mark American Girl" and the catch-phrase "A shoe as good as its name," and the "Good Will," each had a value of over ten thousand dollars, and on page 117 the testimony shows that in this case, "The value of complainant's right to be exempt from unfair competition in trade is more than one hundred thousand dollars." I do not find that the truth of these statements has been anywhere controverted so that they stand as true statements of the values of the rights and things referred to.

This testimony was taken shortly after the filing of the bill, and, therefore, unquestionably refers to the period of time from 1901 to the time of the filing of the bill, for which period of infringement the complainant was then seeking to recover. The decree of the court directing me to take this accounting, and following the directions of the Court of Appeals, restricts my examination to the time since the filing of the bill, so that I am concluded from taking any account of damages or profits or any consideration of testimony relating thereto, for the period of the infringement prior to the filing of the bill. I am asked to exercise a discretion, which, it is assumed, the Master has the right to use, of making an allowance for punitive damages in the absence of specific proof of

actual damages, since damages are specifically awarded by the decree.

In that event, as the period of time since the filing of the bill embraced in this accounting is about the same as that for which recovery was sought prior to the filing of the bill, it would seem to be a fair basis for the allowance of damages against the defendant, providing I had the right to exercise such discretion in the absence of specific proof in this hearing, that the same be assessed in the amount for which the damages were shown to have been suffered by the complainant for a like period of time prior to the filing of the bill, that is to say, in the sum of one hundred and thirty thousand dollars.

If there were no proof or finding in this case with regard to the profits; or if it appeared by the evidence that there had been no profits; or if it appeared by the evidence that the profits accounted for did not adequately compensate the complainant for the damages suffered by reason of the defendant's action, I might, under proper showing, find that the foregoing, or some other definite sum, would adequately compensate the complainant for the damages suffered by the defendant's infringement.

I am, however, perfectly clear in my mind that the Act of July 8th, 1870, was never intended to confer upon a successful complainant the right to recover both damages and profits *concurrently*. That is, that the act does not authorize the recovery of profits in the sum, for example, of $100,000.00, and at the same time, the further sum of $100,000.00 damages. In such a case my opinion is that the sum of $100,000.00 profits adequately represents and covers the sum of $100,000.00 damages, and that judgment could only be rendered for the sum of $100,000.00 profits, as damages. So, per contra, if a finding was for $200,000.00 damages and $100,000.00 profits, the judgment could only be for the $200,000.00 damages, the $100,000.00 profits

being as it were merged in the amount of the judgment for damages, for profits are awarded as damages. The act was intended to prevent a multiplicity of suits; to make it unnecessary to elect between an action at law for damages and one in equity for profits, and to authorize a Court of Equity, having acquired jurisdiction to deal with the entire case and to render a decree for damages to supplement a recovery of profits whenever the profits were insufficient to compensate the complainant for the damages he had suffered.

The following authorities support this interpretation:

> "The act of Congress known as the Patent Act of July 8, 1870, provides that:
>
> " 'Upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in *addition to the profits* to be accounted for by the defendant, the *damages* the complainant has sustained thereby, and the Court shall assess the same or cause the same to be assessed under its direction. And the Court shall have the same powers to increase the same in its discretion that are given by this act to increase the damages found by verdicts in actions upon the case.'
>
> "And thus expressly affirms the defendant's liability to account for profits, as well as authorizes the Court sitting in equity *to award* and to treble *any damages that the plaintiff has sustained in excess of the defendant's profits.*"

Tilghman vs. Proctor, 125 U. S., page 148.

> "Damages of a compensatory character may be allowed to the complainant suing in equity, in certain cases, *where the gains and profits made by the respondent are clearly not sufficient to compensate the complainant for the injury sustained* by the unlawful violation of the exclusive right secured to him by the patent. Gains and profits are still the proper measure of damages in equity

suits, *except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent; in which event* the provision is that the complainant 'shall be entitled to recover, *in addition to the profits to be accounted for* by the respondent, the damages he has sustained thereby.' "

Birdsall v. Coolidge, 93 U. S. P. 69.

"Under the Act of Congress of 1870, he may recover damages in addition to the profits to be accounted for by the defendant; but as the recovery is limited by the Act to the *actual damages,* it is manifest that the *recovery of damages* AND *profits is not intended to be* DOUBLE, but that when necessary the damages are to *supplement that loss* of the complainant which the profits found to have been received *are insufficient to compensate.*"

Root v. Railway Co., 105 U. S. P. 212.

"Damages of a compensatory character may be allowed to a complainant in an equity suit, when it appears that the business of the infringer was so improvidently conducted that it did not yield any substantial profits, as in the case before the Court, 16 *Stat.* 206; *Rev. Stat. Sect.* 4921; *Birdsall et al v. Coolidge,* 93 *U. S.* 64.".

Marsh v. Seymour, 97 U. S. 360.

In the case of Thompson v. Wooster, 114 U. S. 104, the Master found that the complainant was entitled to recover $6,089.35 for the profits made by the infringer, and "The sum of $1,350, which was the amount of the complainant's damages" (page 106). Exception was taken "That the damages found were erroneous" (Page 107).

The Circuit Court "made a decree in favor of the complainant for the profits but *disallowed* the damages". (P. 108).

The decree of the Circuit Court was affirmed by the

United States Supreme Court but, in the lengthy opinion discussing various phases of the case, no allusion is made to the disallowance of the damages, which was, however, affirmed.

There can be no question but that the damages were disallowed, because they were adequately covered by the profits as damages, and the damages and profits could not be doubled.

No testimony has been introduced before me in this case to establish damages since the filing of the bill, as distinguished from profits. All the testimony throughout the hearing, as well as the stipulations of the parties, has been directed to the question of profits alone.

It is evident that the amount of the profits as established before me by the testimony and stipulations is amply sufficient to cover the damages which the complainant has suffered since the filing of the bill, as distinguished from the profits.

Under the following decisions of the United States Supreme Court it is clear that I have no power in this case to assume as a legal inference, in the absence of specific proof, any arbitrary or definite amount of punitive damages which the complainant has suffered as distinguished from the profits, as "complainant has not attempted to introduce any specific proof as to the amount of its damages".

> "There does not appear to be any example of a case in equity in which a Master, upon an accounting, has acted as a jury in a case at law, and awarded punitive damages. The complainants in the case at bar might have chosen to prosecute their rights by an action at law. But they have decided to apply for relief to a court of equity. The functions of a Master on an accounting do not include the imposing of exemplary damages by way of punishment. They are confined to the estimation of the profits realized by the

infringer, on the one hand, and of such damage as has been suffered by complainant, on the other: for the purpose of giving him compensation therefor. Complainants are not entitled to an award of punitive damages."

Hennessy v. Wilmerding Loewe Co., 103 Fed. 95.

"Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact".

Seymour v. McCormick, 57 U. S. 490.

Vide also New York City v. Ransom, 64 U. S. 487.

Dobson v. Hartford Carpet Co.
114 U. S. 444 & cases cited.

Bill v. U. S. Stamping Co. 32 Fed. 551.

The claim of the complainant that I should in my discretion, and in the absence of specific proof, make a finding of punitive damages as distinguished from profits is consequently disallowed as being outside of my jurisdiction, and clearly contrary to the theory of the law of damages in such cases as established by the decisions of the Supreme Court of the United States.

In a proper case the court in equity has the power to award punitive damages, but I do not think it is within the province of the Master to even recommend such action.

Eleventh: This point is, to some extent, similar to the ninth point. The shoe called the "Minden" shoe was one of the various classes of shoes made by Eastern manufacturers and shipped to the defendant, and jobbed by the defendant with its own trade-mark stamped upon the sole.

The testimony was offered more particularly as tending to show that the carton enclosing the "Minden" shoe was made in the East and shipped to the defendant, having already stamped upon it the trademark of the defendant, so that the package was ready for jobbing and sale on arrival, without the necessity of re-packing the "Minden" shoe in another carton made and labeled here. (Record page 548 et seq-).

Having already ruled, in accordance with my view of the decision of the Court of Appeals, that the carton was not "other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company" I sustained the objection of counsel for the defendant to the introduction of this evidence, and I adhere to my ruling.

If, however, the Court should overrule my view and hold that the carton *is* such other accompanying matter, this testimony might be received for what it is worth.

DEFENDANT'S POINTS.

First: The counsel for the defendant take the position that the Master "cannot consider any part of the former record, other than the opinion of the United States Circuit Court of Appeals and the interlocutory decree entered in pursuance of that opinion, and of the equity rule 80, or any exhibit in said former record, unless the complainant or the defendant, in taking its proofs before the Master on the accounting, has specifically and formally brought certain parts of that former record or certain exhibits in that former record to his attention and offered the same in evidence."

In support of this position, counsel cite to me the case of Bell vs. United States Stamping Co., 32 Fed. 550-551.

I do not think the position of counsel is sustained by the above case for two very good reasons:

1. There is nothing in the report tending to show

that the decree in that case was specific in its direction to the Master as is the case here.

2. The testimony which the Master in that case did not consider appears to have been taken before an examiner prior to the hearing in the case on its merits, upon which the decree was based. The order of reference to me in this case was:

> "*Upon the evidence already taken* in this case, *and the exhibits in evidence* in this case, and such further evidence as may be offered before the Master by the parties to this action".

On page 2-b of the record of testimony taken before me, counsel for defendant states that the form of the decree and order was drawn by himself.

There must have been good reason in the mind of the counsel why he wished to have the order made in that form, because, without that direction in the order, any or all of the evidence and exhibits in the case *could* have been introduced before the Master under rule 80, upon the suggestion of the respective counsel.

The hearing proceeded throughout, and without objection being made or suggested, on the theory that all the evidence and exhibits in the case were before the Master by virtue of the order.

> (See Record pp. 33, 61, 65, 78, 79, 84, 89, 91, 92, 95, 96, 438.)

Streets Federal Equity Practice, Section 1434 says:

> "However, the Master is, under rule 77, given such complete power to regulate the proceedings in a reference that he is clearly authorized to take cognizance of proof already in the record, if he sees fit to do so, *though it is not brought before him by the parties.*"

The same Section says:

> "Prior to the adoption of rule 80, it was customary and perhaps necessary for the order of reference to recite that such evidence might be used before the Master, otherwise it could not be used. The rule abrogates the necessity for such a recital in the order of reference. It does not declare that all affidavits, depositions and documents previously used shall *ipso facto* become and be used as evidence in the reference. It merely says that such evidence may be used."

I have acted as Master in a number of such accountings and this is the only case ever before me in which the order expressly referred the matter to me "Upon the evidence already taken in this case and the exhibits in evidence in this case, etc."

My construction of the order is that the "evidence' referred to, was sent to me with the order. If counsel on both sides had refused to take such "Further evidence", as specified in the order, my duty would clearly have been to proceed with the accounting "Upon the evidence already taken", etc., whether the parties did or did not formally introduce any portion of the same before me.

In Wann vs. Coe, 31 Fed. 369, the Court sent the case to a Master for an accounting upon the evidence already in the case, using the following language:

> "It is believed that the evidence now in the record may furnish the necessary information upon all points embraced in the reference. If more evidence is required, application must be made to the court for an order in that behalf, and the application should state the point to be established. and the number of witnesses to be called, and the manner of taking the testimony."

The Court, in the above case, did not intimate that in such reference the counsel on either side must regularly offer in evidence such portion of the record as relied upon by either party.

In this accounting the matter was sent to me "Upon the evidence already taken in the case", etc., and the order was so ample in its terms as to further evidence, that no condition could arise requiring any further order in that behalf.

It seems to me that the importance of this point has been greatly exaggerated in the view of counsel for defendant, unless they have in mind some feature of the evidence in the main case to which attention has not been directed by counsel, or which has not been discovered by the Master.

I have used such evidence, as by the order I felt authorized to do, when it appeared relevant. There is very little of it, so far as I am advised, that is pertinent to the accounting. Naturally the evidence in the main case related almost exclusively to facts and circumstances occurring *before* the filing of the bill, and my investigation is limited to facts and circumstances occurring *since* the filing. I have endeavored to obey the order strictly. I think I have done so. I have no doubt that the evidence specified in the order is before me by the terms of the order.

This point is overruled.

Second: It seems to me that when counsel for defendant take and insist upon the position that the complainant is not entitled to any profits whatever, the argument is one which counsel propose to address or should address to the Court, rather than to the Master. It is not within the province of the Master to overrule the order of reference which would certainly be the effect of sustaining this position.

The Court of Appeals having found the existence of unfair competition in trade on the part of the defendant, and having ordered an accounting of profits from the date of the filing of the bill, the only possible contingency on which this point could be sustained by the Master would be that the testimony showed that

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the defendant had made no profits on the American Lady shoe during the period in controversy.

That large profits had been made by the defendant was apparent before any testimony bearing upon the question of profits had been taken.

After counsel for defendant had applied to the Court for a rule upon the Master "Instructing him not to permit this accounting to proceed", etc., and after the Court had sustained the Master and had overruled the defendant's motion, the counsel for the defendant filed a petition for a rehearing in which, as inducement, they used the following language in an endeavor to convince the Court that it should not adhere to its ruling sustaining the Master:

> "That the probable and almost necessary result will be *that the Master will report and recommend a judgment for a large amount against defendant* for shoes sold since the filing of the bill and marked as above stated; and if this Court should adhere to its ruling made on February 28, 1910, in overruling the part of defendant's motion hereinbefore referred to, *this Court would then confirm the Master's report, with the probably inevitable result that a judgment of this Court would be rendered against this defendant for profits* made on its shoes marked as hereinbefore stated, since the filing of the bill in this case, *amounting to a very large sum of money.*"

(Record pp. 107, D. D. 108, E. E.)

The Court, Dyer J., adhered to its ruling and sustained the Master. The *Master* cannot avoid the results. I am not sure but that the Master is concluded by the ruling of the Court. If the Master has erred, the Court will correct the error.

The point must be overruled.

The case at bar differs from that of Hires Co. vs. Consumers Co. 100 Fed. 813, relied upon by defendant.

In that case the Court, upon reasoning satisfactory to itself, refused to order an accounting.

In this case, the Court has ordered an accounting, and has ordered me to take it.

It is incredible that I should be expected to refuse to obey the order of the Court, because another Court, in another Circuit, in another case, which may or may not have been exactly parallel, had at some time refused to order an accounting.

To decide between rulings apparently conflicting, is not within my jurisdiction. I can consider nothing as my rule of action, but the decree of the Court, referring the cause to me to take the account, and the opinion of the Court of Appeals which ordered an accounting. And upon the necessity for an accounting, both opinions in the Court of Appeals concur.

The counsel for the defendant cite the Dictionary case, so called, 170 Fed. 169, in support of the claim that only nominal damages can be recovered in this case, because as was said in that case, (which was a case of unfair trade):

> "The difficulties involved in ascertaining the profits or damages in this case are almost insoluble."

It does not follow that the difficulties referred to might not have been solved. It is true that the Court did not order them to be solved, nor make any attempt to solve them. That, however, was not for the reason that the difficulties referred to were "almost insoluble"; but because *each party* to that action was a *tort-feasor,* each was found to have trespassed upon the legal rights of the *other,* and for that reason an accounting was denied.

The case was simply an application of the old maxim:

"He who seeks equity must do equity."

Neither am I at liberty to weigh against each other the decisions of the Court of Appeals in the Trinidad Case, which was decided on August 11, 1908, (163 Fed. 977), (recently affirmed by the United States Supreme Court), and the decision by the Court of Appeals in the case at bar, rendered three months later (165 Fed. 413).

In the Trinidad Case, the Court of Appeals found that the defendant had *not* been guilty of unfair competition and consequently refused to order an accounting. Three months later in the case at bar, the same court found that *this* defendant *had* been guilty of unfair competition, and ordered an account to be taken. The cause having been sent to me to take the account, I cannot disobey the order of the Court by reason of any interpretation I may be urged to place upon the decision in the Trinidad Case.

> "When, by an interlocutory decree on the merits, it was adjudged that a defendant was chargeable with unfair competition in simulating the dress of complainant's goods, and a reference was directed to take an account of profits recoverable, the question of defendant's liability is concluded and cannot be reopened before the Master".
>
> De Long Hook & Eye Co. vs. Frances Hook & Eye & Fastener Co. 159 Fed. Rep. 292.

In the same case the Court further says:

> "The Circuit Court directed the issuance of an injunction, and adjudged that defendant account for and pay to complainant *all the profits realized by it on the sale* of hooks and eyes carded by it and sold in imitation of the aforesaid carding of the hooks and eyes manufactured and sold by the complainant".
>
> 94 U. S. C. C. A. 310.

Third: I cannot agree with the counsel for defendant in the assertion which is made repeatedly, and in the following language on page 49 of defendant's first or main brief:

> "The complainant can recover no profits made by the defendant in the sale of defendant's goods unless complainant show, *as to each sale made by the defendant* that the purchaser bought the goods from the defendant *supposing them to be the product of the complainant*".

Counsel in support of this proposition cite to me the case of Baker vs. Baker, 115 Fed. at page 299, where the court says:

> "The evidence failed to disclose that a single person had purchased goods marketed by the defendant, supposing them to be the product of the complainant, or that the complainant had lost a single customer by the defendant's conduct".

In my opinion, the statement of counsel for the defendant that the complainant can recover no profits made by the defendant in the sale of defendant's goods, unless complainant show, *as to each sale made by the defendant, that the purchaser bought the goods from the defendant supposing them to be the product of the complainant,* does not correctly state the law governing this case; and the proposition is not sustained by the finding of the Court in Baker vs. Baker, *supra.* It is true the court did say in that case "The evidence failed to disclose that a single person had purchased goods marketed by the defendant, supposing them to be the product of the complainant, or that the complainant had lost a single customer by the defendant's conduct", but the court did *not* say that the Complainant, in a case of unfair competition, can recover no profits

unless complainant show *as to each sale* made by the defendant, that the purchaser bought the goods from the defendant, supposing them to be the product of the complainant, neither in my opinion does the decision in Baker vs. Baker make any statement from which such a proposition can be inferred. The court was not laying down a rule of evidence, but was showing, in an emphatic expression, how far the complainant in *that* case had failed to prove *anything* establishing more than nominal damages.

Moreover, the position thus taken by the counsel for the defendant is inconsistent with himself, for on page 50 of the record before me, he says:

> "I object to how the shoes are sold to the consumer. We are not concerned with what the retailer does; we are concerned with how the Hamilton-Brown Shoe Company sells the shoes".

It is not necessary for the complainant to show that, in each and every instance of the sale of a pair of "American Lady" shoes, the purchaser had been deceived into buying the "American Lady" shoe as and for the "American Girl" shoe.

> "No man is permitted to use any mark, stars, or any other means whereby, without making a direct false representation of himself to a person who purchased from him, *he enables such purchaser to tell a lie, or make a false representation to somebody else, who is the ultimate customer.*"
>
> Manufacturing Co. vs. Loog 18 Ch. Div. 412.

> "If a manufacturer or wholesale dealer wilfully puts up goods in such a way that the *ultimate purchasers* will be deceived into buying the goods of another, it is no defense that he does not deceive and has no intention of de-

ceiving the retailer to whom he himself sells the goods. * * * *

It is the *ultimate purchaser,* and not the retailer, who will be misled. The retailer or middleman, in buying his stock of goods, generally knows with whom he is dealing, and is accustomed to scrutinize more closely the brands, labels and packages of the manufacturers. And if right *to relief against the latter* were limited to cases in which *they* deceive, or *intend to deceive,* their immediate customers, the courts would be powerless to afford a remedy in a great majority of cases, notwithstanding the fact that the defendant's acts constituted the grossest fraud, and resulted in the greatest detriment to the plaintiff's business".

Note to Schener vs. Miller, 20 C. C. A. 173-4.

Moreover proof of fraud is not required.

"It is not essential to the right of a complainant to an injunction to show absolute fraud or wilful intention on the part of the respondent. * * * * If the acts of the respondent in adopting the name * * * constituted an infringement of the trade-mark, *or trade-name* of the complainant, and it was put on the market in such a manner as to interfere with the legal rights of the complainant, to its loss and injury, it would be entitled to an injunction, irrespective of the question of any testimony as to actual fraud or wilful intent".

Fairbank Co. vs. Luckel K. & C. Soap Co. 102 Fed. 327.

"We have then, the case of a manufacturer who is careful always to sell its goods as its own, but who puts them up in a style of packages so similar to that used by one of its competitors, earlier in the market, that unscrupulous dealers who purchase from the manufacturer in order

to sell at retail to customers, are enabled to delude a large number of such retail purchasers by palming off upon them the goods of the manufacturer as those of its competitor. That this is unfair competition seems apparent, both on reason and authority. In a similar case the court says:

'It is argued that the defendant had nothing to do with the deception of the public. The answer is obvious. Every person who, intending to buy a bottle of the plaintiff's sauce, gets, instead, a bottle of the defendant's, is a customer taken from the plaintiff by this deceit; and, if this is extensively done, the damage to the plaintiff's trade would be serious".

Powell vs. Brewing Co. (1896) Ch. 88.
See also Read vs. Richardson 45 Law T. (N. S.) 54;
Brown vs. Mercer 37 N. Y. Super Ct. 265;
Singer Manuf'g Co. vs. Loog, 18 Ch. Div. 412;
Lever vs. Goodwin, 36 Ch. Div. 1.

In the latter case, the rule is well stated as follows:

"It has been said more than once in this case that the manufacturer ought not to be held liable for the fraud of the ultimate seller, that is, the shop keeper or the shopkeeper's assistant. But that is not the true view of the case. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the *means of deceiving the ultimate purchasers.*"

Fairbank vs. Bell Mfg. Co. 77 Fed. 869.

"I have often endeavored to express what I am going to express now (and probably I have said it in the same words, because it is very difficult to find other words in which to express it)—that is, that no man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct

false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the *ultimate customer.*"

Singer Mfg. Co. vs. Loog, 18 Ch. Div. 412.

The following opinion, as in the case at bar, is in an action brought for infringement of a trade mark.

The Court, (Chitty J. 1887) dismissed the action so far as it related to infringement of the trademark, because there was no proper trademark, but issued an injunction as for unfair competition in trade and directed "An account of the profits made by the defendants in selling or disposing of", etc.

On appeal, the Court (Cotton, L. J.) said:

"It is well known that both in trademark cases and patent cases, the plaintiff is entitled, if he succeeds in getting an injunction, to take either of two forms of relief: He may either say, "I claim from you the damage I have sustained from your wrongful act', or 'I claim from you the profit which you have made by your wrongful act'. It is contended that the only profit which the plaintiff could call for was that profit which arose from the sale of this soap where the ultimate purchaser bought it, not as the defendant's, but as the plaintiff's soap. But in my opinion, that is mistaking the whole gist of this action. The defendants, as I understand, do not sell anything to retail purchasers; what they sell they sell to middlemen, that is to say, to people who purchase from them as wholesale merchants, and who are going to sell it by retail; and the complaint against the defendants is this 'You have dressed up your soap in such a dress that those middlemen to whom you sell it are enabled, by its having that deceptive dress upon it, to sell it to the *ultimate purchasers* as the soap of the plaintiff's. The profit for which the defendants must account is the profit

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which they have made by the sale of soap in that fraudulent dress to the middlemen. *It is immaterial how the middlemen deal with it.* If they find it for their benefit *not* to use it fraudulently, • • • • that cannot affect the question whether the sale by the defendants to those middlemen of this soap in a fraudulent dress was a wrongful act. It still remains a wrongful act, because it put into the hands of the middlemen the means of committing a fraud on the plaintiffs by selling the soap of the defendants as the soap of the plaintiffs. In my opinion, therefore, the account of profits is right as it stands".

(The court was unanimous in sustaining the judgment of the trial court).

Lever vs. Goodwin, 36 Ch. Div. 1.

"Neither will the plaintiff be deprived of remedy in equity, even if it be shown by the defendant that all the persons who bought from him goods bearing the plaintiff's trade mark were well aware that they were not of the plaintiff's manufacture. If the goods were so supplied by the defendants for the purpose of being again sold in the market, the injury to the plaintiff is sufficient. Again, it is not necessary for relief in equity, that proof should be given of persons having been actually deceived, and having bought goods with the defendant's mark, under the belief that they were of the manufacture of the plaintiff, provided the court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other". • • •

"It is then objected by the defendants that the account of profits directed by the decree is too severe; but on examination of it, I am of opinion that the account is in terms as lenient as can be directed consistently with the principles of the Court".

The decree of the court below was:

"That an account be taken of the gains and profits made and obtained by the defendants by

the sale * * * * * and that the defendants be ordered to pay to the plaintiff the amount of such gains and profits."

Edelsten vs. Edelsten. 1 De Gex J. & S. 185.

"The compensation to the owner of a trade-mark for the injury he suffers from a wrongful and unauthorized use of it by another is ascertained and computed on substantially the same principles as damages for infringement of patents and copyrights".

Sutherland on Damages Vol. 4 3rd Ed. Sec. 1201.

"I believe it to be established beyond dispute that cases, arising out of unfair competition, are recognized as analagous to those of violations of trade-marks. * * * * In either case redress may be had at law to recover damages or in equity to restrain infringement and to recover the gains and profits which accrued to the wrongdoer by his adoption of a garb for his goods to which another has a prior and a better right. In each class of cases, the offender seeks to benefit by the reputation of the other, the object being to palm off his goods as the goods of the other. The nature and extent of the injury is substantially the same. The remedy for the enforcement or protection of a trade-mark right or against unfair competition involves the same procedure and ends in the exercise of the restraining power of a court of equity, and the award of such damages as may have been sustained or the profits of the wrongdoer *it is presumed would have accrued to the person whose rights were invaded.*"

Fairbank vs. Windsor, 118 Fed. 96.

The law which I conceive governs this subject is admirably expressed in the case of McCann vs. Anthony, 21 Mo. App. 83, in which the plaintiff was seeking injunctive relief in a case of unfair competition.

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A most excellent and exhaustive, as well as successful, brief in that case supported by a vast array of authorities is interesting in connection with the argument in the case at bar, although that case was decided more than twenty-five years ago It says:

> "Courts of equity will, with great jealousy, protect a manufacturer or trader from unlawful competition in his business, and will override all technicalities to reach justice in a particular case". * * * *
>
> "The principle of Perry vs. Truefitt (6 Beav. 66, 73) that no one has a right to put off his goods as the goods of a rival dealer, and that 'he cannot, therefore, be allowed to use name, marks, letters or indicia, by which he may induce purchasers to believe that the goods that he is selling are the goods of another person' is constantly recognized by the courts as applicable in cases not strictly of technical trade-mark". * * *
>
> "The jurisdiction rests on fraud on the part of the defendant. The fact that actual fraudulent intent is not shown, or that it is disproved, does not defeat the remedy by injunction". * * * *
>
> "Nor is it material that the simulated label or package has not been shown actually to have deceived anyone. If the simulated label is likely to deceive, evidence of actual deception is unnecessary." * * * *
>
> "Nor need the fraudulent label be parallel with that which it imitates. Nor is it material that seen side by side, the two labels, or the two packages, would not deceive the ordinary purchaser". * * * *
>
> "The Courts hold that no trader can adopt a label resembling that of a rival trader to such an extent that the *ordinary purchaser at retail* is likely to be misled. The courts are exceedingly jealous of the rights of business men to the good will of their goods, and will not allow the label to be

simulated either by similar words, colors, shapes, or devices of any kind".

Every position taken in that brief, prepared almost in the infancy of this branch of the law, was sustained by the court, and if I correctly read and understand the many decisions since that day upon the same subject, each is a sound statement of the law of unfair competition in trade as it exists today.

The law of unfair competition in trade is very clearly expressed in the following citations:

"Unfair competition as the redress of a legal wrong which the law will undertake to redress or prevent, has only of late years begun to make its appearance in the books. To most lawyers, it is safe to say, the title carries no very definite meaning, for as yet, its use is almost entirely confined to the reports, and in these it is used only in the most general way, and always with the facts of the particular case in view, while it is quite unrecognized in digest, text book or dictionary."

Harvard Law Review, Vol. 10, page 275.

"The cardinal principle that anything which may deceive is *prima facie* wrongful, and should be prevented if possible, is the only safe guide, and it is most encouraging to see that, as the commercial value and importance of long established business reputations and the opportunities for making unjust gains by fraudulent imitations are more clearly recognized, the Courts are more and more willing to grant the needed protection, and show an uncompromising determination to do their part towards maintaining commercial honesty and fair dealing."

Harvard Law Review, Vol. 12 page 261.

Prof. Townsend of Yale University, speaking of the law of unfair competition in trade, says:

"It is entirely within the last fifty years that this branch of the law has developed and flourished, until the doctrines connected with it have become manifold and ramified as the twigs and the cases innumerable as the leaves."

"During the period of growth the courts, at first inclined to develop the law along narrow and technical lines, have come to see more and more clearly the fundamental principles upon which to act in extending this protection of the law to the achievements of business. Now technical doctrines are less and less employed, and one simple just rule is invoked. The law of trade-marks is disappearing in a broader principle which prohibits unfair trade."

Two Centuries Growth of American Law.
Page 436.

"The gradual, but progressive, judicial development of the doctrine of unfair competition in trade has shed lustre on that branch of our jurisprudence as an embodiment, to a marked degree, of the principles of high business morality, involving the nicest discrimination between those things which may, and those which may not, be done in the course of honorable rivalry in business. This doctrine rests on the broad proposition that equity will not permit any one to palm off his goods on the public as those of another. *The law of trade-marks is only one branch of the doctrine.* But while the law of trade-marks *is but part of the law of unfair competition in trade,* yet when the two are viewed in contradistinction to each other, an essential difference is to be observed. The infringement of trade-marks is the violation by one person of an exclusive right of another person to the use of a word, mark or symbol. Unfair competition in trade as distinguished from infringement of trade-marks does not involve the violation of any exclusive right to the use of a word, mark or symbol. The word may be purely generic or descriptive, and the mark or

symbol indicative only of style, size, shape or quality, and as such open to public use 'like the adjectives of the language', yet there may be unfair competition in trade by an improper use of such word, mark, or symbol. Two rivals in business, competing with each other in the same line of goods, may have an equal right to use the same words, marks, or symbols on similar articles produced or sold by them, respectively, yet if such words, marks or symbols *were used by one of them before the other* and by association have come to indicate to the public that the goods to which they are applied are of the production of the former, the latter will not be permitted, with intent to mislead the public, to use such words, marks, or symbols in such manner, by trade dress or otherwise, as to deceive *or be capable of deceiving* the public as to the origin, manufacture or ownership of the articles to which they are applied." * * * * *

"In Reddaway vs. Banham (1896) App. Cas. 199, it was held that one person was not entitled to pass off his goods as those of another by selling them under a name which was likely to deceive purchasers, whether immediate or *ultimate*, into the belief that they were buying the goods of the former, though the name used was in its primary meaning merely a true description of the goods".

Dennison Mfg. Co. vs. Thomas Mfg. Co. 94 Fed. 659. 660.

"The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, *is injured whenever another adopts* the same name or device for similar articles, *because such adoption is* in effect *representing falsely that the productions of the latter are those of the former*".

Lawrence Mfg. Co. vs. Tennessee Mfg. Co., 138 U. S. 546.

"The principles of trade-mark infringement and of unfair competition have been so often discussed in this Circuit, * * * * *

As has been often pointed out before, it makes no difference that dealers in the article are not deceived. No one expects that they will be. It is the *probable* experience of the *consumer* that the Court considers".

National Biscuit Co. vs. Baker, et al. 95 Fed. 135.

"Whether this is a good trade-mark or not, it is a style of goods adopted by the complainant, which the defendants have imitated for the purpose of deceiving and have deceived the public thereby, and induced them to buy their goods as those of the complainant. *This is fraud.*"

Nail Co. vs. Bennett, 43 Fed. 800.

The case of Coats vs. Merrick Thread Co. 149 U. S. 569, relied upon by the defendant on page 43 of its first brief, filed before me, to establish that the manufacturer is not responsible for the fraud of the retailer, does not, in my opinion, warrant the conclusion drawn by counsel that the defendant in the case at bar cannot be liable for profits in this accounting.

In that case the court held that:

1. "Plaintiffs, having submitted to this" (imitation) "without protest for twelve years, have waived their right to relief upon this ground".

2. "Plaintiffs have failed to prove a case of unfair competition, or any illegal attempt of the defendants to impose their thread upon the public as that of the plaintiffs."

And the quotation from the case as set forth in counsel's brief is expressly based upon the finding that the defendant was not liable in any event. It has no general application whatever to any other case.

So, also the case of Proctor & Gamble Co. vs. Globe Refining Co., 92 Fed. 362, quoted in the same context, on the same page, has no bearing on this question, for in that case, the court below had dismissed the bill because there was no evidence of infringement or unfair competition, consequently the defendant was under no responsibility whatever.

The other case relied upon in the same connection and upon the same page (Saxlehner vs. Siegel Cooper 179 U. S. 42) has no application whatever to the accounting in this case.

In that case, the Court below had dismissed the case against the Siegel Cooper Co. because there was neither charge nor proof of fraud. And there is nothing in the report to show that there was any proof or finding of profits or damages. The Court of Appeals reversed the case and ordered injunction against all the defendants, saying:

> "We think that an injunction should issue against all these defendants, but that, as the Siegel Cooper Company appears to have acted in good faith, and the sales of the others were small, they should not be required to account for gains and profits."

The court, in support of this ruling, refers to Edelsten v. Edelsten, 1 De Gex, J. & S. 185, in which, as shown elsewhere in this report, the court expressly ordered an accounting for all the profits, because the defendant had been guilty of fraud. And further said:

> "Though the persons to whom the sale was made might not be deceived, still the action lay, because the article was sold by them, and they might go and deceive every one else; and those who committed a fraud *must take all the consequences.*"

"Defendant is a manufacturer and sells only to the trade. * * * * * * * *

Undoubtedly, no one who bought from defendant was ever deceived. No effort was ever made to delude the trade into the belief that defendant's salesmen were selling complainant's goods. But equity regards the consumer as well as the middleman. It is to him, more than to the jobber or wholesale purchaser, that the various indicia of origin with which merchants dress up their goods, appeal; and courts will not tolerate a deception devised to delude the consuming purchaser by simulating some well known and popular style of package."

Fairbank Co. vs. Bell Co., 77 Fed. Rep. 875
Cited approvingly in,

De Long Hook & Eye Co. vs. Francis Hook & Eye Co., 139 Fed. 150.

"No general rule can be announced to govern the Master in taking the account in such a case. Sometimes the profits of the infringer is the sole criterion of the actual damage sustained by the patentee, and then a report of the net gains covers the whole ground of profits and damages."

La Baw vs. Hawkins, 2 Bann. & A., 561, 14 Fed. cases 899.

"Complainants right to recover all damages over and above the profits made by the infringer cannot be and has not been disputed. But it was not shown that the damages exceeded the profits made by the defendants, to say nothing of those made by Gerard & Lawrence.

No evidence was introduced to show that complainant's sales had fallen off, or that they had been compelled to reduce the sale price of their coupler or to increase the cost of doing business. The entire body of the evidence bore upon the question of the gains and profits made by the de-

fendants, and the Master's report was based solely upon this question".

Kissinger-Ison Co. vs. Bradford Belting Co. 123 Fed. 91.

In Troy Iron & Nail Factory vs. Corning et al, the Supreme Court of the United States 55 U. S., page 218, ordered the Circuit Court "To enter a decree in favor of the complainants for the use and *profits* thereof, upon an account to be stated by a Master".

The ultimate result of this case as found in 6 Blatchford 328, sixteen years later, shows that the meaning of the order was that complainant should recover the *entire* profits which the defendant had made by the infringement.

"If the defendants made profits by their invasion of the orators rights, the orator is entitled to them whether the same profits would have been made by the orator or not."

Atlantic Milling Co. vs. Rowland, et al. 27 Fed. Rep. 24.

"Where the intention to violate appears, and the party charged is acting *mala fides* he should not be heard to object to an account for profits. The Supreme Court, in the case of Root vs. Railway Co. 105 U. S. 189, said:

'When, however, relief was sought which equity alone could give, as by way of injunction to prevent a continuance of the wrong, in order to avoid a multiplicity of suits, and to do complete justice, the Court assumed jurisdiction to award compensation for the past injury, not, however, by assessing damages, which was the peculiar office of a jury, but by requiring an account of profits on the ground that *if any had been made it was equitable to require the wrong-doer to refund them,* as it would be inequitable that he should make a profit out of his own wrong.'

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In the same case, citations are made from the opinions of Vice Chancellor Wigram in Colburn vs. Sims, 2 Hare 543, and of Sir J. Leach in Bailey vs. Taylor, 1 Russ & M. 329. In Colburn vs. Sims, it is said:

'The court does not accurately measure the damage, but as the nearest approximation it can make to Justice, takes from the wrong-doer *all the profits* he has made by his piracy, and gives them to the party who has been wronged. * * *

The court has no jurisdiction to give to the plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this Court by injunction; and in *such* case the Court will *also* give him an account, that his remedy may be complete. * * *

Every consideration of reason, justice and sound policy demands that one who fraudulently uses the trade-mark of another should not be allowed to shield himself from *liability for the profit* he has made by the use of the trade-mark, on the plea that it is impossible to determine how much of the profit is due to the trade-mark, and how much to the intrinsic value of the commodity. The fact that it is impossible to apportion the profit, renders it *just that he should lose the whole.*"

Avery & Sons vs. Meikel & Co., 85 Kentucky 448.

"The trade-mark sells the whole article, however inferior or injurious in that particular, and prevents the sale of the owner's goods of equal amount. At least, that is the fraudulent purpose, and the natural tendency *whether always accomplished or not;* and the injured party should have at least the whole profit resulting from the wrongful act, and such I understand and hold the rule to be. The damage may be much more arising from destroying the reputation of the owner's goods".

Benkert vs. Feder, et al, 34 Fed. Rep. 535.

It seems to me needless to refer, in support of defendant's position, to cases which are not four square with the case at bar. Centaur Co. vs. Marshall, 97 Fed, 785; Kann vs. Diamond Steel Co. 89 Fed. 706; Wrisley vs. Iowa Soap Co., 122 Fed. 796; Lorillard vs. Peper, 86 Fed. 960; relied upon by defendant on pages 28 et seq. of its main brief, are all cases in which the complainant was defeated because there was no proof of anything establishing unfair competition. In Lorillard vs. Peper, Mr. Bakewell represented the Complainant. On final hearing the bill was dismissed. On appeal the decision was affirmed. Kann vs. Diamond Steel Co. was in the same situation. Mr. Bakewell again represented the complainant. The bill was dismissed and the decree affirmed on appeal.

In this case, on the contrary, the bill was dismissed on final hearing. Upon appeal the judgment was reversed and the case remanded for accounting because the defendant *had* been guilty of unfair competition in trade, with knowledge, with intention, and consequently with fraud.

On page 91 of said brief it is stated that counsel "Expect to use this same brief on any exceptions that either side may make to the Master's report", and I presume that much of this line of argument is addressed especially to the Court and not to the Master.

Fourth: I have not seen any occasion or reason to change the ruling I made early in the hearing, that the words "Hamilton-Brown Shoe Company" stamped upon the American Lady shoe, were not other matter clearly indicating that the Hamilton-Brown Shoe Company was the Maker of shoes so marked.

This point is overruled, and reference is made, in connection therewith, to the consideration of Complainant's third point.

Fifth: I was, during the progress of the hearing, and still am, of the opinion that the Court of Appeals

did not consider the carton with the word "Makers" on it, as being such accompanying other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company.

I was sustained in my position by Judge Dyer, upon the hearing of defendant's motion to order the Master to proceed no further in the examination, and I have considered this matter in complainant's eighth point.

This point should be overruled.

Sixth: Counsel for defendant at page 42 of their first brief, take the position that:

> "In the sale of defendant's American Lady shoes since the filing of the bill, defendant has been guilty of no fraud and is in no way liable on this accounting".

Because, as counsel say:

> "The Court of Appeals in this case finds, as a matter of fact, that since the filing of the bill the defendant has not been guilty of *any* simulation".

And in support of that contention they quote as follows from the opinion at page 417, 165 Fed.:

> "In some respects the markings upon the bottoms of defendant's shoes and upon the cartons and boxes in which the shoes were placed were in simulation of those of complainant; but as the simulation in these respects was discontinued by defendant upon the bringing of this suit, we will not extend this opinion by pointing out the similarity."

I do not think counsel's conclusion can be drawn from the extract quoted from the Court of Appeals' opinion.

On the contrary, the Court plainly says that as those simulations are out of the way, it will not waste time

by pointing out the similarity. It plainly states that its finding is not based upon those discontinued simulations. The Court nowhere intimates or suggests that "The defendant has not been guilty of *any* simulations", or that the discontinued simulations were the only simulations of which defendant had been guilty.

The Court certainly found enough outside of the discontinued simulations upon which to base a decree for injunction, and accounting, otherwise there would have been no decree. The discontinued simulations are not before me in any way for my consideration. I do not even know what they were, and the opinion of the Court of Appeals so completely ignores them, that they are in no way or manner identified in the opinion.

Seventh: I am of the opinion that the testimony introduced by the complainant was not sufficient to establish any usage of trade as to selling or not selling the enclosing carton, with the shoe, to the ultimate customer.

This point is therefore sustained.

At the same time, I am of the opinion that there was no burden upon the complainant to establish any such usage.

Eighth: I cannot agree with counsel for defendant in the position taken, that the complainant is not entitled to recover any profits unless it be proved that the defendant had done the *sum* of the things prohibited and that the defendant is not to be held for their use *singly.*

The essence of the offense of unfair competition in trade is *fraud.* The Master does not declare or determine the fraud. That is the prerogative of the Court. There can be no decree for complainant in a case of unfair competition in trade, excepting the court has found the defendant guilty of fraud, and the Master

is concluded by the finding. There may be a finding of a single fraud and an accounting ordered. There may be a finding as to several fraudulent acts and an accounting ordered as in this case, but the accounting would be the same in either event.

The Court of Appeals sets out the complainant's claims in this action severally and distinctively as follows:

> "This action was brought by complainant, in which it charges the defendant with infringing its trademark 'The American Girl' by the use of the name 'The American Lady' and the portrait of a young woman."
>
> "It further charges the defendant with infringing the catch phrase 'A shoe as good as its name' by using the catch phrases 'The shoe deserves its name' and 'With the character of the woman' ".
>
> "It also charges the defendant with infringement by adopting its numeral numbers before mentioned for similar styles of shoes".
>
> "It also charges defendant with unfair trade". (165 U. S. 414).

Having thus set out separately the several charges of infringement as made by the complainant, the Court proceeds to discuss the same, and finds that the complainant has no trademark in the name "The American Girl," but that "The term 'The American Girl' * * * had nevertheless, by their long continued use of it, come to have a secondary meaning, indicative of the origin and manufacture of the shoes to which it was applied, and had come to be recognized in the trade as meaning that such shoes were those of the complainant and its predecessors. Whatever of good will and advantage resulted from this was the property of the complainant".

The Court then declared the complainant

"Entitled to a decree enjoining the defendant from using the name 'The American Lady', as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, *and therefore not of complainant's,* and from using, in connection with such name, as applied to its shoes for women, the numerals mentioned, or the catch phrase 'With the character of the woman' or any other phrase in simulation of the phrase 'A shoe as good as its name' and also to an accounting as before stated."

The *"accounting as before stated"* was as follows:

"We think an accounting should be limited to the time since the commencement of this suit".

Counsel for defendant are mistaken, when, on page 46 of their first brief before me they say, in reference to the decree for *an accounting as before stated*:

"It clearly appears from the majority opinion that no prior reference had been made to the accounting *and therefore"*, etc.

If counsel will examine line 10, page 418, 165 Fed. they will find the *prior reference* which I have quoted as above.

Thus the Court of Appeals, in one comprehensive sentence, ordered an injunction to issue as to each and every of the several charges of infringement which itself had stated severally as above.

Counsel for defendant on page 6 of their rebuttal brief before me say in reference to the injunction so granted:

"It will be noticed that the Court thus orders an injunction prohibiting the defendant from do-

ing the *sum* of the things mentioned and that their use singly is not enjoined or disapproved by the Court".

Supposing that the Court had not ordered an injunction against the use of the numerals, or against the use of the specified phrases; then the accounting would have proceeded for using the name "The American Lady" as applied to its shoes for women when not accompanied, etc. It could not have been defeated on the ground that the Court had *not* enjoined the use of the numerals or the use of the specified phrases.

The argument of counsel results in this, that because the Court *also* enjoined the use of the numerals and the use of the specified phrases, the injunction is limited in its action instead of being enlarged by covering all the claims, and that the accounting for using the *name* should not proceed. I may be wrong, but to my mind it seems to be an argument that it takes the whole to equal one of its parts.

Its logical sequence would be that there can be no recovery on this accounting unless the "American Lady Shoes" under consideration were accompanied by the prohibited numerals, and the prohibited phrases. Yet there is no claim or pretence or evidence either in the main case or in the hearing before me that the American Lady shoes had ever been accompanied by the catch phrases.

The point is overruled.

BOSTON HOUSE.

Ninth: The overhead charges on the books of the defendant contain for the year 1908-9, or Fourth Period, "Advance Boston House (Record P. 498-a)	$73,772.03
for the year 1909-10 or Fifth period the charge for "Allowance to Boston" is $103,075.14 (Record P. 583) and it is stipulated that the Master shall consider the one-fourth part of said sum to be allotted to the Fifth period to March 9, 1910 (Rec. P. 583) ----------	25,768.78
	$99,540.81

The pro rata of this amount as a charge against *all* American Lady shoes is $13,403. 19 (See Totals 12, Tables 3 and 4).

The pro rata of this amount as a charge against American Lady shoes not marked "Makers" is $10,-271.69. (See Total 14, Table 1; Total 12, Table 2).

The defendant claims to charge these items with all other overhead charges in diminution of Complainant's profits.

On page 571 of the record appears the following stipulation:

> "It is stipulated between counsel for complainant and counsel for defendant in this case, subject to the objections of either party as to its competency, relevancy and materiality to any issue in this case as follows:
>
> That the item of $73,772.03, designated as 'Advance to Boston House' under the heading of '1908-9' of Exhibit 1 of the Kribben report; and the item designated as 'Allowances to Boston, $103,075.14' under the heading '1909-10' on page five of the formal written stipulation of this date,

represent allowances made by the wholesale house of Hamilton-Brown Shoe Company on goods shipped by it to what is known as the 'Boston House', being a separate and distinct corporation from the defendant company, and the amount received by the Hamilton-Brown Shoe Company from the 'Boston House' for goods shipped to it was $73,772.03 and $103,075.14 less than the price at which the goods were billed to that house, and those items do not represent moneys paid by the Hamilton-Brown Shoe Company to the 'Boston House' or advances by the Hamilton-Brown Shoe Company to the 'Boston House' ".

In my opinion this stipulation shows clearly that the items referred to are improper items to be charged in this accounting against complainant's profits.

The stipulation expressly says:

> "Those items do not represent moneys paid by the Hamilton-Brown Shoe Company to the 'Boston House', or advances by the Hamilton-Brown Shoe Company to the "Boston House' ". (Record, p. 571.)

yet they were so charged upon their books.

The Supreme Court says:

> "The profits made in violation of the rights of the complainant in this class of cases, within the meaning of the law, are to be computed and ascertained by finding the difference between cost and yield."
>
> Rubber Co. vs. Goodyear, 76 U. S. 788-804.

The "Boston House" is referred to on pages 506, 507, 509, 518, 523 of the record, but there is nothing in the record explaining what the "Boston House" is, what relation it bears to the defendant, or how it can affect the "cost and yield" of the American Lady shoes.

If the defendant opened a "Boston House" in extending its business operations, it might be commended for such enterprise. It would properly keep a debit and credit account with the "Boston House" as it seems to have done, and as the stipulation shows that it did, but there is nothing in the record or in the stipulation to show that any advances to the "Boston House" had any relation to or bearing upon the manufacture and sale of the American Lady shoes, or the profits resulting from such sale.

The expense of the "Boston House" was a speculative and not a legitimate expense so far as this accounting is concerned.

The profits due the complainant cannot be diminished by exploiting new business enterprises of the defendant.

The complainant is not a partner in the "Boston House" enterprise that it should be required to share in the expenses or losses growing out of the failure to make the speculation profitable, any more than it could claim to share in the profits of the "Boston House" had it been successful.

The overhead charges "Advance Boston House" and "Allowance to Boston" must be disallowed.

Tenth: There is a very great difference between the pro rata upon the American Lady shoes of the overhead advertising which the defendant upon its books charged against the entire product of its business, and the 40 per cent of its entire advertising charged against the profit on the American Lady shoe alone, as the defendant claims to do under the stipulation. The 40 per cent of all the advertising of the entire business of the defendant for the period in con-

troversy amounts to the sum of (See Total 2, Table 3) ---------- $331,278.00

The pro rata of the overhead advertising properly chargeable to all the American Lady shoes is (See Total 2, Table 4) 91,314.66

Making a difference of ---------- $239,963.34 in diminution of the profits of complainant upon the claim to recover the profit on *all* American Lady shoes.

Calculated upon the American Lady shoes not marked "Makers" the pro rata of 40 per cent advertising amounts to (See Total 2, Table 2) ---------- $257,826.60

The pro rata of overhead advertising properly chargeable to same amounts to (See Total 6, Table 1) ---------- 71,547.92

Making a difference of ---------- $186,278.68 in diminution of the profits of the Complainant upon American Lady shoes not marked "Makers."

Calculated upon the shoes which had upon them only the words "American Lady" and nothing more, the pro rata of 40 per cent of advertising amounts to (See Totals 2, 2d and 3d Periods, Table 2) ---------- $142,053.60

The pro rata of overhead advertising properly chargeable to the same amounts to (See Totals 6, 2d and 3d Periods, Table 1) ---------- 34,616.31

Making a difference of ---------- $107,437.29 in diminution of the profits of the complainant upon shoes which had no other mark upon them save only the words "American Lady."

I cannot believe that these immense reductions in the profits due the complainant, which result from charging 40% of all the advertising of the defendant

against the "American Lady" shoes, as an expense exclusively chargeable to the American Lady shoe, instead of the pro rata of the overhead advertising, was in the minds of or intended by the counsel for the complainant when the stipulation was entered into.

This is manifest because counsel differ radically in their views as to the meaning of this stipulation.

The counsel for the complainant holds that, notwithstanding the language of the stipulation, only the pro rata of the overhead advertising can be charged against the profits of the "American Lady" shoe in any event, while they insist that no advertising whatever should be allowed.

On the other hand, counsel for the defendant maintain that the purpose and intent of the stipulation was that the 40% of all the advertising of the entire business of the defendant is to be charged against the profits of the American Lady shoe alone.

The stipulation itself does not go that far or say that much.

It is found on page 586 of the record before me and, in speaking of the 40% of the advertising, says that it "*Had reference exclusively* to the American Lady shoe." This is very far from stipulating that *the expense of the 40% of the advertising shall be charged exclusively against* the American Lady shoe.

In view of the fact that counsel for complainant have contended all through this hearing,

1. That no charge for advertising should be allowed in diminution of the profits to which complainant may be found entitled.

2. That if any charge for advertising should be allowed, it should only be the pro rata of the entire overhead advertising properly chargeable to the American Lady shoe; and in view of the conflicting views of counsel, it might be doubted whether the stipulation would ever have been signed, if, instead of its present form, it had read (as counsel for defendant interpret it)"*The*

expense of the 40% of the advertising shall be charged exclusively against the American Lady shoe."

Such a stipulation would upon its face abandon, without a struggle, the claim to recover the sum of $239,963.34, of the profits on the whole output of American Lady shoes; or the sum of $186,278.68 of the profits on the American Lady shoes which did not have the word "Makers" on them; or the sum of $107,437.29 of the profits on shoes which had on them only the words "American Lady" and no other marking. I do not think such was the intention with which the stipulation was entered into on the part of the complainant. Neither do I think, if the complainant is entitled to recover at all, that it would be just or equitable that its profits should be diminished by such extravagant and disastrous charges, when the defendant's books show that the entire expense of the advertising incurred by the defendant was entered upon its books for its own purposes as a general overhead charge against all the business done by all of the defendant's factories, and has never been charged in any other way excepting for the purposes of this defense.

I am of the opinion, and so recommend, that the advertising to be allowed in diminution of the complainant's profits should be pro rated upon the basis of the overhead charge for advertising, as entered by the defendant upon its own books for its own information as to the profits of its own business.

As, however, the counsel for defendant take the position, very strenuously, that the object and intention of the stipulation was that 40 per cent of all the advertising for the entire business of the defendant should, for the purposes of this controversy, be charged as an expense upon the American Lady shoe *alone*, I have prepared tables 2 and 3, calculated entirely upon that theory. Table No. 2 is based upon the charge of 40 per cent of the advertising pro rata upon the American Lady shoes not marked "Makers" and Table No.

3 upon the 40 per cent charged pro rata upon the entire output of American Lady shoes including those marked "Makers."

These I have prepared in order that counsel for defendant may have before them every figure, every calculation, and every result I have made or found, upon this point, in view of exceptions to my finding.

Counsel for complainant, in brief and argument before me, have taken the position that the word "Makers" is not effectual to avoid the fraud, and I have accordingly prepared Tables 3 and 4 upon that theory.

To my mind the position of counsel for complainant is not sound in this particular. It is directly in conflict with what I conceive to be the meaning of the decision of the Court of Appeals, and by that I must be governed.

In all the tables I have deducted from the overhead charges the proper pro ratas of the items of taxes, insurance, depreciation of real estate and advances to Boston House, as well as also a charge, first made before me in defendant's brief, of interest on the capital. In my opinion, the authorities hold that none of these items can be charged in diminution of the complainant's profits, and they are accordingly disallowed here.

Eleventh:

INTEREST ON CAPITAL.

It is claimed on the part of the defendant that one of the items of offset, in diminution of the profits, is the amount of interest on the plant and on the capital invested in the business.

I am unable to see how this can equitably be claimed in the case at bar. There is nothing in the evidence to show that any plant was erected, or any capital was invested, having for its special object the manufacture and marketing of the brand of shoes marked *American Lady*.

Even if that were the case, it might be doubted whether upon capital invested and plant erected for the purpose of doing a wrong, interest could equitably be charged upon the investment in diminution of the damages suffered by the victim of the wrong.

But it appears on page 413 of the printed record of the Court of Appeals in the testimony of Mr. McElroy, that the defendant simply "adopted the name *American Lady* for a certain line of shoes made by the Hamilton-Brown Shoe Company."

In other words, in furtherance of its scheme of unfair trade which the Court of Appeals has found existed, the defendant spent nothing, built nothing, invested nothing, beyond what it had already spent, built, and invested, excepting only what was spent in "Getting out cartons, and stencils and stamps, etc., made."

The defendant decided to adopt the name "American Lady" for a certain line of women's shoes, in August or September, 1900.

> "Our records show that the first case of these goods was sent out of the factory November 7, 1900. The length of time elapsing between the time of selecting the name and delivering the shoes was taken up by getting our cartons and stencils and stamps, etc., made." (Page 413.)

It seems to me that the rule laid down by the Supreme Court of the United States in the following case, upon exceptions to the Master's report, is the rule which must govern in the case at bar.

> "He refused to allow manufacturer's profits and interest on the capital stock. This was correct. The profits made in violation of the rights of the complainants in this class of cases, within the meaning of the law, are to be computed and ascertained by finding the difference between cost

and yield. In estimating the cost, the elements of price of materials, interest, expenses of manufacture and sale, and other necessary expenditures, if there be any, and bad debts, are to be taken into the account, and usually nothing else. *The calculation is to be made as a manufacturer calculates the profits of his business.*"

Rubber Company vs. Goodyear, 76 U. S. 788-804.

"The Master properly refused to allow the defendant, as an element of the 'factory cost' * * * interest on the capital of the corporation invested in its business."

Am. Ende vs. Seabury, 43 Fed. Rep. 672.

It further appears, so far as the books of the defendant show, that no interest upon the plant or upon the capital invested in the business was ever charged or paid by the defendant or ever entered into its calculations in estimating the gross or net profits of the concern in any year involved in this inquiry, nor *ever* until it appears in the Hart tabulation on page 8, in defendant's reply brief furnished me.

The testimony of Mr. Kribben, the expert accountant, (Record, page 515), establishes the fact that the defendant, for its own information as to profit and loss, had its books audited annually by a firm of expert accountants.

Mr. Kribben's testimony and schedules which are compiled exclusively from the annual reports made to the defendant by its own experts, show that the defendant in its annual audit never charged the interest on its plant and capital against the profits. It is perfectly clear to my mind that the interest which defendant never charged against itself in estimating its own profits cannot in equity be charged against the complainant in diminution of the profits due the complainant under the decree.

If the defendant, for the purpose of diminishing the profits due complainant, claims to charge interest on its capital against the cost of production, it should

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also credit the interest earned on the capital with the amount so charged. This must result when the manufacturer draws a distinction between profits arising from production and interest on the capital.

It is a mere matter of bookkeeping. It is wholly fictitious. No money is paid out as an expense as interest on the capital. No money is received as interest on the capital invested. To make a correct balance of the books, the interest charged on the capital must be credited with the interest earned on the capital, otherwise the results will not balance. As the profit is thus shifted from one of manufacture to one of interest on the investment, the result is as broad as it is long. The general profits are not affected a particle one way or the other. No money passes one way or the other. The earnings are neither enlarged nor diminished.

This is undoubtedly the reason why the defendant's expert accountants did not carry interest on the capital into the overhead charges in diminution of the profits, because it would not be a legitimate charge for that purpose, and would not state the truth as a matter of accounting. No matter how the figures should be juggled, the profits still remain with the concern unaffected, undiminished and unimpaired.

Interest on actual borrowed money is an actual cash expense and must be allowed as a matter of course. The interest on the capital of the concern invested in its business is not a cash expense. It is represented by the production and to carry out the fiction of charging interest on the capital as an outgo, it must be charged against the cost of production which will be diminished by just so much. If not, it diminishes the profits by just so much *on the books,* but not as an actual fact, for the profit remains the same. If the interest is added to the cost of production, it doubles the cost to that extent without any corresponding benefit. The capital is invested in the facilities for manu-

facture. The manufacture produces the profits. To charge the interest on the capital against the profits, and also to charge for the use of all the facilities of manufacture which represent the capital is, to that extent, to charge a double expense against a single profit. In an accounting for the profits due a complainant, such a charge amounts to a division of the profits, to that extent, between the sufferer and the wrongdoer.

I have made a careful examination of the authorities bearing on this claim for interest on the capital invested, which was not raised at the hearing before me, and I have been unable to find an instance in which the courts of last resort have allowed it to be charged in diminution of profits. Some cases have been cited to me in which the Supreme Court, while refusing to allow interest on the capital invested, has declined to hold that it might not be allowed in some cases. From these dicta the inference has been drawn that when it can be apportioned it should be allowed. I am unable to agree with counsel in that view.

I am of the opinion that under the decisions nothing that is not actually an expense of production can be applied in diminution of profits.

In this case the proof shows that enormous sums have been paid as interest on borrowed money, amounting, during the period embraced in this inquiry, to $593,875.33. These borrowed moneys, on which this great sum as interest paid is deducted from the profits, become borrowed working capital in the business. The interest being actually paid is a legitimate charge against the profits. There is no proof or claim before me that the capital invested in the business upon which the defendant claims the sum of $82,184.92 interest in diminution of the profits, is borrowed capital. If such were the case and such interest had been actually paid out to the owner of the borrowed capital as expense

of production, it would have been as legitimate an item of expense as is the interest on borrowed money.

Not having been so paid, and never having been charged by the defendant upon its books as an expense of production in diminution of its own profits, it is a fictitious claim as against the complainant, and cannot be allowed.

The following authority, which I did not see until after the above was written, supports the views here expressed.

> "Where interest *has been paid* upon the capital invested or where it is to be paid upon borrowed capital, it should be allowed in estimating profits; but I am not aware of any rule which requires that it should be deducted where it has not been *actually paid* or incurred. * * *
>
> "It was not shown that any interest * * * had been paid, or any indebtedness incurred therefor. The Master was correct in not making any such allowance."
>
> Herring vs. Gage, 15 Blatch 129.

See also the following:

> "This item in the Exhibit filed by the defendant's bookkeeper may have been the general cost of carrying on the entire business of the defendant, including its manufacturing departments, or it may be a mere approximation of expense of selling which would include *interest upon the general capital engaged.* If this is the fact, *this would be wrong.*"
>
> Kissinger-Ison Co. vs. Bradford B. Co., 123 Fed. 92.

Twelfth: This point was raised upon objection to the introduction of testimony relating to alleged infringements said to have occurred after the entry of the decree, but which had only come to the knowledge

of counsel for complainant during the progress of the examination. It was argued on the part of the defendant that it was not within the power of the Master to take such examination, that the only remedy was by motion to punish for contempt for violation of the injunction.

Upon this objection, I held that the fact that counsel for complainant had stated that the examination was limited to the period between the filing of the bill and the 15th of November, 1909, the date of the decree, did not operate as an estoppel to prevent counsel from correcting a misapprehension they may have been under in so stating. And that the Master was not thereby deprived of the right to proceed with the hearing, and take the testimony regarding the profits which might have been earned since the date of the decree, if any such profits had been earned.

The following authority sustains this position:

> "In taking the account the Master was not limited to the date of the decree. In such cases it is proper to extend the account down to the time of the hearing before him, unless the infringement ceased prior to that time. The rights of the parties are settled by the decree, and nothing remains but to ascertain the damages and adjudge their payment."
>
> Rubber Company vs. Goodyear, 76 U. S. (9 Wallace) 788-800.

The objection was properly overruled.

Vide also Hoe vs. Scott, 87 Fed. 220.

The counsel for complainant on pages 2 and 4 of their rebuttal brief are in error in their interpretation of the table on pages 8 and 9 of defendant's reply brief (Mr. Hart's table).

The tabulations as they appear on said pages 8 and 9 are condensed and convenient statements from the Kribben schedules and the stipulations entered into by the parties, prepared by Mr. Hart of defendant's

counsel. The discrepancies between them and the conclusions of the Expert drawn from the defendant's books are practically nothing. I have adopted these tabulations so prepared as a table of my report.

Counsel for complainant have added together the three columns on page 9, Hart table:

$103,862.46
53,118.20
88,693.77

$245,674.43

and conclude that the sum of the three, or $245,674.43, is the mount admitted to be due from defendant's standpoint, if the Master adheres to former rulings.

This is a mistake. The item of $88,693.77 includes the profit on *all* the "American Lady shoes marked with defendant's name and the name American Lady on sole" as item 17. This includes shoes with "Makers" on them and shoes without "Makers" on them. When the profits on the shoes marked "Makers" are deducted from this item of $88,693.77, the same being $35,575.57, as in column one, the result is $53,118.20, as in column four, which is the profit on shoes, *not* marked "Makers" for those periods.

The column aggregating $88,693.77 is superfluous and need not have been carried into a separate column. Neither was it necessary to carry the column aggregating $35,575.57 into the table, for its only use is to show that when deducted from $88,693.77 it leaves the fourth column of $53,118.20 as the profit on American Lady shoes which have "Hamilton-Brown Shoe Company" on them but do not have the word "Makers" on them.

The last column of Mr. Hart's table shows the profit $103,862.46 on American Lady shoes which do not have on them any words but "American Lady" or anything

else whatever to be construed as in any way indicating the maker. Adding these two classes together gives $156,980.66, which is all the profit which this table concedes to the complainant in any contingency. This appears in Total No. 1, in my tabulation No. 1.

Adding to this amount the class in the second column of Mr. Hart's table $47,859.57 gives $204,840.23, which is the total profit which this table admits to have been made by the sale of *all* the "American Lady" shoes. This appears by Total No. 5 in my tabulation No. 3.

Class $47,859.57 is composed of Class	$35,575.57
and of second period	2,267.69
and of third period	10,016.31
	$47,859.57

Counsel are also in error in adding to the sum of	$245,674.43
the sum of	82,184.92
interest, making	$327,859.35

for the item of interest so added is the amount of interest from defendant's standpoint upon *all* American Lady shoes, and is not the proper pro rata upon American Lady shoes *not* marked "makers." (See Totals 4 and 14, Tables 3 and 4.)

The proper pro rata of interest to be added to American Lady shoes *not* marked "Makers" is $63,364.45. (See Total 4, Table 1, and Totals 4 and 14, Table 2.)

I am not able to adopt the position counsel for complainant take rejecting the charges for advertising, nor their views claiming interest to be charged annually upon the profits earned during each period, as explained hereinbefore.

(See pages 32 and 33 of this report.)

DIMINUTION OF PROFITS.

Mr. Hart's table is made up from the transcript from the expert's auditing of the defendant's books, as the same appears in the testimony of Mr. Kribben (Record, p. 498-a), and from the stipulation (Record, p. 583.)

The profits are found by deducting the proportion of the total overhead charges belonging to the "American Lady Shoe" from the proportion of the total income which resulted from the manufacture and sale of the "American Lady shoe."

The total of these overhead charges for the period involved in this controversy, exclusive of the advertising, amounts to about three and one-half millions of dollars.

The proportion of these overhead charges to be borne by the "American Lady shoes" is to the whole, as the output of the "American Lady shoes" is to the whole output of the defendant's business.

Mr. Hart has deducted from the profits earned by the "American Lady shoes" *all* of the pro rata of the overhead charges (excepting the advertising) which, according to the books of the defendant, would be chargeable to the "American Lady shoes." He has excluded the advertising from his calculations of the general overhead charges, because the defendant claims under the stipulation to charge the advertising in diminution of complainant's profits upon a different basis from that governing the rest of the overhead charges.

Mr. Hart's table does not show the process by which he arrived at the pro rata of the overhead charges belonging to the American Lady shoe. He starts with his statement of profits in item No. 6, after all the overhead charges have been deducted, excepting the advertising, and he reaches what he calls his "actual profits" at the foot of each column, after having made the further deduction of 40 per cent of the total over-

head advertising, and the pro rata of interest on capital, which latter never was an overhead charge.

His work is accurately done and his statements of profits are correct upon the theory on which they are worked out.

There is, however, a difference between the overhead charges which defendant deducts from its income to make a showing of profits for its own information, and the overhead charges, which as an infringer, it will be allowed to charge in diminution of the profits due the complainant under the decree.

Of the overhead charges which I find cannot be allowed to be so charged against the complainant's profits, are the following:

1. Taxes amounting to ----------$ 14,220.78
   being the pro rata on *all* American Lady shoes (Total 6, Table 4), or amounting to ----------$ 10,974.99
   being the pro rata on American Lady shoes not marked "Makers." (See Total 8, Table 1.)
2. Insurance amounting to ----------$ 6,352.22
   being the pro rata on *all* American Lady shoes (See Total 8, Table 3), or amounting to ----------$ 4,933.02
   being the pro rata on American Lady shoes not marked "Makers." (See Total 10, Table No. 1.)
3. Depreciation of real estate amounting to ----------$ 17,087.64
   being the pro rata on *all* American Lady shoes (Totals 10, Tables 3 and 4), or amounting to ---------- 12,508.06
   being the pro rata on American Lady shoes not marked "Makers." (Total 12, Table 1; Total 10, Table 2.)

4. Advance Boston House amounting to..$ 13,403.19
being the pro rata on *all* American Lady shoes. (Totals 12, Tables 3 and 4.) Or amounting to..... 10,271.69
being the pro rata on American Lady shoes not marked "Makers." (Total 14, Table 1; Total 12, Table 2.)

"While the usual and reasonable salaries of such portion of the managing officers as have concern with the infringing business are to be allowed, *the items of taxes, insurance, and use of real estate owned by the infringer are not a part of general expenses.*"

Winchester Arms Co. vs. Am. Buckle & C. Co., 62 Fed. 278.

"The amount paid for insurance, it being for the safety of the property generally and not for the benefit of the manufacturer of the infringing machines, will not be allowed as an item of their cost, nor the amount paid for local taxes on such property.

"Steam Stone Cutter Co. vs. Windsor Mfg. Co., 17 Blatchford 24; Winchester Repeating Arms Co. vs. American Buckle Co., 62 Fed. Rep. 278; Piaget Novelty Co. vs. Headley, 123 Fed. Rep. 897."

Sutherland on Damages, Vol. 4, 3rd Ed., Sec. 1911, p. 3446.

"Another item for which defendant asks credit under general expenses is *insurance* amounting to $1,752.

"This is an improper item and should not be allowed. Steam Cutter Co. vs. Windsor Mfg. Co., 22 Fed. Cas. 1166; Winchester Repeating Arms Co. vs. American Buckle & Cartridge Co., 62 Fed. 279, 280."

National Box & Paper Co. vs. Dayton Paper Nov. Co., 95 Fed. 993.

"The Master was entirely within the rule, in disallowing defendant's claims for insurance, legal services, etc. National Box Co. vs. Dayton Co., 95 Fed. 991; Philp et al. vs. Nock, 17 Wall 460; Parks vs. Booth, 102 U. S. 96."

Piaget Novelty Co. vs. Headley, 123 Fed. 897.

DEPRECIATION OF REAL ESTATE.

I think that the defendant's claim, in the overhead charges, to diminish the profits due the complainant, by what the defendant styles *Depreciation—Real Estate and Buildings* cannot be allowed. The total amount so carried on the books of the defendant in diminution of the profits, for the period in controversy is $150,362.78. The pro rata of said overhead charge which would be chargeable to the entire output of American Lady shoes for the period in controversy is (See Totals 10, Tables 3 and 4), $17,087.64. The pro rata of said overhead charge which would be chargeable to the "American Lady shoes" not marked "Makers," is $12,508.06. (See Total 10, Table 2, and Total 12, Table 1).

I am of the opinion that under the decisions of the U. S. Courts, the above items could not be allowed, in any event, to be charged in diminution of the profits due complainant. Nothing can be so charged which is not an actual expense of production, and these charges in depreciation do not pretend to be actual outgoes or payments to anybody. It is evident from the appearance of them as entered from year to year, that they are in all probability arbitrary amounts based upon nothing but assumption or guess work. For the first period, it was $45,362.78. For the second period, it seems to have been forgotten. At any rate, no charge whatever is made therefor, yet it is not imaginable that the depreciation ceased to continue during the year 1907. For the third period $40,000 is charged in round numbers. For the fourth period $40,000 is

charged again. For the fifth period $25,000 is charged, being under the stipulation (Record, p. 583) 25 per cent on $100,000, charged for the entire year 1910. All these charges for depreciation were entered since the filing of the bill. The *depreciation* can be only another name for *the use of* the real estate, or a reduction in the market value of the real estate by reason of changing conditions in city values, or a distribution of profits under another name. Under neither of these conditions is there any warrant for treating these arbitrary charges as payments in expense of production. If these several amounts charged under this heading were actually withdrawn from the profits of each year as charged, it does not concern this inquiry to know what became of them. They certainly were not paid out as expense of production and cannot be allowed.

Besides the amounts considered above, the defendant has carried into its overhead charges for the period in controversy, under the heading "Depreciation Fixtures and Factories," and "Repairing Building and Fixtures" the gross amount of $65,420.59. The items composing this amount I judge to be legitimate expenses for repairs, for I do not consider that the charge of "Depreciation of Fixtures and Factories" is a duplicate of the charge of "Depreciation—Real Estate and Buildings," *supra,* though the "Factories" are the "Real Estate and Buildings." This would amount to over $1,300.00 per month for the period involved.

The following authorities support this position:

> "The items of taxes, insurance and use of real estate owned by the infringer are not a part of general expenses."
>
> Winchester Arms Co. vs. Am. Buckle & C. Co., 62 Fed. 278.

> "Large amounts appear by the books to have been expended in repairs of building and machinery, tools and fixtures. No further allowance is

made by the master for wear and tear and depreciation."

The above finding by the Master in Rubber Co. vs. Goodyear, 76 U. S. 803, was approved by the United States Supreme Court in the following language:

> "The allowance for repairs and other items mentioned in this connection doubtless exceeded the wear and tear which could have occurred during the time of the infringement."

THE TABLES.

In order that both Court and counsel can readily comprehend the methods by which I have reached conclusions and the conclusions themselves, I have reduced all the calculations and the results into four tabulations, in addition to the one which Mr. Hart prepared from the schedules of the expert accountant, Mr. Kribben. I have for uniformity divided each of these tables into five columns or periods corresponding with the five fiscal years or periods of Mr. Hart's table.

Table No. 1.

In Table No. 1, I have first taken the profits for each of the five periods in controversy, as shown in Mr. Hart's table, amounting in the aggregate to	$156,980.66
These profits are the result, according to defendant's position, after having deducted 40% of the total expense of advertising the entire business, and 6% interest upon "Capital devoted exclusively to American Lady Line of Shoes."	
Restoring to the above aggregate of profits the pro rata of the 40% of advertising expense upon "American Lady Shoes" not having "Makers" on them, amounting to	257,826.60

And the pro rata of the interest upon the capital stock upon the same class of shoes amounting to	63,364.45
Both of which had been deducted in the Hart Table, gives as the net profit on American Lady shoes *not* marked "Makers" after *all overhead charges* had been deducted excepting the advertising expense	$478,171.71
Deducting from this amount the pro rata of the overhead advertising, as charged by the defendant upon its books, which upon "American Lady" shoes *not* marked "Makers" amounts to	71,547.92
Gives	$406,623.79

as the profit on "American Lady" shoes *not* marked "Makers" after deducting *all* overhead charges, including the pro rata of advertising.

Defendant's claim for interest on the capital is disallowed as shown on p. 78 of this report, and is not carried into this table. Of the overhead charges all of which were deducted in Mr. Hart's table, I find that the following were improperly deducted, and are not legitimate charges in diminution of complainant's claim for profits. They are accordingly restored here to the amount of the profits.

Taxes, pro rata	10,974.99
Insurance, pro rata	4,933.02
Depreciation of Real Estate, pro rata	12,508.06
Advance Boston House, pro rata	10,271.69
This gives	$445,311.55

as the profits due the complainant from the defendant as the same are calculated in Table No. 1, from complainant's standpoint, upon American Lady shoes not marked "Makers."

At page 586 of the record it is stipulated that 50% of the advertising of American Lady shoes up to Nov. 15, 1909, "including catalogue advertising, had prominently associated with the name Hamilton-Brown Shoe Co., St. Louis, U. S. A., the words, 'With the character of the woman.'" If the Court should hold that such advertising was so improper that defendant would not be allowed to charge the same in diminution of profits, there should be added to above, the sum of---- 32,917.63

which gives ----------$478,229.18

as the amount of profits due complainant from defendant with 50% of the pro rata overhead charges for advertising disallowed under the above stipulation.

If the Court should hold that *all* the advertising should be disallowed as claimed by the counsel for complainant there should be added to above the further sum of---- 38,630.29

which gives ----------$516,859.47

as the amount of profits due complainant from defendant upon American Lady shoes not marked "Makers" if the Court should disallow all the advertising charges.

TABLE NO. 2.

In table No. 2 I have first taken the net profit on American Lady shoes not marked "Makers" with *all overhead charges* deducted excepting the advertising expense amounting in the aggregate to----------$478,171.71

Deducting the pro rata of 40% of the total expense of advertising the entire business, as claimed by counsel for defendant to be charged against the American Lady shoes *not* marked "Makers," amounting in the aggregate to	$257,826.60	
and the pro rata claimed by defendant to be charged against the same class of shoes for interest on the capital	63,364.45	321,191.05
gives		$156,980.66
Which is the amount shown in the 4th and 5th columns of the Hart table as the profit on shoes marked "American Lady" only	$103,862.46	
And those having on them the name "Hamilton-Brown Shoe Co." but *not* the word "Makers"	53,118.20	
	$156,980.66	

I have restored to the profits the following overhead charges, improperly deducted in the Hart table, which I find are not legitimate charges in diminution of complainant's claim for profits:

Taxes, pro rata	$ 10,974.99
Insurance, pro rata	4,933.02
Depreciation of Real Estate, pro rata	12,508.06
Advance Boston House, pro rata	10,271.69
This gives	$195,668.42

as the profits due the complainant from the defendant as the same are calculated in Table No. 2, with the pro rata of 40% of advertising, amounting to $257,826.60

and the pro rata of interest on the capital, $63,364.45, both deducted.

The defendant claims to charge interest on the capital in diminution of the profits. This was never carried into the defendant's books as an overhead charge. It is not a legitimate charge in diminution of profits and I have disallowed the same as shown on page 78 of this report.

Restoring this item to the profits as above_ 63,364.45

gives ---------- $259,032.87

as the amount of profits due complainant from defendant upon American Lady shoes not marked "Makers" after deducting the pro rata of the 40% of advertising as claimed by the defendant.

If the Court should disallow 50% of the 40% of the advertising, referred to in explanation of Table 1, under the stipulation on page 586 of the record, there should be added to the above the sum of__ 119,362.90

which gives ---------- $378,395.77

as the amount of profits due complainant from defendant with 50% of the 40% advertising disallowed under the above stipulation.

If the Court should hold that *all* the advertising should be disallowed as claimed by counsel for complainant, there should be added to the above the sum of---------- 138,463.70

which gives ---------- $516,859.47

as the amount of profits due complainant from defendant, upon American Lady shoes *not* marked "Makers" if the Court should disallow all the advertising charges.

TABLE No. 3.

The counsel for complainant have taken the position that the Master is in error in holding that the complainant is *not* entitled to recover the profits on American Lady shoes marked with the word "Makers" in connection with the name "Hamilton-Brown Shoe Company."

My views upon this point were dictated into the record (Record, pp. 69 to 91) and are adhered to on pages 28 and 29 of this report.

The following tables are based upon calculations of the profits upon the entire output of American Lady shoes as claimed by counsel for complainant.

In Table No. 3 I have first taken the net profit on the entire output of American Lady shoes, including those marked "Makers," with all overhead charges deducted, excepting the advertising expense, amounting in the aggregate to		$618,303.15
Deducting the pro rata 40% of the total advertising expense upon the entire business as claimed by counsel for defendant to be charged against the entire output of American Lady shoes, amounting in the aggregate to	$331,278.00	
And the pro rata claimed by defendant to be charged against the entire output of American lady shoes, for interest on the capital	82,184.92	413,462.92
gives		$204,840.23

as the profit upon *all* American Lady shoes with all the overhead charges, the pro rata of 40% of the entire advertising expense, and the pro rata of interest on the capital deducted.

I have restored to the profits so found the following overhead charges, improperly deducted in the Hart table, which I find are not legitimate charges in diminution of complainant's claim for profits.

Taxes, pro rata	14,220.78
Insurance, pro rata	6,352.22
Depreciation of Real Estate, pro rata	17,087.64
Advance Boston House, pro rata	13,403.15

I have also restored to the profits the interest charged on capital, which never was an overhead charge, and which as shown on page 78 of this report is not a legitimate charge in diminution of complainant's claim for profits, pro rata 82,184.92

This gives $338,088.98

as the profits due the complainant from the defendant, calculated upon the entire output of American Lady shoes with the pro rata of the 40% of advertising deducted as claimed by defendant.

If the Court should disallow 50% of the 40% of the advertising referred to in explanation of Table 1, and the stipulation on page 586 of the record, there should be added to the above the sum of 155,315.98

which gives $493,404.96

as the amount of profits due complainant from the defendant upon the entire output of American Lady shoes, with 50% of the 40% of the advertising disallowed under the above stipulation.

If the Court should hold that *all* the advertising should be disallowed as claimed by

counsel for complainant, there should be added to the above the sum of ---------- 175,962.02

which gives ---------- $669,366.98
as the amount of profits due complainant from defendant upon the entire output of American Lady shoes, if the Court should disallow all the advertising charges.

TABLE NO. 4.

In Table No. 4, I have taken the net profit on the entire output of American Lady shoes, including those marked "Makers" with all overhead charges deducted excepting the advertising expense amounting in the aggregate to ---------- $618,303.15

Deducting the pro rata of the overhead charge for advertising, as charged by the defendant upon its books, which upon the entire output of American Lady shoes amounts to ---------- $91,314.66
and the pro rata claimed by defendant to be charged against the entire output of American Lady shoes, for interest upon the capital ------ 82,184.92 173,499.58

gives ---------- $444,803.57
as the profit upon all American Lady shoes with all the overhead charges, the pro rata of the overhead charge for advertising, and the pro rata of interest on the capital deducted.

I have restored to the profits so found the following overhead charges, improperly deducted in the Hart table, which I find are not legitimate charges in diminution of complainant's claim for profits:

Taxes, pro rata	$ 14,220.78
Insurance, pro rata	6,352.22
Depreciation of real estate, pro rata	17,087.64
Advance Boston House, pro rata	13,403.19

I have also restored to the profits the interest charged on capital, which never was an overhead charge, and which, as shown on page 78 of this report is not a legitimate charge in diminution of complainant's claim for profits, pro rata 82,184.92

This gives $578,052.32
as the profits due the complainant from the defendant, calculated upon the entire output of American Lady shoes with the pro rata of the charge for overhead advertising, as charged by defendant on its books, deducted.

If the Court should disallow 50% of the ~~40% of the~~ advertising referred to in explanation of Table 1, and the stipulation on p. 586 of the record, there should be added to the above the sum of 42,462.92
whichgives $620,515.24

If the Court should hold that *all* the advertising should be disallowed as claimed by counsel for ~~defendant~~ complainant, there should be added to the above the sum of 48,851.74

which gives $669,366.98
as in Tables No. 3. & 4.

MR. HART'S TABLE.

	Jan. 29, 1906, to Dec. 10, 1906.	Dec. 10, 1906, to Dec. 12, 1907.
1. Pairs of American Lady shoes sold	(468) 491,849	514,829
2. Aggregate selling price of American Lady shoes	(468) $983,698.00	$1,055,399.15
3. % of jobbing profit without allowing for "Advertising" or "Interest on capital"	(Kribben 2) 4.5885%	4.67%
4. % of jobbing profit times aggregate selling price equals jobbing profit on American Lady shoes	$45,136.98	$49,287.15
5. Total factory profit without allowing for "Advertising" or "Interest on capital"	(468-470) $65,083.23	(469-470) $76,885.57
6. Jobbing profit plus factory profit equals total profit, without allowing, etc.	$110,220.21	$126,172.72
† 7. Amount expended on account of "Advertising"	(Kribben 1) $130,455.55	$233,880.73
† 8. 20% of "Advertising"—which "had reference exclusively to the American Lady shoes"	(585) $26,091.11	$46,776.15
9. ½ of 40% of "Advertising—which referred exclusively to Am. Lady and Am. Gentleman shoes"	(584) $26,091.11	$46,776.15
10. Amount of capital "devoted exclusively to American Lady line of shoes"	(587) $264,774.65	$219,375.59
†11. 6% interest on capital "devoted exclusively to American Lady line of shoes"	$13,900.67	$13,162.54
12. 20% of "Advertising" plus ½ of 40% of "Advertising" plus 6% interest on capital "devoted," etc.	$66,082.89	$106,714.84
13. Item 6 above minus item 12 above equals actual profit of defendant on American Lady shoes	$44,137.32	$19,457.88
14. Total actual profit (item 13) divided by number of pairs sold (item 1) equals actual profit on each pair	$.08973754	$.03779484
15. Total pairs American Lady shoes marked "H-B. S. Co., Makers," on top facing and with defendant's name and name "American Lady" on sole	(473) 244,000	None
16. Total pairs American Lady shoes marked "Hamilton, Brown Shoe Co., Makers," on top facing	244,000	*** 60,000
17. Total pairs American Lady shoes marked with defendant's name and name American Lady on sole	491,849	None
18. Total pairs American Lady shoes marked only with defendant's name and name American Lady on sole	247,849	None
19. Total pairs American Lady shoes marked only with name American Lady on sole	None	454,829
20. Actual profit per pair times total pairs marked as in item 15 equals total profit on shoes so marked	$21,895.96	None
21. Actual profit per pair times total pairs marked as in item 16 equals total profit on shoes so marked	$21,895.96	$2,267.69
22. Actual profit per pair times total pairs marked as in item 17 equals total profit on shoes so marked	$44,137.32	None
23. Actual profit per pair times total pairs marked as in item 18 equals total profit on shoes so marked	$22,241.36	None
24. Actual profit per pair times total pairs marked as in item 19 equals total profit on shoes so marked	None	$17,190.19

†In items 7, 8 and 11, in making our computations for the first period, we have used 10½/12 of the amou amounts given for the fiscal year 1910 as representing the period from December 10, 1909, to March 9, 1910; this

*Owing to the fact that the stipulation of June 4, 1910, only extends to Nov. 15, 1910, in so far as it rela done during the fiscal year 1909 as shown by those stipulations are shown in the same column, and in the nex

**The stipulation of June 4, 1910, shows, at page 6 thereof, that from Dec. 11, 1908, to Nov. 15, 1909, 212,000 Shoe Co. and the word "makers" in the center of the belt on one shoe of each pair and each shoe of each pair and the stipulation of Jan. 11, 1911, shows that from Nov. 15, 1909, to Mar. 9, 1910, 17,872 pairs of shoes thus ma marked and sold between Nov. 15, 1909, and March 9, 1910, or 3574 pairs, were sold during the fiscal year 1909 and the sum of those numbers (215,574) is used as a basis for figuring the profit on such shoes for the fiscal ye

***The stipulation entered into at the close of the taking of testimony, and which is found at page 60 years 1907 and 1908, and which bore the silk top facing on one shoe of each pair, said silk top facing bearing 60,000 pairs were sold during the fiscal year 1907 and 60,000 pairs were sold during the fiscal year 1908.

Dec. 10, 1906, to Dec. 12, 1907.	Dec. 12, 1907, to Dec. 11, 1908.	*See Note Dec. 11, 1908, to Dec. 10, 1909.		Dec. 10, 1908, to March 9, 1910.	Total actual profit made by defendant during the entire period of the accounting on shoes marked on the sole of each shoe with defendant's belt trade-mark with name "Hamilton-Brown Shoe Co." thereon and the name American Lady in the center of the belt and on the silk top facing of one shoe of each pair with the name American Lady, the belt trade-mark with the name "Hamilton-Brown Shoe Co." thereon and the word "makers" in the center of the belt.	Total actual profit made by defendant during the entire period of the accounting on shoes marked on the silk top facing of one shoe of each pair with the name American Lady, the belt trade-mark with the name "Hamilton-Brown Shoe Co." thereon and the word "makers" in the center of the belt, and including shoes so marked which also bore other marks as in the first classification.	Total actual profit made by defendant during the entire period of the accounting on shoes marked on the sole of each shoe with the belt trade-mark with the name "Hamilton-Brown Shoe Co." thereon and the name American Lady in the center of the belt and including shoes so marked which also bore other marks as in the preceding classifications.	Total actual profit made by defendant during the entire period of the accounting on shoes marked only on the sole of each shoe with the belt trade-mark with the name "Hamilton-Brown Shoe Co." thereon and the name "American Lady" in the center of the belt.	Total actual profit made by defendant during the entire period of the accounting on shoes marked only with name American Lady—but these shoes, like all the shoes accounted for and covered by these various classifications were sold in cartons, each pair being sold in a carton which was marked as shown by stipulation of June 4, 1910.
514,829	579,187	724,178 28,413	752,591	191,039					
$1,055,399.45	$1,216,292.70	$1,520,773.80 $59,667.30	$1,580,441.10	$401,181.90					
4.67%	3.9995%		1.7%	(582) 1.8638%					
$49,287.15	$48,645.63		$26,867.50	$7,477.23					
(469-470) $76,885.57	$136,512.76	$142,505.58 $4,735.43	$147,241.01	(580) $15,166.09					
$126,172.72	$185,158.39		$174,108.51	$22,643.32					
$233,880.73	$165,673.06		$246,570.53	$51,615.11					
$46,776.15	$33,134.61		$49,314.11	$10,323.02					
$46,776.15	$33,134.61		$49,314.11	$10,323.02					
$219,375.59	$370,009.90		$443,188.98	$421,986.47					
$13,162.54	$22,200.59		$26,591.34	$6,329.78					
$106,714.84	$88,469.81		$125,219.56	$26,975.82					
$19,457.88	$96,688.58		$48,888.95	Loss $4,332.50					
$.03779484	$.16693844		$.06496084	Loss $.02267861					
None	None	**	**	**					
		212,000 3,574	215,574	14,298					
***	***	**	**	**					
60,000	60,000	212,000 3,574	215,574	14,298 (579)					
None	None		752,591	191,039					
None	None		537,017	176,741					
454,829	519,187		None	None					
None	None		$14,003.87	Loss $324.26	$35,575.57				
$2,267.69	$10,016.31		$14,003.87	Loss $324.26		$47,859.57			
None	Nine		$48,888.95	Loss $4,332.50			$88,693.77		
None	None		$34,885.08	Loss $4,008.24				$53,118.20	
$17,190.19	$86,672.27		None	None					$103,862.46

ed 10½/12 of the amounts given for the fiscal year 1906 as representing the period from January 28, 1906, to December 10, 1906, while for the last period we have used ¼ of the
March 9, 1910; this method being authorized by the stipulations at pages 582-3 and 600-1.
9, in so far as it relates to the amount of business done during 1909, and that the stipulation of January 11, 1911, covers the rest of the fiscal year 1909, the amounts of business
lumn, and in the next succeeding column is shown the aggregate business for that year and the succeeding figures are based upon that aggregate.
Nov. 15, 1909, 212,000 pairs of the American Lady shoes sold bore the silk top facing, with the words American Lady, the belt trade-mark with the name Hamilton, Brown
ch shoe of each pair bore on the sole the said belt trade-mark with the name Hamilton, Brown Shoe Co. thereon and the name American Lady in the center of the belt.
urs of shoes thus marked were sold. The stipulation entered into at the close of the proofs on March 7th (found at page 600 of the record) shows that 20% of the shoes thus
g the fiscal year 1909 and that the other 14,288 pairs were sold after the beginning of the fiscal year 1910. Therefore, the 3574 pairs of those shoes are added to the 212,000 pairs
hoes for the fiscal year 1909, while the 14,288 pairs are used as a basis for figuring the profit on such shoes for the period from Dec. 11, 1908, to March 9, 1910.
is found at page 601 of the record, authorizes the Master to consider that of the 120,000 pairs of shoes which the stipulation of June 4, 1910, shows were sold during the fiscal
lk top facing bearing the name American Lady, the belt trade-mark with the name Hamilton, Brown Shoe Co. thereon and the words "Makers" in the center of the belt;
l year 1908.

TABLE No. 1

Table showing profits upon American Lady shoes not marked "Makers," with pro rata of overhead advertising allowed, overhead taxes, insurance, depreciation of real estate and Boston House disallowed, also interest on capital disallowed; and all totals after charging disallowances.

	1st Period	2nd Period	3rd Period	4th Period	5th Period	Totals	
Profits shoes not marked "Makers" after deducting 40% advertising and interest on capital	$ 22,241.36	$ 17,109.19	$ 86,672.27	$ 34,885.08	*$ 4,008.24	$156,980.66	1
Add 40% pro rata advertising	26,295.28	82,649.40	59,404.20	70,376.93	19,100.79	257,826.60	2
Profits after adding 40% pro rata of advertising	48,536.64	99,839.59	146,076.47	105,262.01	15,092.55	414,807.26	3
Add pro rata interest on capital disallowed	7,004.72	11,628.53	19,900.70	18,974.46	5,856.04	63,364.45	4
Profits after adding pro rata interest on capital disallowed	55,541.36	111,468.12	165,977.17	124,236.47	20,948.59	478,171.71	5
Deduct pro rata of overhead advertising	6,856.49	18,556.99	16,059.32	24,362.46	5,712.66	71,547.92	6
Profits after deducting pro rata of overhead advertising	48,684.87	92,911.13	149,917.85	99,874.01	15,235.93	406,623.79	7
Add pro rata of overhead taxes disallowed	880.80	2,178.71	2,704.40	3,454.84	1,756.24	10,974.99	8
Profits after adding pro rata of overhead taxes disallowed	49,565.67	95,089.84	152,622.25	103,328.85	16,992.17	417,598.78	9
Add pro rata of overhead insurance disallowed	399.15	1,307.40	1,514.08	1,332.48	379.91	4,933.02	10
Profits after adding pro rata of overhead insurance disallowed	49,964.82	96,397.24	154,136.33	104,661.33	17,372.08	422,531.80	11
Add pro rata of overhead depreciation of real estate disallowed	1,825.48		3,868.15	3,951.65	2,862.78	12,508.06	12
Profits after adding pro rata of overhead depreciation of real estate disallowed	51,790.30	96,397.24	158,004.48	108,612.98	20,234.86	435,039.86	13
Add pro rata of overhead Boston House disallowed				7,288.05	2,983.64	10,271.69	14
Profits after adding pro rata of overhead Boston House disallowed	51,790.30	96,397.24	158,004.48	115,901.03	23,218.50	445,311.55	15
Add 50% of improper advertising if disallowed	3,428.25	9,278.49	8,029.66	12,181.23		32,917.63	16
Profits after adding 50% of improper advertising if disallowed	55,218.55	105,675.73	166,034.14	128,082.26	23,218.50	478,229.18	17
Add other 50% of advertising if disallowed	3,428.25	9,278.49	8,029.66	12,181.23	5,712.66	38,630.29	18
Profits after adding all advertising if disallowed	58,646.80	114,954.22	174,063.80	140,263.49	28,931.16	516,859.47	19

*Loss.

TABLE NO. 2

Table showing profits upon American Lady shoes not marked "Makers," with 40% pro rata advertising allowed. Overhead taxes, insurance, depreciation of real estate, and Boston House charges disallowed, also interest on capital disallowed; and all totals after charging disallowances.

	1st Period	2nd Period	3rd Period	4th Period	5th Period	Totals	
Profits shoes not marked "Makers" after deducting all overhead charges excepting advertising, also interest on capital	$ 55,541.36	$111,468.12	$165,977.17	$124,236.47	$ 20,948.59	$478,171.71	1
Deduct 40% pro rata advertising	26,295.28	82,649.40	59,404.20	70,376.93	19,100.79	257,826.60	2
Profit after deducting all overhead charges and 40% pro rata advertising	29,246.08	28,818.72	106,572.97	53,859.54	1,847.80	220,345.11	3
Deduct pro rata interest on capital	7,004.72	11,628.53	19,900.70	18,974.46	5,856.04	63,364.45	4
Profits after deducting pro rata interest on capital	22,241.36	17,190.19	86,672.27	34,885.08	*4,008.24	156,980.66	5
Add pro rata of overhead taxes disallowed	880.80	2,178.71	2,704.40	3,454.84	1,756.24	10,974.99	6
Profits after adding pro rata of overhead taxes disallowed	23,122.16	19,368.90	89,376.67	38,339.92	*2,252.00	167,955.65	7
Add pro rata of overhead insurance disallowed	399.15	1,307.40	1,514.08	1,332.48	379.91	4,933.02	8
Profits after adding pro rata of overhead insurance disallowed	23,521.31	20,676.30	90,890.75	39,672.40	*1,872.09	172,888.67	9
Add pro rata of overhead depreciation of real estate disallowed	1,825.48		3,868.15	3,951.65	2,862.78	12,508.06	10
Profits after adding pro rata of overhead depreciation of real estate disallowed	25,346.79	20,676.30	94,758.90	43,624.05	990.69	185,396.73	11
Add pro rata of overhead Boston House disallowed				7,288.05	2,983.64	10,271.69	12
Profits after adding pro rata of Boston House disallowed	25,346.79	20,676.30	94,758.90	50,912.10	3,974.33	195,668.42	13
Add pro rata interest on capital disallowed	7,004.72	11,628.53	19,900.70	18,974.46	5,856.04	63,364.14	14
Profits after adding pro rata interest on capital disallowed	32,351.51	32,304.83	114,659.60	69,886.56	9,830.37	259,032.87	15
Add 50% of improper advertising if disallowed	13,147.64	41,324.70	29,702.10	35,188.46		119,362.90	16
Profits after adding 50% of improper advertising if disallowed	45,499.15	73,629.53	144,361.70	105,075.02	9,830.37	378,395.77	17
Add other 50% of advertising if disallowed	13,147.64	41,324.70	29,702.10	35,188.46	19,100.80	138,463.70	18
Profit after adding all advertising if disallowed	58,646.79	114,954.23	174,063.80	140,263.48	28,931.17	516,859.47	19

*Loss.

TABLE No. 3

Table showing the profits upon ALL American Lady shoes with 40% of advertising allowed as claimed by defendant and the totals after charging disallowances.

	1st Period	2nd Period	3rd Period	4th Period	5th Period	Totals	
Profits after deducting all overhead charges except advertising	$110,220.21	$126,172.72	$185,158.39	$174,108.51	$ 22,643.32	$618,303.15	1
Deduct defendant's 40% of advertising	52,182.22	93,552.30	66,269.22	98,628.22	20,646.04	331,278.00	2
Profits deducting overhead charges and 40% of advertising	58,037.99	32,620.42	118,889.17	75,480.29	1,997.28	287,025.15	3
Deduct defendant's claim of interest on capital.	13,900.67	13,162.54	22,200.59	26,591.34	6,329.78	82,184.92	4
Profits deducting overhead charges, 40% advertising and interest on capital	44,137.32	19,457.88	96,688.58	48,888.95	*4,332.50	204,840.23	5
Add overhead taxes disallowed	1,997.63	2,466.12	3,016.94	4,841.77	1,898.32	14,220.78	6
Profits with overhead taxes added	46,134.95	21,924.00	99,705.52	53,730.72	*2,434.18	219,061.01	7
Add overhead insurance disallowed	905.27	1,479.88	1,689.05	1,867.38	410.64	6,352.22	8
Profits with overhead insurance added	47,040.22	23,403.88	101,394.57	55,598.10	*2,023.54	225,413.23	9
Add depreciation of real estate, disallowed	4,140.13		4,315.18	5,537.96	3,094.37	17,087.64	10
Profits with overhead depreciation of real estate added	51,180.35	23,403.88	105,709.75	61,136.06	**1,070.83	242,500.87	11
Add overhead Boston House disallowed				10,213.66	3,189.53	13,403.19	12
Profits with overhead Boston House added	51,180.35	23,403.88	105,709.75	71,349.72	4,260.36	255,904.06	13
Add interest on capital disallowed	13,900.67	13,162.54	22,200.59	26,591.34	6,329.78	82,184.92	14
Profits with overhead charges and interest on capital added	65,081.02	36,566.42	127,910.34	97,941.06	10,590.14	338,088.98	15
Add 50% improper advertising if disallowed	26,091.11	46,776.15	33,134.61	49,314.11		155,315.98	16
Profits 50% of improper advertising added	91,172.13	83,342.57	161,044.95	147,255.17	10,590.14	493,404.96	17
Add other 50% advertising if disallowed	26,091.11	46,776.15	33,134.61	49,314.11	20,646.04	175,962.02	18
Profits with all advertising added	117,263.24	130,118.72	194,179.56	196,569.28	31,236.18	669,366.98	19

*Loss. **Gain.

TABLE No. 4

Table showing the profits upon ALL American Lady Shoes with defendant's overhead pro rata of advertising allowed as claimed by complainant, and the totals after charging disallowances.

	1st Period	2nd Period	3rd Period	4th Period	5th Period	Totals	
Profits after deducting all overhead charges except advertising	$110,220.21	$126,172.72	$185,158.39	$174,108.51	$ 22,643.32	$618,303.15	1
Deduct overhead advertising pro rated on all.	11,906.56	21,003.84	17,873.17	34,142.27	6,388.82	91,314.66	2
Profit after deducting overhead advertising pro rata	98,313.65	105,168.88	167,285.22	139,966.24	16,254.50	526,988.49	3
Deduct defendant's claim of interest on capital.	13,900.67	13,162.54	22,200.59	26,591.34	6,329.78	82,184.92	4
Profits after deducting overhead advertising and interest on capital	84,412.98	92,006.34	145,084.63	113,374.90	9,924.72	444,803.57	5
Add overhead taxes disallowed	1,997.63	2,466.12	3,016.94	4,841.77	1,898.32	14,220.78	6
Profits with overhead taxes added	86,410.61	94,472.46	148,101.57	118,216.67	11,823.04	459,024.35	7
Add overhead insurance disallowed	905.27	1,479.88	1,689.05	1,867.38	410.64	6,352.22	8
Profits with overhead insurance added	87,315.88	95,952.34	149,790.62	120,084.05	12,233.68	465,376.57	9
Add depreciation of real estate disallowed	4,140.13		4,315.18	5,537.96	3,094.37	17,087.64	10
Profits with overhead depreciation of real estate added	91,456.01	95,952.34	154,105.80	125,622.01	15,328.05	482,464.21	11
Add overhead Boston House disallowed				10,213.66	3,189.53	13,403.19	12
Profits with overhead Boston House charges added	91,456.01	95,952.34	154,105.80	135,835.67	18,517.58	495,867.40	13
Add interest on capital disallowed	13,900.67	13,162.54	22,200.59	26,591.34	6,329.78	82,184.92	14
Profits with overhead charges and interest on capital disallowed	105,356.68	109,114.88	176,306.39	162,427.01	24,847.36	578,052.32	15
Add 50% improper advertising if disallowed	5,953.28	10,501.92	8,936.58	17,071.13		42,462.92	16
Profits 50% improper advertising added	111,309.96	119,616.80	185,242.98	179,498.14	24,847.36	620,515.24	17
Add the other 50% advertising if disallowed	5,953.28	10,501.92	8,936.58	17,071.14	6,388.82	48,851.74	18
Profits with all advertising added	117,263.24	130,118.72	194,179.56	196,569.28	31,236.18	669,366.98	19

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The most numerous class of the American Lady shoes manufactured by the defendant, and the most productive as to profit, was the shoe which had upon it the words "American Lady" only, without the name of Hamilton-Brown Shoe Company, or anything else to be construed as in any way indicating the maker.

Concerning American Lady shoes constituting this class, the counsel for the defendant, at page 106B, of my record, in the motion made by the defendant to the Court for a rule upon the Master to proceed no further in the examination, made use of the following language in his statement to the Court:

> "(b) That, therefore, defendant only has to account for such of its shoes, sold since the filing of the bill as it might be shown to have sold which were marked with the words 'American Lady' and not accompanied with such distinguishing marks or matter (such as defendant's name thereon) as would plainly *indicate* that the shoes so marked *emanated* from the Hamilton-Brown Shoe Company."

It is due to the counsel, however, to say that the foregoing statement was made by the counsel as a conclusion, at a time when the counsel believed, upon erroneous information from his client, that the defendant had never made any shoes so marked with the name "American Lady" only, and consequently it cannot be construed to be an admission of a liability upon a state of facts, the existence of which was not known to the counsel at the time.

In tables No. 1 and 2, the columns styled *second* and *third periods* relate exclusively to shoes having on them the words "American Lady" *only*, with no name or mark whatever on them to indicate the maker.

The sum of the headings of these two columns in table No. 1, $17,190.19 and $86,672.27 gives $103,862.46, which in the last column of Mr. Hart's table is stated to be the profit on "American Lady" shoes, having on them the words "American Lady" only, after having

charged against such shoes their pro rata of the 40% advertising on the entire business amounting to $142,053.60, and also having charged the pro rata of interest on the capital amounting to $31,529.23, the total being $173,582.83.

This shows that of the----------$478,171.71
which Total No. 5 in Table 1 shows to be the profit on American Lady shoes not marked "Makers" as claimed by the defendant, without having deducted 40% advertising and interest on capital, the profit on shoes marked "American Lady" only, being 974,016 pairs is------$277,445.29
The profit on shoes marked "Hamilton-Brown Shoe Company," in addition to the name "American Lady," being 961,607 pairs is ---$200,726.42

The profit on shoes marked "Makers" in addition to Hamilton-Brown Shoe Company, being 593,872 pairs is $140,131.44.

All these are based upon Mr. Hart's table, and are without deducting advertising and interest on capital, but with *all* overhead charges deducted.

The profits on shoes marked "American Lady" only, being 974,016 pairs are derived as follows:

Net Profits Deduct pro rata overhead advertising on Complainant's theory.		Net Profits Deduct pro rata of 40% advertising on Defendant's theory.
$277,445.29		$277,445.29
34,616.31		142,053.60
242,828.98	--Restore to profits----------	135,391.69
4,883.11	--Taxes pro rata ----------	4,883.11
2,821.48	--Insurance pro rata ---------	2,821.48
3,868.15	--Real Est. dep. pro rata----	3,868.15
$254,401.72		$146,964.43

The profits on shoes marked "Hamilton-Brown Shoe Company," being 961,607 pairs, are derived as follows:

Net Profits Deduct pro rata overhead advertising.		Net Profits Deduct pro rata of 40% advertising.
$200,726.42		$200,726.42
36,931.61		115,773.00
163,794.81	Restore to profits	84,953.42
6,091.88	Taxes pro rata	6,091.88
2,111.54	Insurance pro rata	2,111.54
8,639.91	Real Est. dep. pro rata	8,639.91
10,271.69	Adv'ce Boston H'se pro rata	10,271.69
$190,909.83		$112,068.44

The profits on shoes marked "Makers," being 593,872 pairs, are derived as follows:

Net Profits Deduct pro rata overhead advertising.		Net Profits Deduct pro rata of 40% advertising.
$140,131.44		$140,131.44
19,766.74		73,451.40
120,364.70	Restore to profits	66,680.04
3,245.79	Taxes pro rata	3,245.79
1,419.20	Insurance pro rata	1,419.20
4,579.58	Real Est. dep. pro rata	4,579.58
3,131.50	Adv'ce Boston H'se pro rata	3,131.50
$132,740.77		$ 79,056.11

This report is printed in accordance with the following stipulation between the parties:

> "It is stipulated and agreed between counsel for complainant and counsel for defendant that after the Master has prepared his report the same shall be printed in conformity with the rules of printing the record as the same exists in the United States Court of Appeals for the Eighth Circuit, and that he shall provide counsel for complainant with forty printed copies of his report, and counsel for defendant with forty copies of his report;

and that the cost of printing the report shall be taxed as costs in this case.

"When the report has been printed the Master shall submit his bill for the same, and in advance of the determination of which party shall pay the costs on this accounting, the Complainant shall pay to the Master one-half of the cost of printing the Master's said report and the defendant shall pay to the Master one-half of the cost of printing the said report."

Record pages 626-7.

This report is accompanied by two volumes of transcripts of the record of the oral testimony taken before me during the progress of the hearings, the same having been reduced to typewriting under the stipulation of the parties on page 97 of the said transcript of the record, and the same constitute and comprise all the oral testimony taken before me, and the stipulations entered into by and between the parties.

This report is also accompanied by the exhibits introduced before me by both complainant and defendant.

In order to avoid the necessity of producing before me a vast multitude of the books and papers of the defendant as actual exhibits, there were introduced in evidence before me schedules of the same, compiled by Mr. B. D. Kribben, expert accountant, from books, reports and data furnished to him by the officers of the defendant, (see transcript of Record, p. 498-A) and supplemental schedules made by stipulation of the parties, to cover a subsequent period not embraced in the Kribben schedules. (See transcript of Record, p. 583).

All the tables of calculations embraced in this report are based upon and made from these schedules.

The premises considered, I have the honor to recommend to this Honorable Court that a judgment be entered herein in favor of the complainant and against the defendant.

First; for the sum of Two Hundred and Fifty-four Thousand, Four Hundred and One Dollars and Seventy-two cents ($254,401.72) which I find from the evidence to be the profits made by the defendant by the

sale, during the period in controversy, of shoes having no other marking on them save only the words "The American Lady."

Second; for the further sum of One Hundred and and Ninety Thousand, Nine Hundred and Nine Dollars and Eighty-three cents ($190,909.83), which I find from the evidence to be the profits made by the defendant by the sale, during the period in controversy, of shoes having upon them, in addition to the words "The American Lady," the words "Hamilton-Brown Shoe Company."

The aggregate of the judgment so as above recommended, is for the sum of Four Hundred and Forty-five Thousand, Three Hundred and Eleven Dollars and Fifty-five cents ($445,311.55).

I also find from the evidence that the profits made by the defendant by the sale, during the period in controversy of shoes having upon them the word "Makers" in addition to the words "The American Lady" and "Hamilton-Brown Shoe Company" amounted to the sum of One Hundred and Thirty-two Thousand Seven Hundred and Forty Dollars and Seventy-seven cents ($132,740.77).

In my opinion the complainant, though claiming the profits on shoes so marked "Makers," is not entitled under the opinion of the Court of Appeals and the decree of the Circuit Court in accordance therewith, to recover the same, and I have accordingly not included such profits in the amount of the judgment herein recommended.

In this case, at the request of the counsel for defendant, which was based upon the ruling of the Court in the case of Bliss vs. Anaconda Copper Mining Co., 156 Fed. 309, 313, I furnished to counsel for complainant and to counsel for defendant complete copies of my report as hereinbefore set forth, and gave to counsel such reasonable time as they suggested within which to file with me their several exceptions to my report.

Accordingly, the counsel for the complainant, on the 7th day of September, 1911, furnished me with their

exceptions to my report, being five in number, in typewritten form, and on the 12th day of September, 1911, the counsel for the defendant furnished me with their exceptions to my report, being thirty-eight in number, comprised in a pamphlet of forty-three pages.

In the same case the Court further says:

> "Thereafter the Master should consider the objections, suggestions and exceptions, and act upon them as his judgment dictates, and then make up his report, which should be accompanied by the objections and exceptions interposed and his action thereon."

In accordance with the views of the Court so expressed, my report is herewith "accompanied by the objections and exceptions interposed, and my action thereon," as follows:

COMPLAINANT'S EXCEPTIONS TO THE MASTER'S REPORT.

Exception number one is taken to the action of the Master in allowing to the defendant the sum of $34,616.31 on account of advertising, in diminution of the profits on shoes marked only with the name "American Lady."

This exception is overruled.

Exception number two is taken to the action of the Master in allowing to the defendant the sum of $36,931.62 on account of advertising, in diminution of the profits on shoes marked in addition to the words "American Lady" with the words "Hamilton, Brown Shoe Company."

This exception is overruled.

These two exceptions are overruled for reasons stated on pages 32 and 33 of this report.

Exception number three is taken to the action of the Master in refusing to allow to the complainant the

sum of $132,740.77 as profits made by the defendant by the sale of shoes having upon them the word "Makers," in addition to the words "American Lady" and "Hamilton, Brown Shoe Co."

This exception is overruled.

Exception number four is taken to the action of the Master in refusing to allow to the complainant the sum of $152,507.51, being the profits made by the defendant upon the shoes so marked as in exception number three, this being the sum of..... $132,740.77
having added thereto the sum of..... 19.766.74
pro rata advertising.

$152,507.51

This is the same as exception number three, with the amount of the pro rata advertising added, and it is also overruled.

These two exceptions are overruled for the reasons stated on pages 22, 29, and 105 of this report.

Exception number five is taken to the action of the Master in sustaining the objection of counsel for defendant to the introduction of evidence offered by complainant of "Minden" shoes and cartons.

This exception is overruled for the reasons stated on pages 42 and 43 of this report.

DEFENDANT'S EXCEPTIONS TO THE MASTER'S REPORT.

Exception number one is overruled. See pages 22, 23 and 66 of this report.

Exception number two is overruled. See same pages of report.

Exception number three is overruled. See same pages of report.

Exception number four is overruled. See same pages of report.

Exception number five is overruled. See pages 30 and 31 of this report, and Gulden vs. Chance, 182 Fed., 303, 320.

Exception number six is overruled. See pages 43, 44, 45 and 46 of this report, and the pages of the record there referred to, particularly pages 61 and 78.

Exception number seven is overruled.

The counsel are in error in supposing that the number and capacity of the defendant's factories are "relied upon in this accounting." It appears on p. 104 of this report that all the tables of calculations embraced in this report are based upon and made from the schedules of Mr. Kribben and the supplemental schedules made by stipulation.

The reference to the number and capacity as the same appear on page 33 was solely by way of illustration, and the "pro rata" which enters into the calculations is in no way derived from the number and capacity of the factories, but wholly from the relation between the overhead charges and the income from the sale of American Lady Shoes.

Exceptions numbers eight, nine, ten and eleven are overruled.

Exceptions numbers twelve and thirteen are overruled for the following reasons:

At the bottom of page 16 of defendant's pamphlet of exceptions, and at the end of the thirteenth exception, occurs the following quotation:

> "Whatever general language in the earlier federal cases there can be found against the rule favoring the defendants must be considered as superseded by Baker vs. Baker, 115 Fed., 297.."

The four lines so quoted as such a convincing authority are simply the expression of opinion of one or both of the writers of the article in the Harvard Law Re-

view as to his or their interpretation of the meaning of the decision in Baker vs. Baker. While the statement is entitled to such respectful consideration as is due the writers of an article acceptable to a magazine of such standing as the Harvard Law Review, it does not necessarily follow that it draws a correct inference, or correctly states the law of unfair competition in trade as it exists today. It binds no one. I think, in the light of the later decisions of the Federal Courts, it cannot convince many.

If the decision in Baker vs. Baker can be construed to mean what the writers of those four lines seem to think it means, the decision marks a long retrogression from the beneficent advance made in the law of fair dealing between man and man.

I do not believe such is the law. I cannot accept the opinion of the Harvard Law Review writers as a rule of action.

I may be arrogant in presuming to differ with the writers of the article referred to and so much relied upon by the defendant, but I am in most excellent company in so doing. The case of Baker vs. Baker is reported in the 115 Fed. Rep. In the seventy odd volumes of the Federal Reporter published since that case was decided, not a single reported case of unfair competition has quoted, or alluded to, or relied upon Baker vs. Baker to support any such conclusion, as laid down by the writers of the article referred to, or any such proposition as counsel for defendant have inferred from the language of the decision in Baker vs. Baker. On the contrary the courts have uniformly adhered to the law as previously laid down.

Counsel for defendant, it seems to me, have adopted the view of these writers without any examination of "*the circumstances of the case*" to which the Court refers but to which the writers themselves make no allusion and of which they perhaps were, but should not have been, ignorant.

Briefly stated, the history of the case, which explains the "circumstances" to which the Court refers, is as follows:

Walter Baker & Co. were widely and well known as makers of chocolates. One W. H. Baker, of Winchester, Virginia, set himself up as a maker of Baker's Chocolates. Walter Baker & Co. brought a bill against this W. H. Baker and obtained a perpetual injunction. There was no prayer for an accounting and no decree for one. The inference is obvious. This convicted infringer brought a bill for unfair competition in trade against another W. H. Baker, of Syracuse, N. Y., who had also gone into the business of manufacturing Baker's Chocolates and obtained an injunction restraining the defendant from using the name W. H. Baker unless "conjoined with *Syracuse.*"

The Master refused the complainant either profits or damages for want of proof.

Complainant also brought another bill against William H. Baker, Syracuse, N. Y., a corporation which the other W. H. Baker had organized and controlled. This bill was dismissed by the court on final hearing.

The infringing complainant took an appeal in each case. Both cases were heard together and reported in 115 Fed. 297, as Baker vs. Baker.

The Court in its decision plainly says that "the complainant commenced the manufacture of chocolates and cocoas at Winchester, Va." * * * "in the expectation of marketing them as the products of the original concern" (Walter Baker & Co.) The Court, speaking of the injunction granted to the infringer in the first of the two cases, said:

> "That injunction gave the full measure of relief to which the complainant, *under the circumstances of the case,* was entitled, except such a recovery for profits and damages as he might be found entitled to."

This case was heard before Wallace, Lacombe and Townsend, JJ.

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Judge Lacombe, in a separate *concurring* opinion, said: "I concur in the result but solely for the reason that the complainant does not come into equity with clean hands. * * * Both are piratical traders, seeking to sell their goods on the strength of the reputation of another manufacturer whose name was a household word throughout the country before either of them appeared; and, in my opinion, neither of them is entitled to equitable relief against the other."

Both decrees were affirmed. The "piratical" complainant "*under the circumstances of the case,*" recovered his "full measure of relief" by the injunction.

Such is the case in which the writers of the article in the Harvard Law Review held that Judge Lacombe (with his associates) had overruled with "the earlier federal cases," his own elaborate and well-considered opinion in National Biscuit Co. v. Baker, 95 Fed. 135.

The Harvard Law Review article was published in the June number, 1907, of that magazine.

Somewhat more recently than the Harvard Law Review article, Hand, J., on July 22, 1910, says:

> "It has been repeatedly decided that *actual deception need never be proved* provided there is reasonable likelihood of its occurrence."
>
> American L. Pencil Co. vs. Gottlieb & Sons, 181 Fed. 178.

While the above is a trademark case it is evident from the decision that the injunction would have been denied but for that the rule of the secondary signification was applied, and it is allied to the unfair competition cases.

In the following case of Gulden vs. Chance, decided August 18, 1910, still more recently than the Harvard Law Review article, the Court emphatically re-establishes and reaffirms the decisions of the Federal Courts regarding unfair competition in trade, which the writers of that article assert were overruled in the case of Baker vs. Baker.

I quote at some length from the decision as giving sufficient reason for overruling the defendant's exceptions numbers twelve and thirteen.

And as showing that no court of last resort, in passing upon cases of unfair competition in trade, has ever found that Baker vs. Baker overruled anything.

> "The material point here is the liability of ordinary consuming purchasers to be confused and misled on the subject. In Florence Mfg. Co. vs. J. C. Dowd & Co., 178 Fed. 73, Judge Cox, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit expressed views in which we fully concur on the subject of unfair competition in trade, as follows:
>
> " 'The law has a threefold object: First, to protect the honest trader in the business which fairly belongs to him; second, to punish the dishonest trader who is taking his competitor's business away by unfair means; and third, to protect the public from deception * * *. It is so easy for the honest business man, who wishes to sell his goods upon their merits, to select from the entire material universe, which is before him, symbols, marks and coverings which by no possibility can cause confusion between his goods and those of competitors, that the courts look with suspicion upon one who, in dressing his goods for the market, approaches so near to his successful rival that the public may fail to distinguish between them. The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions."
>
> "In National Biscuit Co. vs. Baker (C. C.), 95 Fed. 135, Judge Lacombe said":
>
> "As has been often pointed out before, it makes no difference that dealers in the article are not deceived. No one expects that they will be. It is the probable experience of the consumer that the

Court considers. Here, too, we have the manufacturer of the articles complained of, who explains, as usual, that, in adopting a trade-name by which to identify his own product, he has been most careful not to trespass on the 'rights' of complainant, and that 'after considerable thought' he selected a name which should make the difference between his goods and complainant's distinct and plain, so that there could be no possibility of mistake. It is a curious fact that so many manufacturers of proprietary articles, when confronted with some well advertised trade-name or mark of a rival manufacturer, seem to find their inventive faculties so singularly unresponsive to their efforts to differentiate. * * * There are, as also is usual, a number of minor differences between the forms and the dress of the two packages, which are expatiated upon in the affidavits and the brief; but no one can look at both packages without perceiving that there are strong resemblances, which could easily have been avoided had there been an honest effort to give defendant's goods a distinctive dress. Both name and dress are clearly calculated to mislead, and the statements that both were adopted with an eye single to differentiation strain the credulity of the Court beyond the breaking point."

"In Lever vs. Goodwin, L. R. 36 Ch. Div. 1, an appeal was taken from a decree of Mr. Justice Chitty in favor of the complainants in a case of unfair competition in trade. The decree was affirmed. In his decision he said":

"Then comes the case where the manufacturer, by devices which are to accompany the goods on their sale in the market, gets them up in such a form as to be calculated to deceive the *ultimate buyer* into the belief that the goods which he, the manufacturer, is putting on the market are the goods of some other maker. Here, generally speaking, a double fraud is commited: First, there is the fraud which is perpetrated on the other manufacturer, who loses part of his trade. In this class of cases the trade is seldom deceived, the re-

tail dealers know from whom they are buying, and if there is a fraudulent device they are rarely taken in by it. But in such a case the manufacturer puts an instrument of fraud into their hands. Now it has been said more than once in this case, that the manufacturer ought not to be held liable for the fraud of the ultimate seller—that is, the shopkeeper or the shopkeeper's assistant; but that is not the true view of the case. The question I have to try is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchasers.

"The evidence shows that" (goods) "packed and dressed by the defendant have been mistaken for those of complainant.

"The question now before us involves unfair competition in trade as contradistinguished from the infringement of trademarks and the defendants having been shown to have indulged in unfair competition with respect to the business of the complainant carried on under certain labels and packages are not entitled to immunity," etc. * * *

"We think that an injunction should be granted in this case perpetually restraining the defendants, their servants, agents or employees from directly or indirectly packing and selling or offering for sale," etc. * * *

"The complainant is also entitled to recover from the defendants all *profits and damages* lost and sustained by him by reason of ALL SALES *by the defendants,*" etc. * * * "and to an account therefor."

Gulden vs. Chance, 182 Fed. 303.

In view of the repeated decisions of the Federal Courts I can but reaffirm and emphasize my opinion as to the meaning of Baker vs. Baker, as appears on pages 50 and 51 of this report.

Exception number fourteen is overruled. In this exception counsel state that the case of Reddaway vs. Banham "seems to have been thoroughly misunderstood by the Master."

If counsel will more thoroughly review the report they will be reminded that the Master has not referred to, quoted, commented upon, discussed or expressed any opinion regarding the case of Reddaway vs. Banham. The only place in the report where mention of that case appears is incidentally on page 60, where it occurs as part of an excerpt from an opinion in 94 Fed. Rep., which quoted that case with approval.

Exceptions numbers fifteen, sixteen, seventeen, eighteen, nineteen, twenty and twenty-one are overruled.

Exception number twenty-two is overruled.

I do not understand the position of counsel upon this exception. They take exception to a reference made on page 29 of this report, to the recent case of Jacobs vs. Beacham (221 U. S. 263), and erroneously assume that upon my view of that case I decided against the defendant.

My reference to Jacobs vs. Beecham occurs on page 29 of my report, as counsel correctly states. By reference to page 29 it will be seen that in overruling the second point raised by the complainant and deciding it in favor of the defendant (and not against the defendant as this exception assumes) I referred to Jacobs vs. Beecham. I did not think then and do not think now that it applies to this controversy. I did not decide anything under it, nor quote it as sustaining any position. It is pre-eminently a case of unfair competition, as all trademark cases are. I was in error in the impression that the trademark was merely technical. But that is wholly immaterial, as I did not pretend to use the case as an authority for anything. My only idea was that if it could be construed as being in conflict with the case at bar, having been decided after the hearing of this reference was concluded, I did not think it proper for the Master to decide that question.

Exception number twenty-three is overruled.

Exception number twenty-four is overruled.

The Master made no such statement "at page 29 of his report" as is alleged in this exception.

Exception number twenty-five is overruled.

Exception number twenty-six is overruled.

The Master made no such ruling as is assumed in this exception.

Exceptions numbers twenty-seven, twenty-eight and twenty-nine, taken to the allowance of advertising in diminution of profits, are overruled.

Exception number thirty, taken to the disallowance of interest on the capital in diminution of profits, is overruled.

Exception number thirty-one, taken to the disallowance of the claim for taxes in diminution of profits, is overruled.

Exception number thirty-two, taken to the disallowance of the claim for insurance in diminution of profits, is overruled.

Exception number thirty-three, taken to the disallowance of the claim for depreciation of real estate in diminution of profits, is overruled.

Exceptions thirty-four and thirty-five, taken to the disallowance of the claim for advance to and allowance to Boston House, are overruled.

Exceptions number thirty-six and thirty-seven are overruled.

Exception number thirty-eight is overruled.

Counsel are mistaken in the grounds stated for this exception. By reference to pages 548 to 563 of the Master's record of testimony, and to pages 42 and 43 of this report, it will be seen that the Master expressly sustained the objections of counsel for defendant to the introduction of the testimony regarding the Minden shoe and carton referred to in this exception. Atten-

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tion is also called to complainant's Exception No. 5 to the action of the Master in excluding the testimony regarding the Minden shoe and carton.

This report is also accompanied by the exceptions filed thereto before me by both complainant and defendant.

I respectfully pray this Honorable Court for an order allowing me such compensation for my services herein as the circumstances of the case, the importance and magnitude of the controversy, and the perplexing labor of the accounting, may determine, as well as for the very unusual and very considerable additional labor imposed by the necessary consideration of the numerous exceptions filed to my report by counsel for complainant and counsel for defendant, as hereinbefore set forth. And such as this Honorable Court may deem meet and just in the premises. All of which is respectfully submitted.

HENRY H. DENISON,
Master.

161 Volume I of Testimony Before Special Master.

Dates of Meetings.

In re Hamilton-Brown Shoe Company Case.

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February	15, 1910	Tuesday	68
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March	3, 1910	Thursday	108
March	10, 1910	Thursday	109
March	17, 1910	Thursday	110
March	24, 1910	Thursday	111
March	28, 1910	Monday	112
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April	8, 1910	Friday	217
April	9, 1910	Saturday	326
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January	19, 1911	Thursday	590
January	23, 1911	Monday	590
February	1, 1911	Wednesday	591
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February	16, 1911	Thursday	597
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162 *Index of Witnesses.*

In re Hamilton-Brown Shoe Co. Case.

Name of Witness.	Direct.	Cross.	Redirect.	Recross.
McElroy, W. F.	3	51	54	
			61	
			63	63
" (rec.)	162	207		
" (res.)	217			
Blome, B.	113	117		
Maize, J. H.	121	145		
Blœcher, W. F.	148	158		
Johnston, J. T.	326			
" (rec.)	433			
" (rec.)	528			
Kribben, B. D.	496	510	516	
Clinton, C. W.	548			
White, A. G.	602	607		
Hart, L. E.	614	620		

163 *Complainant's Index of Exhibits.*

No. of Exhibit.	Description.	Date of offer.	Page record offered.
		1910.	
A	Pair of shoes manufactured by Hamilton-Brown Shoe Company, American Lady Factory.....	1/31	15
2	Pair of shoes bought of "Shore Mart" Feb. 15, 1910, by Bertha Blome — Serial number 115 3 0	4/7	120
3	Carton in which above named shoes were packed Feb. 15, 1910.....	4/7	120
4	Pair of shoes having tag attached with the words "Catalogue No. 6232, serial number 62798G" thereon	4/8	311
5	Catalogue called Shoelight No. 3.....	4/9	370
6	Catalogue called Shoelight No. 4.....	4/9	370
7	Catalogue called Shoelight No. 5.....	4/9	370
8	Catalogue called Shoelight No. 6.....	4/9	370
301	Catalogue called Shoelight No. 2.....	5/31	402
302	A pair of shoes, low cut, bearing tag with the words "Catalogue No. 6125, Serial No. 15004"	5/31	405
303	A pair of low cut shoes serial number 40434G..	5/31	409
304	A pair of shoes marked Catalogue No. 6125, serial No. 4045G.....	5/31	415
305	Pair of shoes marked Cata. No. 6125, serial No. 47682G	5/31	417
306	Pair of shoes marked Cat. No. 6214, serial No. 64126G	5/31	421

307	Pair of shoes marked Cat. No. 6137, serial No. 64239G	5/31	424
308	Pair of shoes marked Cat. No. 6214, serial No. 54001G	5/31	428
309	Pair of shoes marked Cat. No. 6214, serial number 61590G	5/31	428
310	Pair of low cut shoes, size No. 435, serial No. 44292G	6/5	448
AA	Report made by Mr. Kribben	12/9	498
		1911.	
499	A pair of shoes, serial number 35618A	1/11	535
500	"Minden" carton	1/11	563
501	"Minden" shoes (1 pair)	1/11	563
502	"Our Own Make" shoes (1 pair)	1/11	566

164 *Defendant's Index of Exhibits.*

A	Printed uncertified copy of the application for a writ of certiorari to the Supreme Court of the United States	1/31/10	64
498	Carton (described on page 533)	3/7 /11	599

In the Circuit Court of the United States, Eastern Division, Eastern Judicial District of Missouri.

No. 5262. In Equity.

WOLF BROTHERS & Co., Complainant,
vs.
HAMILTON-BROWN SHOE Co., Defendant.

Hearing Before Special Master H. H. Denison, Esq.

ST. LOUIS, MO., Jan. 31, 1910.

The above entitled cause coming on for hearing on this 31st day of January, 1910, the following proceedings were had:

Appearances.

Mr. Henry H. Denison, Special Master.

Messrs. Percy Werner and Simeon Johnson, appeared in behalf of the Complainant.

Mr. Paul Bakewell appeared in behalf of the Defendant.

Mr. Bakewell on behalf of the defendant hands to and files with the Master herewith his return to a notice heretofore served upon him as counsel for defendant by the Master, this return being in typewritten form.

Mr. Bakewell also furnished the Master with copies of the briefs he has heretofore filed in Court in this case.

NOTE: Said papers are received by the Master.

The return above referred to is in the words and figures following to-wit:

Return of Defendant to the Notice Served by the Master.

The Master has served on the complainant's counsel and on the defendant's counsel the following notice in this case:

"To the above named Complainant or to Mr. Percy Werner, its Solicitor:

To the above named Defendant or to Mr. Paul Bakewell, its Solicitor:

165 You and each of you are hereby notified that on Monday, the 31st day of January, 1910, at the office of Mr. Percy Werner in the Rialto Building on the corner of Fourth and Olive Streets, in the City of St. Louis and State of Missouri, and at 2 o'clock P. M. of said day, I will proceed with the taking of the testimony in said cause under the reference to me as Special Master, made and entered of record in said Court on the 15th day of November, 1909, when and where you will appear, and each and every of you are further notified to produce before me on said hearing, at said time and place, all books, papers, vouchers, documents and exhibits in any manner pertaining to or relating to the matter in controversy.

HENRY H. DENISON,
Special Master."

Before the interlocutory decree in this case was entered by the Circuit Court, in pursuance of the mandate of the Court of Appeals, the question of the proper form of decree to be entered in the case was threshed out before the United States Circuit Court, the form submitted by the complainant being as follows:

"The mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the appeal of the plaintiff from the decree entered herein on Feb. 3, 1908, and the opinion of said court of appeals having been filed in this court, it is now, in pursuance of said mandate, ordered, adjudged and decreed as follows:

1. Said decree entered herein on Feb. 3, 1908, is set aside.

2. The defendant, Hamilton-Brown Shoe Company, its servants, agents, officers and employes, are perpetually enjoined from using the name 'The American Lady,' as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Bros. & Company, and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408 or 397 or the catch phrase 'With the Character of the Woman' or any other phrase in simulation of the phrase 'A Shoe as Good as its Name.'

3. The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded.

4. The case is referred to —— —— upon the evidence already taken and such further evidence as may be offered by the

parties to ascertain and report the damages, since the commencement of this suit, to which the palintiff is entitled,
166 and the profits for which the defendant is liable under the ruling and opinion of the Circuit Court of Appeals in this case."

On the other hand, the form submitted by the defendant is the form adopted by the Circuit Court by its decree entered herein on November 15, 1909, under which the present Master is empowed to act.

It will be noticed that by the form of decree as actually entered by the Circuit Court the court expressly limits the accounting to "shoes sold by the defendant, since the filing of the bill in this case, and which were marked with the name 'The American Lady' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of Hamilton-Brown Shoe Company." Therefore, the notice which has been served upon the defendant's counsel by the Master must be construed in the light of the present decree and its history, and the inquiry must be limited to "the matter in controversy."

Under the Court's decree appointing the Master this inquiry is necessarily "limited to shoes sold by the defendant, since the filing of the bill in this case, and which were marked with the name 'The American Lady' and not accompanied by any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company."

Furthermore, the complainant is not entitled to have produced, and the Master, under this decree, is not entitled to order the defendant to produce, any books, papers, vouchers, etc. generally, but only such as relate to the above limited inquiry; and, furthermore, under the [dicisions], the particular books, etc., should be specifically limited by naming what books and papers the complainant may claim are in the possession of the defendant which will show any matter relevant to this limited inquiry.

The defendant's return is: That, since the filing of the bill in this case, the defendant has sold no shoes marked with the name "The American Lady," which shoes were not accompanied with other matter closely indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company; and, therefore, the defendant has no books, papers, vouchers, or documents "in any manner pertaining to or relating to the matter in controversy"; and the defendant, for the reasons more particularly pointed out herein, and under the authorities herein cited, and in the light of the specific terms of the interlocutory decree in this case, submits that this is a complete and proper return, and that it should not be compelled to produce here any books, papers, vouchers or documents
167 relating to its general business, and which, under the law, and in view of the terms of the decree in this case, it cannot be lawfully compelled to produce.

Therefore, it is plain that upon this accounting under that decree the complainant has no right to make a general inquiry as to the American Lady shoes manufactured and sold by the defendant nor

to a production of the books and records of the defendant for the purpose of such a general inquiry, and it is also plain that the accounting must be limited to American Lady shoes sold by the defendant since the filing of the bill which were not accompanied with matter clearly indicating that such shoes were of the manufacture of Hamilton-Brown Shoe Company, and that the complainant is only entitled to have produced at the hearings upon this accounting books and records of the defendant which show that since the filing of the bill in this cause the defendant has sold shoes "marked with the name 'American Lady' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company."

An examination of the authorities shows clearly that the complainant is not entitled to the production of the defendant's books, etc., for the purposes of the general inquiry which it desires to make upon this accounting. As already pointed out, the interlocutory decree under which this accounting is being taken expressly limits the inquiry to shoes sold by the defendant, since the filing of the bill marked with the name "American Lady" and not accompanied with other matter clearly indicating that such shoes were manufactured by Hamilton-Brown Shoe Company. The complainant does not claim nor pretend that the books, papers, etc., which it desires to have produced do contain such evidence, but it claims, as we understand it, that those books, etc., may contain such evidence, and if produced may show such facts. In other words, it is a mere fishing expedition which the complainant desires to make and it is well settled that such an inquisition will not be tolerated.

In the case of Bischoffshein vs. Brown, 29 Fed., 341, an equity suit, "the only issue between the defendants and the plaintiff" was "whether a trust fund was appropriated by them." Judge Wallace in passing upon a motion to compel the production of books, papers, etc., in that case said:

"This is a motion on behalf of the defendants Seligman & Brown to compel production by the plaintiff for inspection of books, papers, and documents described in Exhibit A annexed to moving papers.

The proofs in the cause, are being taken orally before an
168 examiner, and certain witnesses for the plaintiff have testified that the papers and documents are under the control of the plaintiff. The papers specified in Exhibit A are not any particular book, document, or writing, but comprise all or a great number of several classes of papers, some of which may possibly be found when examined to contain evidence advantageous to the defendant in controverting the plaintiff's case or supporting *their* own case. The motion seems to have been made and has been argued upon the theory that either party to a suit in equity may call upon his adversary to exhibit for inspection anything and everything in writing under the latter's control which may assist the party who makes the call. The case of Coit vs. North Carolina Gold Amalgamating Co., 9 Fed. Rep. 577, is cited as an authority in this direction. Notwithstanding this authority it must be held that such practice cannot be sanctioned. Courts of equity and courts of law have always

been solicitous to protect parties and witnesses against any unnecessary inquisition into the contents of their private papers by those who have no interest in them."

In the case of Bloede vs. Bancroft & Sons, 98 Fed. 186, 189, the plaintiff asked for an order under section 724 of the revised statutes to inspect "all books, papers," etc. of the defendant. The Court held that the plaintiff was not entitled to such an order and said:

"It will not be awarded to gratify mere curiosity or to enable one party to make undue inquisition into the affairs of another. Nor will the court extend discovery beyond the legitimate requirements of the case to be aided thereby. So under section 724 production of books or writings is authorized only so far as they contain evidence pertinent to the issue. An exposure of business details and secrets, not pertinent to the issue, to enable one to discover clues to guide him in conducting an investigation of possible claims or defenses against an adversary is not to be tolerated."

In the case of West Pub. Co. vs. Edward Thompson Co., 151 Fed. 138, an action to restrain infringement of a copyright, the defendant alleged, on information and belief, that an examination of the books and records of the complainant would show that the complainant had failed to comply with the copyright law requiring the first two copies of its books to be placed in the mail addressed to the librarian of Congress. Judge Chatfield, in denying the motion to compel a production of the books, etc., pointed out that the production was desired for the purpose of ascertaining, if the books, etc., did contain such evidence, and it was not alleged that such facts would appear from an examination of those books, etc.

169 In the case of Oro Water, Light & Power Co. vs. City of Oroville, 162 Fed. 975, complainant sought to restrain defendant from enforcing an ordinance fixing a maximum rate to be charged for electricity. The defendant answered and then asked for an order to permit it to examine the books, papers, etc., of the complainant. In denying the order Judge Farington said: "The federal courts have no power to grant, and the litigant in the federal court has no right to expect, an order which will compel his adversary to exhibit for inspection anything and everything in writing under the latter's control which may assist the party who makes the demand. The theory upon which this court and courts of equity have always proceeded is that the party against whom discovery is sought has rights which must be protected. The court cannot lend itself to any scheme to conceal evidence, neither can it compel a party to disclose evidence which, for instan-e, would subject him to criminal prosecution. Neither party has a legal right to examine all records and documents in his adversary's possession simply for the purpose of discovering whether they contain something which might benefit him, or to see in advance of the trial what evidence will be produced on the other side. Again, a court of equity should make no order blindly. It should command of no man anything which he has a legal right to refuse, and, when issued, its order should be specific and certain, leaving as little as possible to the discretion of the person or persons against whom it is directed. In cases of this kind,

there should be no uncertainty as to what documents are in the possession of the party against whom discovery is sought, and just what portion of them he should exhibit. The court should require the production of no evidence which is not competent and material, and within the legitimate issues of the case and in aid of the action or defense of him who seeks it."

We also submit herewith to the Master, to assist the Master in interpreting the decree of the Court as actually entered in this case, a copy of defendant's original brief and a copy of defendant's reply brief which defendant submitted to the Circuit Court on the matter of the settlement of the decree in this case, and which tend to show why the court limited the inquiry on this accounting by its decree.

Respectfully submitted,

HAMILTON-BROWN SHOE CO.,
Defendant,
By PAUL BAKEWELL, *Its Solicitor.*

St. Louis, Jan. 31, 1910.

170 (*Testimony for Complainant.*)

WARREN F. MCELROY, a witness of lawful age being duly produced, sworn and examined on the part of the complainant, testifies as follows:

Direct examination.

By Mr. PERCY WERNER:

1 Q. Please state your full name?
A. Warren F. McElroy.
2 Q. What is your age?
A. I am 44.
3 Q. And your residence?
A. 4933 Forest Park Blvd., St. Louis, Mo.
4 Q. Your business?
A. I am the superintendent of the manufacturing department of the Hamilton-Brown Shoe Company.
5 Q. How long have you held that particular position?
A. For 19 years.
6 Q. That manufacturing department comprises, doesn't it, all your separate factories?
A. No, sir, I have charge of four factories: the American Lady, the American Gentlemen, the Security and the Union factory. We have other factories, too.
7 Q. Where are these four factories located?
A. Two are located at 21st and Locust Streets, one at 21st and Olive Streets, and one at Jefferson Avenue and Randolph Street.
8 Q. All in the City of St. Louis, Missouri?
A. Yes, sir.
9 Q. Where is the American Lady factory located?
A. St. Louis, on the corner of 21st and Locust St.

10 Q. So you are the superintendent of these four different factories?

A. Yes, sir.

11 Q. Are the records of each of these factories kept separate and distinct?

Mr. BAKEWELL: That is objected to. I respectfully submit, if your Honor please, that the records of the various factories of the Hamilton Brown Shoe Company are not a matter of inquiry here; nor are the records of the factory of the Hamilton Brown Shoe Company which the witness has referred to as the American Lady factory, matters of inquiry on this accounting under the decree.

The MASTER: The objection is overruled. There is nothing offered to be produced; it is merely an inquiry to which an answer may be yes or no.

A. They are kept separate, yes, sir.

171 Mr. WERNER:

Q. So that the output of the American Lady Factory, selecting that particularly, since it commenced operation is a matter of separate record?

Mr. BAKEWELL: The last objection is repeated.

The MASTER: The objection is overruled.

A. They are kept separately, yes. However, you speak of "since the factory was started"—that is a great long distance back. We probably would not be able to produce the records so far back as that.

Mr. WERNER:

Q. You may not be able to reach it. When was "The American Lady" factory started, do you remember?

Mr. BAKEWELL: That is objected to unless the inquiry is confined to——

The MASTER: I do not see how that could be pertinent. The inquiry is expressly limited.

Mr. WERNER: So far as the accounting is concerned, that is entirely right, yes; there is no question about that.

The MASTER: What is there but the accounting before me?

Mr. WERNER: The matter to which the accounting is to relate.

The previous question to the witness is here read.

The MASTER: The objection is sustained.

To which ruling, the complainant by its counsel, then and there, at the time, duly excepted.

12 Q. Let me, for instance, take your No. 6 Shoe Light Catalogue, which I hold in my hand and show to the witness: you identify that as the last catalogue you have issued, showing your style of American Lady shoes?

Mr. BAKEWELL: Objected to as having absolutely nothing to do with this inquiry, as the inquiry before the Master is in this ac-

counting, in the expressed terms of the decree, "to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits, since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bills in this case and which were
172 marked in the name "The American Lady" and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company".

The catalogue referred to, no matter when issued, has absolutely nothing to do with the question of "The American Lady" shoes sold by the Hamilton-Brown Shoe Company since the filing of the bills (Jan. 29, 1906).

And it appears, furthermore, prominently on the face of this said catalogue, and throughout the said catalogue, in various places, that this is a catalogue of shoes, the catalogue being the catalogue of the Hamilton-Brown Shoe Co.

I object, therefore, to the question as utterly irrelevant and immaterial to any issue in this matter.

The MASTER: The objection is overruled. Counsel has stated, which is shown on the face of the catalogue, that it is a catalogue issued by the Hamilton-Brown Shoe Co. and the witness has been asked simply to [*in*centify] it. There is no harm in that identification.

A. (After examining catalogue.) I am not able to identify this as the last catalogue. I do not keep up with them close enough to know that. But I know it is our catalogue.

Mr. WERNER:

13 Q. Is it the present catalogue?

Counsel for defendant makes the same objection heretofore entered.

The MASTER: The objection is overruled.

A. I am not able to identify it.

Mr. WERNER:

14 Q. Can you tell me when it was issued?

A. No, sir. I cannot.

15 Q. Can you tell me about when it was issued?

Counsel for defendant makes the same objection heretofore entered.

The MASTER: The objection is overruled.

A. I am unable to say. My opinion is that this is our last catalogue but to positively identify it as such I am unable to do.

16 Q. About when was it issued?

173 Counsel for defendant makes the same objection heretofore entered.

The Master makes the same ruling.

A. I would say it was issued sometime—it must have gone out near the first of October.

17 Q. Of 1909?

A. Yes, sir, October, 1909.

18 Q. About how often do you issue the catalogue?

Counsel for defendant makes the same objection heretofore entered.

The Master makes the same ruling.

A. I am not competent to answer that.

19 Q. Who knows better than you, connected with your establishment?

A. Mr. McLaughlin.

20 Q. What is his position?

A. He is our advertising manager.

21 Q. What is his full name?

A. R. L. McLaughlin.

22 Q. With which particular house is he connected?

A. He is at the general offices at 12th and Washington Avenue.

23 Q. Those catalogues are issued periodically for the purpose of showing to the trade the different styles of shoes offered?

Mr. BAKEWELL: The question is objected to for the reason previously stated and also on the ground that no foundation has been laid for the question and the witness does not appear to be qualified to speak on that matter.

The MASTER: The objection is sustained unless the witness qualifies himself as having knowledge.

Mr. WERNER:

24 Q. As Superintendent of the "American Lady" factory you, of course, know the different styles of shoes put out by that factory?

A. Well——

Mr. BAKEWELL: The question is objected to. It is not here a question of different styles of shoes put out by the Hamilton-Brown Shoe Co. The inquiry on this accounting is limited, as I have already stated, in my objection, and as appears from the decree, to the "American Lady" shoe sold by the Hamilton-Brown Shoe
174 Company since the date of the filing of the bill in this complaint, and which shoes were marked with the name "The American Lady" and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Co.

Mr. WERNER: None of us will lose sight of this simple decree and having this read into the record time and again becomes very tiresome.

Mr. BAKEWELL: It may be tiresome to you but I am going to protect my client's interest to the best of my ability.

Mr. WERNER: I understand your position.

Mr. BAKEWELL: I am going to emphasize it on every occasion.

Mr. WERNER:

25 Q. I notice in the catalogue you have identified—there are some 86 different styles of American Lady shoes catalogued: I will ask you whether each and every one of those styles so indicated is manufactured at your American Lady factory?

Mr. BAKEWELL: I repeat the same objection heretofore made and I respectfully submit, your Honor, that this is only a way to try to get on this record testimony which is utterly irrelevant and immaterial to any issue i nthis case.

No matter what styles of American Lady shoes the Hamilton-Brown Shoe Company may be putting out and selling today, this inquiry is limited expressly, by the terms of the decree, to the shoes sold by the Hamilton-Brown Shoe Company since the filing of the bill in this case and which are marked with the name "The American Lady" and not accompanied by any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company

This inquiry is limited to that; therefore, I submit this is clearly incompetent, irrelevant, and immaterial.

The MASTER: What are the dates between which this inquiry is limited?

Mr. WERNER: I should say Jan. 29, 1906 to Nov. 15, 1909, the latter being the date of your appointment and the date of the entry of the interlocutory decree.

The MASTER: There is no doubt whatever in my mind but that the inquiry must be limited to the terms of that decree and unless this question is understood to be so limited I must sustain the objection.

175

Mr. WERNER: I so understand it.

The MASTER: I so understood that it is limited to the period within which the examination is authorized to be continued. I think the objection should be overruled.

Mr. WERNER: The question in terms relates to a catalogue issued in 1909.

The MASTER: The catalogue is a mere matter of information, I suppose, anyway. We are trying to find out what shoes were manufactured and sold between certain dates, which bear certain marks.

Mr. WERNER: The question is whether all the shoes indicated there were manufactured by them.

The MASTER: I think that is not competent. This refers to all the shoes manufactured and sold by the Hamilton-Brown Shoe Company but that does not strike me as being limited to the matter of this inquiry.

NOTE.—The previous question is read and counsel adds to same as follows:

26 Q. I notice in the catalogue you have identified some 86 different styles of American Lady shoes catalogued: I will ask you whether each and every one of those styles so indicated are manufactured at your "American Lady" factory? Or were at the time of the issuance of that catalogue, which you say was about October, 1909.

Mr. BAKEWELL: If all the shoes listed in that catalogue were manufactured by the Hamilton-Brown Shoe Co., that would be an absolutely impertinent inquiry; but under the terms of this decree the only pertinent inquiry is, whether shoes made since the filing of the decree, sold by the Hamilton-Brown Shoe Company, and marked with the name "The American Lady" were not accompanied with other matter clearly indicating that such shoes were the manufacture of the Hamilton-Brown Shoe Company.

If those shoes were accompanied by other matter clearly showing that they were of the manufacture of the Hamilton-Brown Shoe Company, I respectfully submit the complainant has no right to inquire into that matter.

176 Mr. WERNER: I agree to that, and I expect to show that. But we cannot show everything in one question.

Mr. BAKEWELL: You cannot go into our business.

Mr. WERNER: I expect to go into it only far enough to show what shoes were manufactured during the period of the accounting, under the name of "The American Lady" and not so marked as to show that the Hamilton-Brown Shoe Company were the manufacturers. I am now asking as preliminary to that, whether all of the various styles indicated in that catalogue were manufactured by the defendant. I will come to the marking next.

Mr. BAKEWELL: I submit you cannot go into the manufacture.

The MASTER: That is not limited in your question, Mr. Werner, to the period of time within which I am entitled to make inquiries.

Mr. WERNER: I beg your Honor's pardon, but the witness has identified that catalogue as being issued in October, 1909.

I will go back a year and start with another one. I expected to work back from this to 1906, and will have to do it. I do not care which way I proceed. I started to proceed the other way and you shut me off, so now I am going backward. But it is immaterial to me which way I proceed.

Mr. BAKEWELL: I submit, if your Honor please, you cannot go into our manufacture, under this decree. You can only go into the shoes sold, bearing the name of "The American Lady" and which were not marked—to use the exact language of the decree—"and which were not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company" and, therefore, any general inquiry into the general business of the Hamilton Brown Shoe Company as to its manufacture or even with its sales which has to do with shoes clearly indicating that they were of the manufacture of the Hamilton-Brown Shoe Company, is not relevant, material, or pertinent, to this inquiry.

Mr. WERNER: There is no difference between counsel on that matter.

Mr. BAKEWELL: Then if there is no difference I do not see how that question can stand.

Mr. WERNER: That relates to the manufacture. Next I will come to the marking.

177 27 Q. I first want to know if the various styles indicated in that catalogue are of your manufacture, all of them?

Mr. BAKEWELL: That is objected to for the reason above stated.
The MASTER: You may answer that question.

A. Do I understand all these that have the brand "American Lady"?

28 Q. All those indicated in the catalogue as "The American Lady" [shoes] whether they are the output of your factory?

A. Yes, sir, they are.

29 Q. Do you know of any shoes sold by the Hamilton-Brown Shoe Company from 1906, Jan. 29th, to Nov. 15, 1909, under the trade name "The American Lady" shoe which were not the product of your factories?

Mr. BAKEWELL: The question is objected to as utterly immaterial.
The MASTER: The objection is overruled.

A. I have no knowledge. There positively was none.

Mr. WERNER:

30 Q. I will ask you, prior to Jan. 29, 1906 and during your connection with the Hamilton-Brown Shoe Company, whether you know of any shoes sold by the Hamilton-Brown Shoe Company under the trade name "The American Lady" which were not the product of your own factories?

Mr. BAKEWELL: The question is objected to for the reason above stated.
The MASTER: The objection is sustained. I do not think this inquiry can go back of Jan. 29, 1906.
To which ruling the complainant, by its counsel, then and there, at the time, duly excepted.

Mr. WERNER:

31 Q. I will show you a pair of shoes which I will ask the Master to have marked "Complainant's Exhibit A Jan. 31, 1910."

Mr. WERNER: I will state here that your Honor has now before you, under the old record, some 20 odd pairs of shoes as exhibits.
The MASTER: All the testimony in the record is by direct order of the court before me.

178 Mr. WERNER:

32 Q. Do you identify these (indicating pair of shoes marked "Complainant's Exhibit A, Jan. 31, 1910") as the product of your "American Lady" factory?

Mr. BAKEWELL: Defendant's counsel objects to these shoes and to any question relating to them as not within the scope of this inquiry; but on the contrary clearly outside of the scope of this inquiry, for the reason that it appears plaintiff marked on the sole of each of said shoes that the name "The American Lady" which appears on said shoes is also accompanied with the name "Hamilton-Brown Shoe Company".
Mr. WERNER: And I submit that is not sufficient under the terms

of the decree. There is nothing to indicate that the Hamilton-Brown Shoe Company were the manufacturers of that shoe.

The MASTER: The question may be answered subject to the objection. I do not understand exactly what the difference is between counsel in regard to this matter.

Mr. WERNER: It is appearing now pretty clearly, if he contends that the shoe is in accordance with that decree. We have reached——

Mr. BAKEWELL: Counsel for defendant also states that the question as put, as an examination of the witness will show, does not clearly represent the situation because as a matter of fact, as it will appear, it reflects upon the unfairness of the question, that the Hamilton-Brown Shoe Company had sold no shoes in boxes, which boxes were not clearly marked with the name of the Hamilton-Brown Shoe Company.

Mr. WERNER: Now, I draw the decree on Mr. Bakewell and show by the terms of the decree that the shoes were to be so marked, and not the boxes or advertisement of advertising matter or anything of that kind.

Mr. BAKEWELL: I call the attention of the Master to the terms of the decree which says:

"Said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case, and which were marked with the name "The American Lady" and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company";

and I respectfully submit that cannot be construed to be limited to the marking on the shoe itself.

179 I also submit that an impertinent inquiry cannot be answered as to the manner in which shoes are sold.

The MASTER: The question may be answered subject to the objection; if you desire to have introduced hereafter in evidence an enclosing case which you hold under that decree is "accompanying matter": there is nothing of that kind before me now. That will be decided when it arises.

Mr. WERNER:

33 Q. Do you identify these (indicating pair of shoes marked Complainant's Exhibit, Jan. 31, 1910) as the production of your "American Lady" factory?

A. I do.

34 Q. Can you point out in that catalogue the particular style of the shoe you hold in your hand?

Mr. BAKEWELL: That is objected to.

The MASTER: The objection is overruled.

A. I don't know that I could do that.

Mr. WERNER:

35 Q. I will ask you, looking on the inside of this shoe I find

two numbers, one 450, the other 80,129 G: will you tell us what those two numbers indicate?

Mr. BAKEWELL: I wish to object to this question for the same reasons I objected to the question put to the witness when the shoes were first submitted to him. Each of said shoes bears plainly marked on the sole thereof the name "Hamilton-Brown Shoe Company" in connection with the name "The American Lady" and I would like to have it understood that the same objection obtains to all the questions he may be asked about that particular pair of shoes.

36 Q. That is the size of the shoe?

A. The first number relates to the size of the shoe; 450 would be size, 5, four widths A, B, C, and D.

A. Yes, sir, and the width. The second number is the serial number under which we run the cases through.

37 Q. Just what does that mean, "the serial number".

A. The number of the case lot; case lot or lot; it may be one pair or 36 pairs. But never to appear upon but one lot. It may be a one pair lot or a 36 pair ot. We have a record for keeping track of them.

38 Q. Are there any other record marks on those shoes (indicating)?

Q. No, sir, that is the only record we have of them.

39 Q. So by means of those numbers found in any particular shoe you identify the serial or lot number and the size. But the size speaks for itself.

180 A. Yes, sir, the size on each individual shoe. But the size would change on each individual pair of shoes; but on the case lot it would not change.

40 Q. That is they would all be the same serial number?

A. Yes, sir.

41 Q. From Jan. 29, 1906 down to Nov. 15, 1909, all the various styles of "American Lady" shoes bear their serial numbers of which records have been kept?

Mr. BAKEWELL: The question is objected to unless it limits the inquiry to shoes marked with the name "The American Lady" and not accompanied with any other matter clearly indicating that such shoes were of the manu*afc*ture of the Hamilton-Brown Shoe Company.

Mr. WERNER: At the proper time we may cut out all those properly marked.

Mr. BAKEWELL: I submit you cannot go into an inquiry of our business now, and then cut it out afterwards.

The MASTER: The question may be answered subject to the objection.

A. Yes, sir.

Mr. WERNER:

42 Q. So that should it become pertinent to this inquiry, you have records showing the entire output of the "American Lady"

shoes from your "American Lady" factory from Jan. 29, 1906 to Nov. 15, 1909.

Mr. BAKEWELL: That is objected to. That is simply a fishing inquiry. It is outside the range of this inquiry here.

The MASTER: The question may be answered subject to the objection.

A. We have.

Mr. WERNER:

43 Q. As to the marking on the shoe; you have referred to the serial number; I direct your attention to the marking on the sole of this shoes which consists of two parts: "Security Welt", is the first. Will you please state the meaning of those words?

A. It is our own expression.

44 Q. Of a particular style?

A. Of a process of the shoe.

45 Q. I then note what is apparently a representation of a strap cast in oval form?

A. It is a belt.

46 Q. With the words on the belt "Hamilton-Brown Shoe Company"; and within the oval the words "The American Lady"; do you notice that?

A. Yes, sir.

181 47 Q. You are familiar of course, with that method of marking your shoes?

A. I am.

48 Q. I will ask you, aside from the particular process "Security Welt" whether the marking is indicated by size, serial number, and the device of the strap with the words indicated, was the uniform method of marking your "American Lady" shoes from Jan. 29, 1906 to Nov. 15, 1909?

A. That is indicated somewhere on the shoe, yes, sir.

49 Q. Not necessarily always on the sole, I take it?

A. No, sir.

50 Q. But if not on the sole then on the top facing?

A. In one of the shoes, it appears.

51 Q. One shoe or the other?

A. In one of a pair of shoes.

52 Q. Do you keep samples of all the various styles of "American Lady" shoes which your factory has manufactured within the period indicated?

Mr. BAKEWELL: That is objected to as immaterial, whether they keep samples or not. It is not a question of the style of the shoes here but it is a question of the marking of shoes marked with the name "The American Lady" shoe and whether or not such shoes sold by the Hamilton-Brown Shoe Company since the date of the filing of the bill in this case are not accompanied by any other matter fairly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company; therefore, the styles have not anything to do with it.

The MASTER: That question can be answered subject to the objection.

A. We do not. I understand that is during the period from the 29th of January, 1906, up to the present date?

53 Q. Yes.

A. No, sir; I did not.

54 Q. What samples do you retain?

Mr. BAKEWELL: I make the same objection as above noted.

The MASTER: And I make the same ruling.

A. We retain the samples from the time we put the samples out until they are called in. That is a period of supposably six months.

Mr. WERNER:

55 Q. That is, the particular samples?

A. Yes, sir.

56 Q. What is there, for instance, any particular style of "American Lady" shoe that you have had on the market continuously during the period mentioned?

182 Mr. BAKEWELL: Counsel for defendant makes the same objection as heretofore noted.

The MASTER: The Master makes the same ruling.

A. The styles of shoes are much like the millinery, they change every season.

57 Q. Are some of them constant?

Mr. BAKEWELL: Counsel for defendant makes the same objection heretofore noted.

The MASTER: The Master makes the same ruling.

A. Very few.

Mr. WERNER:

58 Q. Have you personal knowledge of the marking of these shoes, whether the device indicated shall go on the sole or elsewhere on the shoe or did you during the period mentioned?

A. Personally, I cannot see every shoe, of course.

59 Q. No.

A. But it is under my supervision and my orders are supreme.

[—] Q. Are there records to indicate how the various styles of shoes manufactured and put on the market since Jan. 29, 1906 were marked?

Mr. BAKEWELL: That is objected to unless confined to the shoes sold by the Hamilton-Brown Shoe Company since the filing of the bill.

The MASTER: I understand, of course, that these inquiries are limited to the shoes manufactured and sold in that period between those dates; although that expression is not included in the question each time, it must be meant and I shall rule that counsel must confine himself in these questions to the shoes manufactured and sold between the dates Jan. 29, 1906, to Nov. 15, 1909.

Mr. WERNER:

61 Q. Now as to the shoes, what if any record have you of the marking on those shoes?

A. The record of the marking would not show; there would be no record of the marking, further than a general order.

62 Q. And where is the record kept of that general order?

A. There is no record of it. The record of it is, that we have never sent out any shoes without the name "Hamilton-Brown Shoe Company" on them, regardless of what the other name was.

183 63 Q. Has this particular device, this belt and buckle, been the device used for marking the name "Hamilton-Brown Shoe Company" on those shoes since Jan. 29, 1906?

A. In some instances the word- "The American Lady" appears on the bottom of the shoe, but that device will appear on the shoe elsewhere; for instance, in the upper facing.

64 Q. In one place or the other that device is used; that is what you mean?

A. Yes.

Mr. BAKEWELL:

65 —. That device with the name Hamilton-Brown Shoe Company?

A. Yes, sir.

Mr. WERNER:

— Q. So the Master may fairly take this shoe (indicating shoe marked "Complainant's Exhibit Jan. 31, 1910") so far as its marking is concerned, as showing, whether on the sole of the shoe or elsewhere, the marking adopted to place the name "Hamilton-Brown Shoe Company" upon it.

Mr. BAKEWELL: That is objected to as calling for a conclusion.

The MASTER: The objection is overruled.

A. Yes, sir.

Mr. WERNER:

67 Q. Mr. McElroy, in as much as this inquiry refers to the manufacture and sale of certain shoes, and you being the superintendent of the manufacture of them during the period in question, I will ask you what becomes of the output of your factory?

Of course, you understand this all relates to the particular period we have under inquiry.

Mr. BAKEWELL: The question is objected to by counsel for defendant.

Mr. WERNER:

68 Q. Where do these shoes go? Do you scatter them about the world or do you send them to a particular place?

Mr. BAKEWELL: Objected to by counsel for defendant.

The MASTER: The objection is overruled and the question may be answered subject to the objection.

Mr. BAKEWELL: One moment: it appears plainly from the terms of the decree that the inquiry is not for the manufacture but simply the sale of the shoes.

184 Mr. WERNER: I am following that up. That is simply what I am coming to.

Mr. BAKEWELL: It is plain you cannot go into the manufacture but into the sale.

Mr. WERNER: I am going into the sale now as quickly as you will let me.

A. They are sent to our general warehouse at 12th and Washington Ave. You want to know where they go directly from the factory?

69 Q. That is right. They go direct from your factory to your general warehouse at 12th and Washington Ave.?

A. Yes, sir.

70 Q. That is where you have the general offices of your corporation, I believe?

A. Yes, sir.

Mr. BAKEWELL: Defendant's counsel asks the Master to refer to the decree in this case and then pass on the question of whether or not this inquiry has to do with the manufacture or is now by the express terms of the decree confined to the sale.

I respectfully submit in that decree we may have our factory full of shoes marked with the name "The American Lady."

Mr. WERNER: Allow me to indicate that of course there could not be any profit on a shoe not sold.

Mr. BAKEWELL: But in the meantime you get into the record an impertinent inquiry as to shoes not sold, and only as to those sold not accompanied by any other matter clearly indicating that such shoes were manufactured by the Hamilton-Brown Shoe Company.

Mr. WERNER:

71 Q. I will ask you what if any office you have held during the period you have mentioned with your corporation, other than superintendent of the factories indicated?

A. I was Vice-President up to the 20th of December.

72 Q. As Vice President I will ask you whether you were familiar with the general business operations of your company?

A. Well, in a measure, yes.

Mr. BAKEWELL: Objected to by counsel for defendant.

The MASTER: The objection is overruled.

Mr. WERNER:

73 Q. I will ask you what if anything the factory departments of the American Lady shoe during the period mentioned had to do with the selling of those shoes?

A. We had nothing.

74 Q. What was the agency adopted by your company for the

selling of its "American Lady" output during the period in question?

A. Through the medium of traveling salesmen.

185 75 Q. Those traveling salesmen I believe you stated had no connection whatever with your factories?

A. None.

76 Q. Their connection was limited to what you call your general warehouse; is not that what you denominated it?

A. To the selling department.

77 Q. That selling department was the department that had charge of the sales of the shoes manufactured by all your factories?

A. Yes, sir.

78 Q. That selling department had its office at 12th & Washington Avenue?

A. Yes, sir.

79 Q. That selling department, then, or the department at 12th & Washington Avenue which you have said were the general offices of your company, and the warehouse of your company, was the jobber or distributor of your shoes?

A. They are the distributors.

80 Q. The term "jobber" or "distributor" means about the same?

A. We use the term "jobber" as connected with the concern that is selling its own shoes. They are distributed; that department distributes the output.

81 Q. I see. So far as the term would apply to shoes of your own manufacture you would not apply the term "jobber" but you would apply the term "distributor"?

A. Yes, sir.

82 Q. But so far as you sold the shoes of other factories you would be jobbers?

A. Yes, sir.

83 Q. Thus, for instance, if you sold rubber shoes or infants' shoes which you did not manufacture yourselves, you would be jobbers as to those?

A. Yes, sir.

Mr. BAKEWELL: Counsel for defendant objects to the question and the answer.

The MASTER: I think the answer may stand.

Mr. WERNER:

84 Q. I will ask you if during the period in question, during which you say you were vice president of your company and familiar with these [operation-], whether your company did both a jobbing business of the shoes of other factories and a distributing business of shoes of your own manufacture?

Mr. BAKEWELL: That is objected to as utterly irrelevant and immaterial to any issue in this case. This is an inquiry into the general business of the company.

The MASTER: I think that question is objectionable unless it be for the purpose of getting at the method of business, because it is not limited to the sale of the "American Lady" shoes.

Mr. WERNER: Intentionally it is not.

186 Mr. BAKEWELL: He can readily limit it to the "American Lady."

Mr. WERNER: I do not care to be limited to that.

The MASTER: I do not see the pertinency or relevancy of that question.

Mr. WERNER: I will state that. The purpose of it is this: I propose to show that they did both a jobbing and distributing business, within the definition of those terms given by the witness. But that from the marking on the shoes it could not be ascertained whether they were in fact merely jobbers selling the output of factories other than their own; or, distributors selling their own output.

The MASTER: But what relevancy can that have, when I understand the witness has already said that all the shoes marked "The American Lady" were manufactured by their own concern? Now what relevancy can there be in a question as to their acting as jobbers with regard to other shoes? The others could not be "The American Lady" shoes if they were manufacturers and distributors of "The American Lady" shoes.

Mr. WERNER: Except for the general purpose indicated. I expect to show that the marking on the shoes did not indicate to the ultimate consumer whether they were the maker- or merely the jobber-.

Mr. BAKEWELL: But on the testimony of this very witness it appears that the marking, so far as "The American Lady" shoe, did indicate who was the maker, because the witness says nobody but the Hamilton-Brown Shoe Company made "The American Lady" shoes which the Hamilton-Brown Shoe Company manufactured.

Mr. WERNER: And for the same reason that that same mark appeared on shoes that they did not manufacture but did job.

The MASTER: He may show that.

Mr. WERNER:

Q. You, for instance, job rubber shoes and infants' shoes that you did not manufacture, during that period?

Mr. BAKEWELL: That is objected to.

The MASTER: Unless that is limited to "The American Lady" shoes sold within the period of the terms of this decree, I think that is immaterial, Mr. Werner.

187 If you propose to show that they jobbed shoes which were marked "The American Lady" which they did not manufacture, that is a different question from this. Whether they act as jobbers for rubber shoes or anything else manufactured by other parties.

Mr. WERNER: If your Honor please, I desire by this testimony to show that the marking "Hamilton-Brown Shoe Company" in the manner in which it has been placed upon these shoes, in the manner as testified to by the witness and as shown on the exhibit produced here today, not only in terms did not indicate that the Hamilton-Brown Shoe Company were the makers of those shoes

but that the same marking was put upon other shoes admittedly not of their manufacture.

Mr. BAKEWELL: The objection to that is not only for the reasons I have already stated but for another reason which I respectfully submit is perfectly sound. In that instance the Hamilton-Brown Shoe Company had a certain brand of shoes made for it by some one acting as its agent, like its employes; its agent and servant; the shoes were made for the Hamilton-Brown Shoe Company and they would be responsible for them. And the name "Hamilton-Brown Shoe Company" would stand for and by the shoes made by and for the Hamilton-Brown Shoe Company. That is true as a general proposition.

But so far as this particular matter is concerned, the inquiry must I respectfully insist, be limited to "The American Lady" shoe, manufactured by the Hamilton-Brown Shoe Company and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company.

What the Hamilton-Brown Shoe Company may have done with regard to other shoes has nothing to do with this inquiry.

Mr. WERNER: I desire to state that Mr. Bakewell has himself stated my contention perhaps better than I could do; and that is, that where the Hamilton-Brown Shoe Company have shoes made by other manufacturers and places the stamp of their name on them, they do adopt them; and so far as the ultimate consumer is concerned they stand as sponsors or as makers of them. And it is precisely for that reason that so far as aught is shown upon the shoe before your Honor as exhibits appear, the complainant, Wolf Brothers, may have been the manufacturers of this shoe and the Hamilton-Brown Shoe Company the jobbers of them.

188 And it is for that reason, as I conceive the opinion of the United States Court of Appeals, that this has been sent back for this accounting.

Mr. JOHNSON: We claim it does not clearly show it is of their manufacture.

Mr. WERNER: Not only clearly, but there is nothing on there to indicate it is of their manufacture.

The MASTER: I see what is the difference between you. The complainant holds that the stamp of the words "Hamilton-Brown Shoe Company" do not of themselves, without an inference clearly show that the Hamilton-Brown Shoe Company were the manufacturers.

Mr. WERNER: Yes.

The MASTER: The defendant claims that the stamping of the words "Hamilton-Brown Shoe Company" upon the shoe is an indication that it is manufactured by the Hamilton-Brown Shoe Company.

Mr. WERNER: I do not think he makes that claim so broad; because he just now admitted that they might stand only as sponsors for shoes manufactured by another.

Mr. BAKEWELL: I say as to your general inquiry.

The MASTER: That is the difference between you gentlemen and that would place a different construction upon the marking of the shoe and of course a different construction upon the decree and the order of the court to me.

Mr. WERNER: Will you let me just here say just one word?

The United States Court of Appeals had before it over 20 pairs of shoes marked as the shoe that has now been shown to your Honor. It eliminated, among other questions which went toward showing an unfair competition, and sent this back for an accounting for the profits upon all shoes, that did not indicate as those before it evidently did not indicate, that they were of their manufacture.

Mr. JOHNSON: In other words, we claim if the contentions of Mr. Bakewell were correct, that these shoes in evidence were of the manufacture of the Hamilton-Brown Shoe Company and clearly indicated so, then the Court of Appeals would never have sent it back to you at all.

The MASTER: If Mr. Bakewell's interpretation of the ruling of the Court of Appeals is correct his position would be correct and there would be nothing but nominal damages.

189 Mr. JOHNSON: That is what you are to pass upon.

The MASTER: I do not want to pass upon that today. I want to examine the record of the Court of Appeals.

Mr. JOHNSON: And the notice, too.

Mr. WERNER: I have some 20 odd pairs of shoes in the United States Court of Appeals as exhibits in the case. I would be glad for your Honor to examine them and then you would have before you exactly what the court had before it.

Mr. BAKEWELL: I wish to state that the complainant in this case shows clearly that that is not their understanding of the decision of the Court of Appeals, in as much as they applied to the Supreme Court of the United States for a writ of certiorari.

Mr. WERNER: We did not.

Mr. BAKEWELL: I beg you not to interrupt me, Mr. Werner.

They applied for a writ of certiorari for using our name "Hamilton-Brown Shoe Company."

The MASTER: On the theory that it was a trade-mark?

Mr. WERNER: And we lost out on that.

Mr. BAKEWELL: Just exactly as the Supreme Court of the United States in the Singer case, where it was a question of the use of the name "Singer", denied the complainant the exclusive right to the use of the name "Singer" and decided that if the defendant put its name on the machines, defendant might continue to use the name "Singer."

That is what we did here, precisely.

Mr. WERNER: I am glad you quoted the Singer Machine case.

They decided a name must be on the machine and not on the case [*and not on the case*] in which the machine or goods was to be shipped. Not only on the machine, but not hidden where the ultimate consumer could not see it, but prominently on the machine.

Mr. BAKEWELL: What the Supreme Court decided in the Singer

case is a very easy matter for the Master to learn and your misrepresentation of it will not influence him.

Machines are not sold in boxes, but our shoes are sold in boxes or cartons. All the Supreme Court held was that the defendant who had not heretofore put his name on the machine anywhere might continue to manufacture the machine if he put his name on
190 the machine. In this instance it is on the shoe. But in this case defendant puts its name on every shoe as well as on the carton containing each pair of shoes.

The Supreme Court in the Singer case did hold, as a reference to their decision will show, that it was sufficient if the defendant put its name on the machine and then it could continue to use the name "Singer".

The MASTER: I do not see the pertinency of the question. I will have to sustain the objection.

Mr. WERNER: I offer to show, and intended by the question to elicit, that during the period in question the defendant sold shoes of various kinds and descriptions, some of which were the output of other factories than its own, others of which were the output of its own factories, all of which were marked as shown on Exhibit A, Jan. 31, 1910, heretofore and now introduced, with nothing on the shoe to indicate which were the product of its own factories and which were the product of factories other than its own. In other words, as to which they stood in the relation of jobbers and which they stood in the relation of distributers, within the definition of those terms given by the witness.

Mr. BAKEWELL: Even if counsel themselves offer to prove that, it is irrelevant, immaterial and incompetent to any issue in this case.

The MASTER: I do not know whether it is irrelevant or not. It certainly would be as tending to show that the name of Hamilton-Brown Shoe Company and "The American Lady" was stamped upon a shoe manufactured by another concern, unless that be for the purpose of showing that the testimony heretofore given that the Hamilton-Brown Shoe Company manufactured all the shoes marked "The American Lady" is untrue; but it may be relevant possibly if it were tending to show, irrespective of the question of the manufacture of the American Lady shoe, a custom of trade by which jobbers marketed goods marked with their own name which were not manufactured by themselves.

Mr. WERNER: Precisely what I want to show.

The MASTER: If it is proposed to show that for the purpose of getting at the question of whether marking "The American Lady" shoe is a sufficient indication that it is manufactured by the Hamilton-Brown Shoe Company, I think that might be relevant in that view.

Mr. WERNER: That is the object of it.

191 The MASTER: If that is the purpose of what counsel has indicated he wishes to show, he may have an opportunity of doing so by further interrogatory.

Mr. WERNER: That is the purpose of it.

Mr. BAKEWELL: The defendant excepts to the ruling.

Mr. WERNER:

Q. I will ask you, then, to state whether during the period in question, during which you were Vice-President of the Company and familiar with their operations, you both distributed shoes of your own manufacture and jobbed shoes manufactured by factories other than your own, on all of which were placed the name "Hamilton-Brown Shoe Company."

Mr. BAKEWELL: Counsel for defendant objects to the question unless confined to the precise question in this case, as limited in this decree.

The MASTER: The objection is overruled upon the reason heretofore suggested.

To which ruling the defendant by its counsel, then and there, at the time, duly excepted.

A. We did job shoes during that period. They were all stamped "Hamilton-Brown Shoe Company."

Mr. WERNER:

87 Q. And manufactured by whom?

Mr. BAKEWELL: That is objected to.

The MASTER: The objection is overruled.

To which ruling the defendant by its counsel, then and there, at the time, duly excepted.

A. Whether we manufactured them or whether we jobbed them.

Mr. WERNER:

88 Q. But within the definition of your term you only jobbed those of other factories than your own?

A. Yes, sir.

89 Q. Where were those factories located?

A. Factories of our own?

90 Q. No, the others. Those you strictly jobbed?

A. Those were located anywhere we happened to buy goods.

91 Q. Anywhere in the United States?

A. Yes, sir, but generally in the east.

92 Q. And if I understand you, the markings on the shoes, whether strictly distributed or jobbed, so far as the appear-
192 ance of it, the name "Hamilton-Brown Shoe Company" on them was substantially the same—as for instance, on the shoes marked "Complainant's Exhibit A Jan. 31, 1910."

Mr. BAKEWELL: Objected to as it is not confined to the shoes in this inquiry.

The MASTER: The objection is overruled. It is not directed to "The American Lady" shoe but to a custom of the trade in the distribution and jobbing.

A. The appearance of the shoe would be changed materially by the wording. For instance, if we bought a shoe from the east we might have "Comfort" on it and that would appear in the place of "The

American Lady." The individuality of the shoe would be changed entirely by the bottom finish and the style of type.

We do not conform to any special form of type, except in the American Lady shoe. In the American Lady shoe the style and type is always conformed to. Every style and type is conformed to and is exactly the same.

In the eastern manufactured shoe it is different you will notice.

93 Q. The point was, whether so far as the marking of the Hamilton-Brown Shoe Company's output of your factories and the output of other factories is the same?

A. It is in the general shape of the design.

94 Q. As indicated on this "Complainant's Exhibit A, Jan. 31, 1910" introduced in evidence here today?

A. I am not prepared to say. I know very little about the balance of the business. I am not competent to pass on that. I do not ever see the other man's shoes.

95 Q. The testimony so far indicates that your company had various factories, among others four of which came under your superintendence and one of these was the factory of "The American Lady" shoe: and that your company is in possession of records showing the entire output of the American Lady shoe during the period concerning which this inquiry covers.

It also appears from your testimony that these shoes leave your factory and are sent to a general warehouse, which does the jobbing or distributing—that is to say a selling business of shoes; so far I am correct in summing up your evidence?

Mr. BAKEWELL: That is objected to as incompetent, immaterial, and irrelevant.

The MASTER: The question is not formulated yet.

Mr. WERNER: I now ask whether from your familiarity as Vice President of this Company, during the period in question
193 separate records were kept showing the factory cost and records showing the cost of handling and distributing——

Mr. BAKEWELL: I object to the question as——

Mr. WERNER: (continuing):

96 Q. And I have reference in particular to the American Lady shoes during the period in question.

Mr. BAKEWELL: I object to the question unless it is limited entirely to "The American Lady" shoes sold by the defendant and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company.

The MASTER: The question may be answered subject to the objection.

The previous question is here read.

A. I don't know whether I quite gather that. The methods of our business is something I would not care to say anything about.

97 Q. Put it briefly, then, Mr. McElroy.

A. We bill our goods to our concern.

98 Q. That is, the factory bills it to the jobbing house?

A. Yes, sir, the factory bills it to the jobbing house; and they are sold at exactly the figures we bill them. For instance, our "American Lady" shoes we bill at $2.50 and they bill it to the trade at $2.50.

99 Q. That $2.50, of course, covers the entire cost of manufacture plus the expense of selling, and a profit?

A. Yes, sir, if we are smart enough to get it.

100 Q. That is all calculated, then, at the factory end?

A. Yes, sir.

101 Q. I will ask you whether the profits made by the factory are in any way separated from the profits made by the distributing end?

A. They are.

162 Q. How is this done?

A. It is a system of figuring shoes.

103 Q. Explain that system.

Mr. BAKEWELL: That is objected to.

The MASTER: The objection is overruled.

A. We take our labor cost and our material cost and our general expenses of the factory; and then we allow a figure that we charge for selling or disposing of those goods and add that to the general cost of the shoes.

104 Q. And bill it to yourselves as jobber at that price?

194 A. At that price. Bill it to the concern at the price we have on the shoe.

105 Q. By "billing it to the concern" you mean billing it to the Hamilton-Brown Shoe Company?

A. Yes, sir, to the Hamilton-Brown Shoe Company.

103 Q. I do not yet know how you distinguish——

A. They take a discount off our figures. We turn in the shoe at $2.50 and they take a discount off that. They sell the shoe at the same price we bill it to them, but they take a discount off our figures. The shoe goes through our works and is billed to them at that price.

107 Q. So the discount they take off——

A. Reduces their profit.

108 Q. Plus the expense?

A. Yes, sir, plus the expense.

109 Q. So that discount practically means a rebate to the factory?

A. To the store.

110 Q. The factory charges them out at that price?

A. Yes, sir.

111 Q. But in settling with the factory they take off a discount?

A. Yes, sir, and charge it back to us.

112 Q. As I say that is a sort of rebate?

A. Yes, sir.

113 Q. Then in order to get at the profit, for any particular "American Lady" shoes sold during the period in question, we would have to——

A. We would have to——

Mr. BAKEWELL: One moment.

Mr. WERNER:

114 Q. You would have to deduct from the gross selling price that portion of the discount reserved to the Company as jobber, expended or eaten up by the expense of distribution.

Mr. BAKEWELL: The question is objected to on the ground that it is an attempt to get into the profits made by the Hamilton-Brown Shoe Company on this "American Lady" shoe marked with the name "Hamilton-Brown Shoe Company" and those profits the complainant is not entitled to inquire about on this accounting.

The MASTER: It is evident that the Hamilton-Brown Shoe Company makes no "American Lady" shoes which are not stamped "Hamilton-Brown Shoe Company."

It appears, of course, that the difference between the complainant and the defendant is that the complainant holds that it is not a sufficient evidence of the manufacture; and the defendant holds it is sufficient evidence of the manufacture.

195 That is a question which the Master will have to decide.

But there is no way of getting at the profit of the manufacture, if the Master should hold that it is properly to be taxed against those shoes so marked, except by such an interrogatory as has been put to the witness.

I shall overrule the objection to that, not holding either one way or the other as to the contention between the parties, but for the purpose of following in what seems to be a proper and legitimate way a method of arriving at how the profit is estimated.

Mr. BAKEWELL: I respectfully submit, if the Master please, that if the Master desires to take that position the Master should first adjourn the taking of this testimony and determine this question; because otherwise if the Master should rule that they are not entitled to recover profit on shoes marked with the name "Hamilton-Brown Shoe Company" then we would have gone into an inquiry which the other side had no right to go into.

The MASTER: That is what I suggested a while ago.

Mr. WERNER: The next question I put will bring us up to that point.

The MASTER: This question can very well be properly answered irrespective of what my ruling shall be upon the point of difference between you. I shall overrule the objection to that question. It is not asking what the profit is.

Mr. BAKEWELL: It is an inquiry into our method of business and they have no right to inquire into that.

Previous question read.

The MASTER: He may answer the question subject to the objection.

A. In the figuring of shoes we are not always consistent. One shoe bears a larger profit that the other, though sold for the same price. The stock in one shoe may cost considerably less than the stock in another. It may be showy enough in its appearance to command a higher price than another shoe costing more. We let each individual shoe take care of itself.

Mr. WERNER:

115 Q. But in every case, I say, the discount——

A. The same discount applies to all of them. A shoe that failed to show a profit at would come under the discount equal to the one that showed a larger profit.

196 116 Q. But the records are so kept as to show the profit on each particular line of shoes?

Mr. BAKEWELL: The question is objected to.

The MASTER: The objection is overruled.

A. We make our estimates and many times our estimates will not hold out. The record on each case of shoes is not figured separately but there is an estimate made on the shoe before it goes through.

117 Q. In advance?

A. Yes, sir.

118 Q. You cannot tell what the profit is until the end of a period when it is sold and actually figured out?

A. Yes, sir, and then you cannot tell what each particular shoe contributed toward the general profit.

119. Q. Suffice it to say that the records for instance made up as indicated will show the profit on "The American Lady" shoes during any particular period, including both the factory and the distributing ends.

A. No, sir, it would hardly do that. We make other goods in this factory besides "The American Lady." We make shoes under other brands. All we would have would be the net results of the factory during those years.

120 Q. Do you mean to say you do not keep separate records showing the material and labor and all costs, for instance, upon each separate brand?

Mr. BAKEWELL: The question is objected to.

The MASTER: The objection is overruled.

A. No, sir, we do not have a separate—well, we have our labor cost, our general estimated cost for each shoe or each case of shoes. At the end of a period we can go through to see if we kept within the bounds of these estimates.

But we cannot separate any one shoe and say what our profits were at the end of the year.

121 Q. But, as a matter of fact, you do separate and show profits on "The American Lady" shoe?

A. On "The American Lady" factory, not shoe.

122 Q. That is what I had in mind.

A. But there are other shoes made in those factories, under other brands.

123 Q. What others, for instance?

A. The "Vassar."

124 Q. Are they sold as "American Lady" shoes?

A. No, sir. We could come to an approximation.

125 Q. Because you keep separate estimates of the cost of producing the "Vassar" shoe, or a case of them?

A. Yes, sir.

197 126 Q. So you could get at it?

A. Yes, sir.

127 Q. I spoke of two profits on "The American Lady" shoes, for instance; I spoke of one as the profit of the factory end and the other as the profit of the distributing or jobbing end; will you please state how those profits are separated or are arrived at?

Mr. BAKEWELL: I respectfully submit this is going into exactly the kind of inquiry that should not be gone into at all until your Honor has ruled upon this question of whether or not the marking of "The American Lady" shoes with the name "Hamilton-Brown Shoe Company" is not a clear indication that the shoes are not the shoes of the complainant.

The MASTER: It is very clear, Mr. Bakewell, that until it is determined whether shoes so marked as has been testified to are liable to have a profit declared upon them, this question of getting at the profit is not strictly or exactly in order; but this is merely a preliminary question as to whether it can be derived. It is not going into the profit at all. And the answer of the witness in regard to it does not fix or establish a profit or say the shoes are liable to the profit. It is merely an examination to find out whether there is a way in which the profit can be determined.

The witness may answer that question and then I think the examination should stop until that can be decided.

Mr. WERNER: It will stop with the next question.

Mr. BAKEWELL: I wish to state this, that cross-examination of this witness as to the way these shoes were marked and how packed and shipped would throw further light on the question and make it more apparent that this inquiry is absolutely impertinent; but in examination the Master may go into this and I think that should precede any examination into their method of doing business. If my position is correct you are permitting them to go into an examination as to our methods of conducting our business.

The MASTER: I do not think so. It is merely when we come to that point if they can find out what that profit is. It is a little irregular. It might have been postponed in its entirety until the question had been determined as to whether shoes so marked were liable to the profit. But it is not asking what profit was made, what was expended or what the proportion of labor or material was, or anything of the kind; but merely getting at the question as to whether the profit can be ascertained when the proper time comes. Of course, it never may be ascertained if the proper time never comes.

The witness may answer the question.

Previous question read.

198 A. The profits of the factory are arrived at by keeping a set of books there; and the profits of the general business are kept by keeping a set of books there.

As I stated before, they charge us a discount for doing business. We bill them all our goods at the market price of the shoes and they sell them at those prices. They deduct those discounts from us.

128 Q. As indicated by you, after that discount is allowed there is a factory profit?

A. Yes, sir.

129 Q. And after you take out your expenses of the jobbing house, there is a jobbing profit.

A. Yes, sir.

130 Q. The two together represent the total profit?

A. Yes, sir.

The MASTER: An exhibit has been made here of a mark and the witness has stated "The American Lady" shoes are marked in the same way; so if they are entitled to this profit or not, all the "American Lady" shoes bear that mark.

If you think it best to ask the witness any question, I have no objection to your doing so.

Mr. BAKEWELL: I wish to ask the witness how each shoe is packed and shipped. I want to show that each pair of shoes, in addition to the mark upon the shoes is packed in a box and each box plainly bears upon it the name "Hamilton-Brown Shoe Company" as manufacturers.

Mr. WERNER: We object to that under the terms of the decree so often read this afternoon.

The MASTER: Mr. Bakewell may ask the question because I am somewhat in doubt as to whether the wording of that decree may not bear that construction.

I am not prepared now to say whether the shoes being put in a box marked Hamilton-Brown Shoe Company is some other way of showing that they are made by the Hamilton-Brown Shoe Company; "and which are marked by the name 'American Lady' and not accompanied by any other matter clearly indicating that such shoes are of the manufacture of the Hamilton-Brown Shoe Company."

I am not prepared to say now that the box in which the shoe is sold may not be matter accompanying it which clearly indicates that such shoes are of the manufacture of the Hamilton-Brown Shoe Company.

Mr. JOHNSON: If he is permitted to show that, we wish to show that the consumer in nine out of ten instances never sees the box.

Mr. WERNER: That is already in the record.

199 Mr. BAKEWELL: I object to how the shoes are sold to the consumer. We are not concerned with what the retailer does; we are concerned with how the Hamilton-Brown Shoe Company sells the shoes.

Mr. WERNER: We object to Mr. Bakewell at this time offering that testimony.

The MASTER: The objection is overruled.

To which ruling the plaintiff by its counsel, then and there, at the time, duly excepted.

Cross-examination.

By Mr. BAKEWELL:

— Q. Having referred to a certain pair of shoes put in evidence during your direct examination by complainant's counsel, on the sole of which appears the name "Hamilton-Brown Shoe Company" in a circle with the name "American Lady" in the center: I now call your attention to a box, on the lid of which appears prominently in white letters on a black background the following: "Hamilton-Brown Shoe Company's."

The above appearing at the head or top of the lid and below appears in the same white type on a black background the name "American Lady."

At the end of the box appears something in the shape of a strap with a red center, upon which appears the following: "Hamilton-Brown Shoe Company" and in the center on a red background, in prominent letters, the word "Makers."

The name "American Lady" and the word "Special" also appear on the end of the box.

There also appears on the lid of the box a picture of a young lady.

I will ask you if you are familiar with that box?

A. I am.

Mr. WERNER: The question is objected to because immaterial so far as this inquiry goes as to what markings were on the box in which the shoes were packed: or what markings were used, than those used on the shoes. And for the further reason that it does not relate to the period concerning which this inquiry extends.

Mr. BAKEWELL: I simply asked him if he is familiar with that box.

A. I answered that, yes.

132 Q. State whether or not since the filing of the bill in this case, on Jan. 29, 1906, up to the present time, continuously, the Hamilton-Brown Shoe Company has used boxes like the one I referred to in my previous question.

A. They have——

200 Mr. WERNER: One moment——

Mr. BAKEWELL (continuing):

133 Q. In which it has packed and now packs every pair of its "American Lady" shoes which it has sold since the filing of the bill in this case.

Mr. WERNER: That is objected to because it is immaterial and irrelevant, it being immaterial how the box or carton was marked, in view of the decree which requires that the marking indicating that the Hamilton-Brown Shoe Company were the makers of the shoe must appear upon the shoe itself.

The MASTER: The question may be answered subject to the objection.

A. We have used this box in every instance.

Mr. BAKEWELL:

134 Q. Since the date of the filing of the bill?
A. Yes, sir.

Mr. BAKEWELL: The box referred to by the witness is offered in evidence and marked by the defendant's counsel both on the lid of the box and on the top of the box "Defendant's Exhibit American Lady Shoe carton, Jan. 31, 1910."

Mr. WERNER: That is objected to for the reasons previouly stated.

The MASTER: It is taken subject to the objection.

Mr. BAKEWELL:

— Q. Has it been the regular practice of the Hamilton-Brown Shoe Company ever since the filing of the bill of complaint in this case and up to the present time, to pack every one of its pairs of "American Lady" shoes sold during the time mentioned in boxes like the exhibit just referred to marked "Defendant's Exhibit American Lady Shoe Carton, Jan. 31, 1910" and which exhibit is now in the hands of the Special Master?

Mr. WERNER: That is objected to because it is immaterial for the reasons previously stated.

The MASTER: It may be answered subject to the objection although I think the witness answered it completely before. I think he stated in every instance they were so boxed but there is no harm in having it answered again.

A. It has.

Mr. BAKEWELL:

135 Q. So that during the period referred to, that is to say, from the date of the filing of the Bill up to the present time, all
201 "The American Lady" shoes sold by the Hamilton-Brown Shoe Company which have left their distributing house have been packed in cartons such as the one marked "Defendant's Exhibit American Lady Shoe Carton, Jan. 31, 1910."

Mr. WERNER: Objected to as immaterial.

The MASTER: He may answer subject to the objection.

A. They have.

Redirect examination.

By Mr. WERNER:

136 Q. Mr. McElroy, I notice that the device of the strap with the name "Hamilton-Brown Shoe Company" has inside of it, on a red background, the word "Makers": I will ask you if you can state from your memory when that word "Makers" was first placed on your carton?

A. I cannot positively answer that, I think we had at one time "Shoe Makers" in there and we changed it to "Makers".

137 Q. Did you ever have anything else on it beside "Makers" or "Shoe Makers"?

A. I do not recall it.

138 Q. Did you ever put "American Lady" in there or leave it blank?

A. I believe at one time we had "American Lady" in there.

Mr. BAKEWELL: That is objected to unless he specifies the time.

Mr. WERNER:

139 Q. Do you know what time that was?

A. No, sir.

140 Q. Are there any means of ascertaining in your factory, when that was first put on that box?

A. No, sir.

141 Q. Who was the manufacturer who first made that device or printed them?

A. You would have to go to the Advertising Department for that.

142 Q. The Advertising Department will show who printed that?

A. I don't know whether it will or not.

143 Q. You could not tell?

A. No, sir.

144 Q. You admit that at one time you had "Shoe Makers" "Makers" or "American Lady" in there?

A. I do not admit that. My recollection of that is hazy. I remember there was "Shoe Makers" at one time in there.

145 Q. You remember at one time there was "American Lady" in there?

A. I cannot say positively.

146 Q. Do you remember at one time there was also a blank?

Mr. BAKEWELL: That is objected to "one time", unless it was subsequent to the filing of the bill.

202 Mr. WERNER:

146*a* Q. Subsequent to Jan. 29, 1903?

A. I cannot answer that.

147 Q. Then you cannot tell when that word "Makers" was put in?

A. No, sir.

148 Q. The best way of getting at that, then, would be, you say, from your advertising man?

A. The advertising man has been changed. I don't know whether he would know it or not. There ought to be a means of getting at it, though?

149 Q. Do you know who did the printing of those labels?

A. The printing of those labels was done through the Holman Paper Box Company at that time.

150 Q. At what time?

A. Perhaps August of last year.

151 Q. Who has done it since?

A. We do it ourselves.

152 Q. You have your own printing establishment now?

A. Yes, sir.

153 Q. Since August 1st?

A. Along about that time we started making our own cartons. Probably earlier than that, the first of June, 1908.

154 Q. Do you know whether you have in your records samples of all these labels that have been used in the past?

A. We probably have not.

155 Q. Is no record kept of that?

A. No, sir.

156 Q. Or of the various changes made in those labels.

A. No, sir.

157 Q. There have been changes made during the period in [*in*] question?

A. Oh, yes, we have changed the style of the carton several times.

158 Q. During the period in question?

A. During the period in question, I cannot say; but I say we have changed that box several times.

159 Q. But when the change was made, you do not recollect?

A. I made the box and I will make a little explanation of it; at one time we had—the different factories had this design in different places and in different sizes on the box.

160 Q. You mean the strap?

A. What we call the Hamilton-Brown trade mark. That is our trade mark.

161 Q. Which is the trade mark?

A. "Hamilton-Brown Shoe Company" in the belt.

162 Q. That is your trade mark?

A. Yes, sir. We have had that in different places and different sizes on the boxes; and two years ago, about the first of
203 February, 1907, there was a big demand made by the trade generally to place that thing in one place and to have it of a uniform size. And the size or the belt trade mark was changed and it was agreed to put it all in the upper right hand corner on the front end of the box.

163 Q. That was when?

A. That resolution was passed I think sometime probably in February, 1907. That is when all the cartons were made with that small design and placed in the upper right hand corner on the front end of the box.

164 Q. That relates to the belt with the name on it?

A. Yes, sir.

165 Q. Irrespective of what may have appeared in it?

A. Yes, sir. But at that time that appeared in it; because there has been no change in the label since then. Whatever has been done since that period it is the same thing as upon the box, because there was no change whatever in the label or on the end of the box.

166 Q. Would you say the word "Makers" *have* appeared on these since 1907?

A. I would say it probably antedated that time, but certainly since that time.

167 Q. You are sure of that?

A. Yes, sir.

168 Q. On every carton that left the "American Lady" factory?

A. Any of the Hamilton-Brown Shoe Company's factories.

169 Q. I am interested in "The American Lady."

A. Well, take the American Lady factory.

170 Q. That label that appears on the end of that box, you say——

A. As it appears on there.

171 Q. Exclusively has been used since February, 1907?

A. We passed the resolution then and it may have been three or four weeks before we got those labels in.

172 Q. Do you pass a resolution every time you change a label?

A. Every time we make a radical change of that kind, the directory does it.

173 Q. You pass a resolution?

A. The directors pass a resolution and then give us the order.

174 Q. You can furnish us a copy of that resolution? and the date?

A. I doubt it.

175 Q. If it is on your records you can?

A. Yes, sir.

176 Q. Will you?

A. If it is on our records. I have very serious doubt that it is a matter of record; because it is a minor resolution and we
204 were all present and it was told us to go to work to get up that label and all conform to it.

177 Q. If it is a matter of record there is no objection to producing a copy and showing us the date of it?

A. My reason for saying it was in February is that our salesmen were present and petitioned us; the Board of Directors were in session; and the salesmen come in February.

178 Q. If the Master rules that it is pertinent to the inquiry you can produce before him the records showing the profits on "The American Lady" shoes marked on the shoe as indicated by you, since Jan. 29, 1906 to Nov. 15, 1909 and I will ask you whether you will do so upon request of the Master.

Mr. BAKEWELL: That is a double barreled question. Ask him one at a time.

Mr. WERNER: He has stated there are records of that kind.

The MASTER: The witness said a short time ago he could approximate that.

A. I could not do as you state it. There would be no way of determining the exact profits on "The American Lady" output. The only way that could be done,—for instance, our year runs from Dec. 10th and if we started in the 29th of January we would take the number of months and divide it into the whole amount of profit and then we would have to go into the records of our company and decide what portion of the shoes in that factory were "American Lady" shoes.

Mr. WERNER: In the testimony heretofore in the record, for instance, it was stated that your records showed that——

Mr. BAKEWELL: I understood we were to close with the examination of the box.

Mr. WERNER: If you prefer we close, I will close with the request that at the adjourned meeting those records be produced, if your Honor holds those are pertinent to the inquiry.

The MASTER: The Master certainly would not be willing to discuss that before ruling.

Mr. BAKEWELL: I ask that the examination be suspended until the Master has made his ruling.

The MASTER: This order requires that I pass upon this matter with the testimony which has already been taken in the trial of the cause and such other testimony as may be taken before me; and I have been unable to get a copy of the record. The Clerk of the Court could not furnish me with one and I have not had an opportunity to examine this record. I shall have to do
205 so, and I see very clearly that I shall have to examine this record of testimony introduced in the hearing before the Court, with regard to this very matter you are asking me to pass upon now.

Recross-examination.

By Mr. BAKEWELL:

Q. —. I understood you to say that according to your recollection, about two years ago, at the request ——

A. About three years ago.

Q. —about three years ago, at the request of the salesmen this mark with the red background was ordered placed at the right hand top of the end of the box.

A. As we expressed it, at the upper right hand corner.

Q. —. You do not mean to say that mark was not used on other parts of the box, before that?

Mr. WERNER: That is objected to because it is immaterial what marking appeared on the box or carton.

A. Yes, sir, it appeared on the box. As I stated before, it appeared on different parts. Each factory puts the mark where they chose. Sometimes it ran clear across the whole front. I am not prepared to say what was in the center. Some of you have suggested that "The American Lady" was in there. My answer included all the boxes the Hamilton-Brown Shoe Company used. We came to an understanding to have a uniform trade mark in the upper right hand corner of the box.

182 Q. But prior to that time when you came to this resolution about the marking on your box and confining the inquiry as to "The American Lady" box, was such a trade mark as there appears placed on the end of the box?

Mr. WERNER: Objected to as immaterial. [*an*]

A. I think the trade mark at that time happended to be right here (indicating).

183 Q. Near the left hand lower corner of the box?

A. Yes, sir, that is where they claim there was more room for it, right in there (indicating). The printer of the box had it down here, (indicating).

184 Q. State that so the record will show what you mean by "right down here."

A. Previous to the raising of it finally to the upper right hand corner of the box the design was just below the word "Lady." That is my recollection of it.

206 The MASTER:

Q. —. Near the lower left hand corner?

A. Yes, sir, and of a large and more conspicuous size.

Redirect examination.

By Mr. WERNER:

186 Q. If I understand you, the word "Maker" constituted no part of your trade mark as such?

Mr. BAKEWELL: That is objected to as immaterial.

The MASTER: He may answer subject to the objection.

A. I do not recall that part of it. I do not think that constitutes a part of the trade mark.

The MASTER: That is what the witness said a while ago.

Recross-examination.

By Mr. BAKEWELL:

187 Q. The trade mark you are referring to here is the representation of a strap or belt?

A. A belt and buckle, we call it.

Mr. WERNER: That is objected to as immaterial.

The MASTER: It will be received subject to the objection.

Mr. BAKEWELL: I wish to put in, in this connection, a copy of the application for the writ of certiorari filed and presented to the Supreme Court of the United States and denied, before the interlocutory decree in this case was entered.

Mr. WERNER: That is objected to as immaterial. We do not object to it on the ground that the paper is not a certified copy.

Mr. BAKEWELL: And you admit that a writ of certiorari was denied before the interlocutory decree was filed?

Mr. WERNER: Yes.

Mr. BAKEWELL: Counsel for defendant here offers in evidence, subject to the objection above stated, a printed uncertified copy of the application for a writ of certiorari to the Supreme Court of the United States.

The printed copy last referred to is marked by the Master "Defendant's Exhibit A, 1/31/10, Henry H. Denison, Special Master."

207 DEFENDANT'S EXHIBIT "A."

January 31, 1910.

Henry H. Denison, Special Master.

Substitute.

Received March 20, 1909.

Supreme Court of the United States, October Term, 1908.

No. —.

THE WOLF BROTHERS AND COMPANY, Petitioner,
vs.
HAMILTON-BROWN SHOE COMPANY.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, and Brief for Petitioner.

Lawrence Maxwell, Simeon M. Johnson, John E. Jones, Counsel for Petitioner.

Supreme Court of the United States, October Term, 1908.

No. —.

THE WOLF BROTHERS AND COMPANY, Petitioner,
vs.
HAMILTON-BROWN SHOE COMPANY.

Petition for Writ of Certiorari.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Wolf Brothers & Company, prays for a writ of certiorari to review the decree of the circuit court of appeals for the eighth circuit, in the case in that court, numbered 2811 on its docket, in which your petitioner was appellant and the respondent Hamilton-Brown Shoe Company, was appellee.

Your petitioner annexes hereto a statement of the case, and of the grounds for this petition. It files printed copies of the record in the circuit court, which were printed under the supervision of the clerk of the court of appeals, and were distributed by him in that court (one copy duly certified), and a certified transcript of the
208 subsequent proceedings in the court of appeals.

LAWRENCE MAXWELL,
SIMEON M. JOHNSON,
JOHN E. JONES,
Counsel for Petitioner.

Statement of the Case.

This was a bill in the circuit court by the petitioner, The Wolf Brothers & Company, to enjoin the infringement of the trade-mark, "The Americal Girl," which petitioner and its predecessor in business had used for about ten years prior to the filing of the bill, as a trade-mark for women's shoes manufactured by them. The circuit court dismissed the bill. The court of appeals reversed the decree, and enjoined defendant from infringing the words "The American Girl" in a manner and under circumstances constituting unfair trade, but the court refused to protect the words as a trade-mark, solely on the ground that "geographical names can not be appropriated to the exclusive use of one as a trade name," and because "the name, as applied to shoes is descriptive merely, and not an arbitrary or fanciful name."

The court found (R. 508-515) that in 1896 plaintiff's predecessor in business, George F. Dana & Company, adopted the words "The American Girl" as a trade-mark for women's shoes manufactured by them; that the firm of Wolf Brothers & Co., which was afterwards incorporated under the laws of Ohio as The Wolf Brothers & Company, acquired said business and trade-mark in 1898; that plaintiff and its predecessors built up a large trade for their product under the trade-mark, and advertised their shoes extensively as "The American Girl;" that defendant, which is a large manufacturer in St. Louis, adopted the trade-mark, the "American Lady," for its shoes in the latter part of 1900; that plaintiff, in January, 1901, on seeing one of defendant's advertisements of its shoes under the designation of the "American Lady" promptly protested in writing to defendant on the ground that it was an infringement of plaintiff's trade-mark; that defendant disregarded the protest and "expended something like over $100,000 in advertising American Lady shoes after the bringing of this suit;" "that the words The American Girl and The American Lady are so similar as to cause confusion, and the evidence fully discloses such to have been the result;" and that "defendant's action in the several respects above enumerated was not taken without knowledge of complainant's rights" (R. 513).

The court might also have referred to the fact disclosed by the evidence, that defendant, on May 5, 1905, applied to the
209 patent office to register the name "American Lady" as a trade-mark for shoes; that plaintiff opposed the application as owner of the trade-mark "American Girl;" and that the examiner of interferences and the commissioner of patents, on appeal, sustained the opposition and refused to register "American Lady" as a trade-mark, on the ground that "the words American Girl had been in continuous use as a trade-mark for shoes by The Wolf Brothers & Company and their predecessors, from whom they derived title since the year 1896 or 1897, which is long prior to any date of use of the words, American Lady, claimed by The Hamilton-Brown Shoe Company," and "that the testimony showed confusion in the minds of purchasers between the terms American Girl and American Lady,

arising from their similarity." The decision of the commissioner of patents is reported in 125 O. G. 667.

The court of appeals concluded that "while the term The American Girl as applied by complainant and its predecessors was not subject to exclusive appropriation by them, it had, nevertheless, by their long continued use of it, come to have a secondary meaning, indicative of the origin and manufacture of the shoes to which it was applied, and had come to be recognized in the trade as meaning that such shoes were those of the complainant and its predecessors." The court accordingly enjoined defendant "from using the name The American Lady as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture and therefore not of complainant's" (R. 515).

The plaintiff, in connection with its trade name, had also used a catch phrase, "A shoe as good as its name," which defendant simulated, and certain arbitrary numbers which defendant copied, and the injunction covered those points; but the important relief which plaintiff asked, in order to protect "The American Girl" as a trade-mark, was denied, on the sole ground that such a combination of words is not capable of being appropriated as an exclusive trade-mark for a vendable commodity.

Plaintiff sewed the words "The American Girl," accompanied by the word "trade-mark," onto its shoes as a top facing. See sample (R. 229), and also stamped the words on the sole. See pictures of plaintiff's shoes (R. 484-490). So that the words were used as a trade-mark in the strict sense of the term, and not merely as an advertisement trade name. Likewise, defendant stamped American Lady on its shoes. See picture of defendant's shoes (R. 491-494).

210 Grounds for the Petition.

The case presents in simple and concise form the single question whether such a combination of words as "The American Girl" can constitute a valid trade-mark for shoes. The two circuit judges who sat in the court of appeals were divided in opinion. District Judge W. H. Munger, who wrote the opinion, Circuit Judge Van Devanter concurring, disposed of the subject with the following brief statement (R. 510):

The first question for consideration is whether the term "The American Girl" constitutes a valid trade-mark. We think it settled doctrine that geographical names can not be appropriated to the exclusive use of one as a trade name. Columbia Mill Co. vs. Alcorn, 150 U. S. 460; Delaware & H. Canal Co. vs. Clark, 13 Wall. 311; Gennessee Salt Co. vs. Burnap, 73 Fed. 818, 20 C. C. A. 27; Ill. Watch Co. vs. Elgin Nat. Watch Co., 94 Fed. 667, 35 C. C. A. 242; 179 U. S. 665; Allen B. Wrisley Co. vs. Iowa Soap Co., 59 C. C. A. 54.

We also think that the name, as applied to women's shoes is descriptive merely, viz: shoes manufactured in America and to be worn by women, and not an arbitrary or fanciful name to indicate maker; hence the name "The American Girl," as applied to shoes, is not the subject of a valid trade-mark.

Circuit Judge Sanborn, dissenting, said (R. 515):

If the alleged trade-mark were the "American Shoe" it would be invalid, because that term would constitute a geographical name of the shoes, but the title, "The American Girl," when applied to a shoe, is, in my opinion, an arbitrary and fanciful name and hence constitutes a valid trade-mark when it comes to designate the origin or manufacture of the shoe. It was not a geographical description of the shoe because it does not state or indicate that it was made, or sold, or used, in America. It was not when first applied by the complainant to the shoe and before he had taught the trade its meaning, descriptive of the shoe or of its materials or characteristics (and that is the true test, Wellcome vs. Thompson & Capper, 1 L. R. Chan. Div. 1904, pages 736, 742, 749, 750, 754; Keasbey vs. Chemical Works, 142 N. Y. 467, 471, 474, 475, 476), because it described nothing but a girl and the term "American Girl" was just as descriptive of a coat, or a hat, or a glove, or a car, or an engine, or any other manufactured article, as it was of a shoe, that is to say it was not descriptive of a shoe in any way whatever. It was nothing but an arbitrary fanciful term which the complainant, by means of its advertisements and its use, caused to indicate to the trade that the shoe to which it was applied originated in the complainant's
211 shops and was made by it. For these reasons I am of the opinion that the term "American Girl," when applied to a shoe, constitutes a valid trade-mark, that the defendant infringed upon the right of the complainant thereto by the use of the term the "American Lady" to designate a class of shoes which it sold, that on account of that infringement it should be enjoined from the use of that term and should account to the complainant from the date of filing of the bill.

A word which is merely descriptive can not be appropriated as an exclusive trade-mark for a vendible commodity, because every dealer has a right to describe the thing and to use any appropriate term for that purpose. It is for the same reason that a geographical name, when it is merely descriptive of the place where an article is manufactured, can not be appropriated. But "The American Girl," as applied to shoes, describes nothing. The majority opinion says that it describes "shoes manufactured in America and to be worn by women." Naturally it suggests that the shoe known as The American Girl is intended for women, but that does not make the term so far descriptive as to prevent its adoption as a trade-mark.

In Keasbey vs. The Brooklyn Chemical Works, 142 N. Y. 467, cited by Judge Sanborn, the court of appeals of New York held that "Bromo-Caffeine" was a valid trade-mark, overruling the contention that the word could not be appropriated because it was merely descriptive of the article. Mr. Justice Peckham said (p. 477):

"We think this case comes within the doctrine of those cases which have protected the words as a trade-mark, although they suggested more or less the composition, quality, or characteristics of the article".

He conceded (p. 474) that "the name may and probably would suggest to any intelligent man a suspicion or perhaps a belief that the article had bromine or a bromide and caffeine in it in some con-

ceivable form," but he held that that was no objection to its appropriation as a trade-mark. He said (p. 474):

"The trade-mark does not impart information as to the general characteristics and composition of the plaintiffs' preparation, at least to such an extent as to render the trade-mark itself invalid on that ground."

"Unless the word give some reasonably accurate, some tolerably distinct knowledge as to what the ingredient is, it is clear that it is not descriptive within the meaning of that term as used with reference to a trade-mark" (p. 474).

212 "The word could only be said to inform one of the fact that bromine or some kind of bromide had entered into and formed part of the compound, but upon the question whether it was bromine, or one of the many different kinds of bromides, the word "Bromo" would give no knowledge whatever. A name which furnishes no information on this point can not be said to be so far descriptive in its nature as to prevent its adoption as a trade-mark so far as this question is concerned" (p. 475).

The majority opinion in this case shows that "The American Girl" was not understood by the trade as a descriptive term, but as a trade-mark, for the opinion states that it was "recognized in the trade as meaning that such shoes were those of the complainant and its predecessors" (R. 514). True, the court says that this was its secondary meaning, but "The American Girl" had no other meaning as applied to shoes. It was a fanciful combination of words designed to attract the attention of those seeking a stylish shoe, fit for the American Girl.

Nor does the phrase make such use of a geographical name as to affect its validity as a trade-mark. "American" is not used alone or as merely descriptive of place of manufacture. One can not appropirate "Lackawanna Coal," because that means coal from the Lackawanna Valley and every dealer in such coal is entitled to apply that description (13 Wall. 311); nor "Elgin Watches," for that means watches made in Elgin, and every manufacturer there is entitled to use the designation (179 U. S. 665). So the petitioner would be debarred from appropriating "American Shoes." But "The American Girl" as a designation for shoes is nothing but a fanciful term to suggest a shoe fit for the typical smart dresser, the American Girl. It is no less fanciful than "The Chic Girl," "The French Girl," "The Actress," "The Smart Dresser," "The Smart Set," "The New York Belle," or "The Saratoga Bells," any of which would be a valid trade-mark for corsets, shoes, or other articles of wearing apparel.

Greek Maid (corsets), The Bachelor Girl (ladies' belts), Violet Girl (perfumes), Boston Girl (hosiery) and Leading Lady (shoes), have been registered in the patent office as trade-marks under the Act of February 20, 1905. On May 5, 1905, defendant registered American Gentleman as a trade-mark for shoes. Mr. Dana, member of the firm to whose business petitioner succeeded, and kinsman of Charles Dana Gibson, the artist, is supposed to have selected The American Girl as a trade-mark from its analogy to The Gibson Girl.

Circuit Judge Sanborn, had the distinction well in mind
213 between "American" as a geographical term, indicating place of manufacture, and "The American Girl" as a fanciful term, suggesting a type of woman, the smart dresser, for he delivered the opinion in the circuit court of appeals for the eighth circuit in Shaver vs. Heller & Merz Co., 108 Fed. 821, where it was held that American Ball Blue could not be appropriated to the exclusive use of anyone as a trade-mark, and where he said: "Geographical terms and words descriptive of the character, quality, or places of manufacture or of sale of articles can not be monopolized as trade marks."

The decision of the court of appeals seems to strike down every trade-mark of which a geographical term is a part, simply because it is geographical, without reference to its significance in the phrase. "The American Lady," for instance, on which the court of appeals finds that defendant has spent more than $100,000 pending this suit, would be held to be invalid as a trade-mark merely because it contains the word "American," and the same fate will befall defendant's valuable trade-mark for men's shoes, "American Gentleman." Many trade-marks of great value now in use will be invalidated, and the field for future trade-marks will be much circumscribed. This is said to be the result of prior decisions of this court; but such a conclusion may not be accepted in other circuits, in view of the trenchant dissent of the senior circuit judge of the eighth circuit, and many contests and much litigation and confusion may ensue unless this court makes an authoritative decision.

We, therefore, respectfully submit that the case is a proper one for the award of a writ of certiorari.

LAWRENCE MAXWELL,
SIMEON M. JOHNSON,
JOHN E. JONES,
Counsel for Petitioner.

Mr. WERNER: We are up to the question of the competency of the defendant's record on the question of the profits during the period in question; and ask that the defendant be ordered to produce those records.

The MASTER: The request is overruled at present, for the reason that I do not think it is proper at this time to make that motion.

Mr. WERNER: It is intended to raise the question now of its competency under the interlocutory decree.

The MASTER: I do not see how that raises any question in regard to the competency of this exhibit under the interlocutory
214 decree. It is a matter I am obliged to pass upon now. If you gentlemen have taken any action in the matter or have anything briefed that will help me to get some light on that question I would be very much obliged to be furnished with it.

Mr. WERNER: It is a question on the competency of the marking on the box.

The MASTER: How the decree shall be construed in regard to that marking upon the shoe or upon the box.

Mr. JOHNSON: These exhibits that are offered do not show "maker" on the box.

Mr. BAKEWELL: Do you mean there is a single exhibit proved to have been made and sold by them since the filing of the decree, that do not show it?

Mr. JOHNSON: Yes.

Mr. BAKEWELL: I deny it.

Mr. JOHNSON: The Circuit Court of Appeals saw them and we wish your Honor to seem them.

Mr. JOHNSON: They are not before you by inspection.

The MASTER: They belong to the hearing before me.

Mr. BAKEWELL: I deny there is any exhibit before the Circuit Court of Appeals in the shape of a carton established to have been sold by the Hamilton-Brown Shoe Company which does not bear "Maker" upon it and which it is shown was sold since the filing of the decree.

The MASTER: The records will show that.

Mr. BAKEWELL: The record might show a box, a job lot of shoes, but it would not prove when that box was sold by the Hamilton-Brown Shoe Company. It had to be sold, to be pertinent evidence, before the filing of the bill and not since the filing of the bill.

Mr. JOHNSON: There are certain boxes which do not show the word "Maker." I am honest in saying they do not show it and Mr. Bakewell is honest in saying it does show it.

The further hearing of testimony herein is adjourned to Thursday, February 10, 1910, at 10:30 A. M.

ST. LOUIS, February 10, 1910.

Met pursuant to adjournment as above, on Thursday, February 10, 1910, at ten o'clock A. M.

215 At the request of the Master, and by consent of the parties, the further taking of testimony was continued until Tuesday, February 15, 1910, at the hour of ten o'clock A. M.

ST. LOUIS, February 15, 1910.

Met pursuant to adjournment as above, on Tuesday, February 15, 1910, at ten o'clock A. M.

Present: Same parties as heretofore.

The following proceedings were had:

Mr. WERNER: Was there any preliminary matter?

Mr. BAKEWELL: There is a decision to be rendered, I suppose.

Mr. WERNER: I want to say that I understand that a carton was offered by Mr. Bakewell to be identified by the witness on cross-examination. I do not understand that that was being offered in evidence at this time. It would have been and I suppose it was——

Mr. BAKEWELL: It was offered in evidence in connection with that.

Mr. WERNER: He naturally would wait until it came the defendant's time——

Mr. BAKEWELL: It could be offered to develop the defendant's——

The MASTER: I know that I signed it as an exhibit.

Mr. WERNER: My objection goes to the ground that it is premature, but I will withdraw that objection.

I do not know whether you would prefer to have the exhibits introduced indiscriminately, or first those offered by one and then the other side?

The MASTER: Counsel can exercise their own judgment in regard to that.

(Ruling of Master on Question of Introduction in Evidence of Certain Exhibits.)

The MASTER: At the last session counsel asked me to prepare a written opinion upon a question submitted to me. I have not had time to do so, but I will dictate my views upon the question presented.

When we adjourned at the other hearing the question had arisen as to what would be the position of the court with regard to the exhibits, particularly the shoes that were introduced
216 in evidence (and I presume others to be introduced) under the decree of the court, which held that the defendant must account for the profits upon all shoes of "The American Lady" brand, which were "not accompanied by any other matter clearly indicating that such shoes were of the manufacture of Hamilton-Brown Shoe Company."

Counsel for complainant holds that the stamping of the words "Hamilton-Brown Shoe Company" upon the sole of the shoe, in the belt and buckle trade-mark, with the words "The American Lady" in the center, is not such a mark as clearly indicates that the shoes were of the manufacture of the Hamilton-Brown Shoe Company; while counsel for the defendant claims that that same marking is a sufficient indication that the shoes were manufactured by the Hamilton-Brown Shoe Company.

I am called upon to decide between these respective claimants, because, in the one case, an examination must proceed for the purpose of ascertaining the profits, and in the other the profits would probably be very nominal.

There was introduced at the last hearing also, an exhibit, or if not an exhibit, the testimony was introduced showing that the Hamilton-Brown Shoe Company in connection with its business, had manufactured for it by some eastern manufacturer (whose name was not given) shoes which were stamped with identically the same mark on the sole as that which is placed upon "The American Lady" shoe, except that they were not the brand known as "The American Lady." But the stamp "Hamilton-Brown Shoe Company" upon the belt and buckle, was stamped indiscriminately and alike upon the shoes manufactured by the Hamilton-Brown Shoe Company and those which were manufactured for it, which it employed some eastern firm to manufacture.

It seems to me that under that showing it is quite clearly indicated that the simple words, "Hamilton-Brown Shoe Company"

upon the belt and buckle trade-mark, do not sufficiently indicate that the goods are of the manufacture of the Hamilton-Brown Shoe Company, because if that were the case, the stamp of the "Hamilton-Brown Shoe Company" upon the goods which were admittedly manufactured for it by an eastern house, would be falsehood and fraud upon the public, if there should be any occasion to investigate it, which would probably not arise, but the Hamilton-Brown Shoe Company by that action was placing these shoes which are manufactured for it, in the same category as the shoes which it manufactured itself, the stamp being identical upon the sole of the shoe of each manufacturer.

217 The question arises here as to what are or should be the limits within which the Master could compel the production of testimony.

This matter, as the counsel for defendant will remember, was pretty thoroughly worked out in the Westinghouse case which was heard before me and in which I ruled (and there was no objection made to my ruling before the court above, and my ruling was sustained, that where a preliminary examination is being heard before the court, the court has no power, or ought not to exercise its power to compel the production of what counsel for defendant has termed "the manufacturer's or trade secrets," because, as I stated in that case and I may repeat it here, that is in the case where a preliminary injunction was sought.

Now, a preliminary injunction will be granted, if ordered, upon the showing of a single infringement. It is not necessary in seeking a preliminary injunction, to investigate the business of the defendant, because, while that would accumulate proof with regard to the infringement, one infringement is as good as a hundred for the purpose of procuring a preliminary injunction. But when the question comes after the preliminary injunction has been granted, before the Master, for the purpose of taking the testimony and making a finding in the case, the party against whom the court has ruled becomes a wrongdoer, and a wrongdoer in this, as in any other line of business, can have no business secrets or trade secrets which he is allowed to conceal from the examination. And where the Master finds that the testimony must be produced, there is no limit to the requirement of the Master or the duty of the witness excepting there should be a personal privilege of the witness to be considered or some matter presented so clearly, so utterly, so absolutely immaterial in the case, that the Master would have no question on ruling it out.

My own view has always been that it is the duty of the Master to take the testimony and present it to the court with his views in regard to it, for the reason that unless that is done the court will have no opportunity to determine whether the Master has erred or not when the matter comes before the court upon the Master's report.

This question has arisen quite a number of times and the first important case, which has been followed very frequently, is the case of Blease v. Garlington, 92 U. S. Supreme Court Rep. 1, in

which the Supreme Court ruled that in suits in equity all the
218 evidence sought by either party, whether it was received or rejected by the trial court, should be elicited, and, in case of an appeal presented to the Supreme Court, to the end that if that court were of the opinion that the evidence rejected below should have been received, it might consider it and render a final decree without remanding the suit to procure the rejected evidence.

It said that:

"Since the amendment of Rule 67, in 1861, there could never have been any difficulty in bringing a case here upon appeal, so as to save all exceptions as to the form or substance of the testimony, and still leave us in a condition to proceed to a final determination of the cause, whatever might be our rulings upon the exceptions." * * *

"So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the ruling will not be considered by us."

I am reading now from the decision in the case of Dowagiac Mfg. Co. v. Lochren, et al., which case was heard before Judges Sanborn, Hook and Adams, and in which they go on to say; (143 Fed. Rep. 211).

"The considerations have led us to this conclusion: It is not the duty of an auxiliary court or judge, within whose jurisdiction testimony is being taken in a suit pending in a court of another district, to consider or determine the competency, materiality or relevancy of the evidence which one of the parties seeks to elicit. It is the duty of such a court or judge to compel the production of the evidence, although the court deems it incompetent or immaterial, unless the witness or the evidence is privileged or it clearly and affirmatively appears that the evidence cannot possibly be competent, material or relevant, and that it would be an abuse of the process of the court to compel its production."

In the case of Fayerweather v. Ritch, 89 Fed. Rep. 529, (it does not appear exactly how the matter came before the court excepting it states it is upon a motion to strike out testimony), Judge Lacombe said:

"Personally I do not think that the testimony objected to is relevant under the issues raised by the plea, but it is evident that complainant's counsel is of a different opinion, since he is putting his clients to considerable expense in putting it in. It may be that he can persuade the Appellate Court to take his view of the issues; and if so, under the rule adopted by the Supreme Court in Blease v. Garlington, (92 U. S. 1), the testimony, although the judge of first instance deems it irrelevant, should be incorporated in the record."

219 In this a stipulation was offered with regard to what the testimony should be, and the court held that that stipulation might take the place of further testimony in the matter, but the court added:

"In view of the decision in Blease v. Garlington, supra, this court seems powerless to afford any greater measure of relief."

That case, from all that appears upon the record, is a case which did not come before an auxiliary court, as alluded to in the case of Dowagiac Mfg. Co. vs. Lochren.

In the case of Parisien Comb Co. v. Eachwege, et al., 92 Fed. Rep., 721, there was an application before the court to require a witness before a Master to answer a question. This case is evidently in the same district in which the case was pending, and was not the case of an auxiliary court.

Judge Lacombe said:

"This is another application to require a witness to answer a question propounded during taking of proofs in equity. As has been so often pointed out, the decision of the Supreme Court in Blease v. Garlington (92 U. S., 1), seems controlling. It seems as if the information sought to be elicited were not essential to complainant's case, nor indeed relevant or material to the issues which, according to practice, will be first argued, namely, the validity of patent, construction of claim and infringement. Nevertheless, this court is not the final arbiter as to whether the testimony is or is not immaterial, and in view of the object intended by the amendment to the 67th Rule, it should obtain and preserve the answers for the benefit of the appellate tribunal. Blease v. Garlington, supra. As to order of proof, it is not understood that the trial judge will be without power to enter a final decree assessing damages, if the evidence warrants it, without going through the formality of an interlocutory decree, and reference to a master. The question must be answered."

In the case of Maxim-Nordenfelt, etc. v. Colt's Patent Firearms Mfg. Co., 103 Fed. Rep., 39, upon a motion to compel a witness for defendant to answer a certain question, Townsend, J., said:

"Counsel for defendant objects to said question as irrelevant and immaterial, and as not proper cross-examination. It is not the practice in this court, so far as is known to this court, to pass upon questions of this character in the course of the examination of the witness. The usual procedure is for the witness to answer the question, and to have such answer preserved, and to have the question of the relevancy thereof reserved for final hearing. In Blease
220 v. Garlington, 92 U. S., 1, the court held that while the examiner could not decide objections to testimony, he must take down the whole examination in writing and note all exceptions. In Appleton v. Ecaubert, 45 Fed. Rep. 281, Judge Lacombe, in passing on a motion similar to that made in this case, says that no authority for such practice is shown, and that Blease v. Garlington condemns it. In Fayerweather v. Ritch, 89 Fed. Rep. 529, Judge Lacombe held that even if the Circuit Court, in such motion, could deem certain testimony irrelevant, it should yet be incorporated in the record. In view of these decisions and the settled practice the witness should answer the question, and his answer and objections should be noted by the examiner. This rule is not intended to apply to questions of personal privilege which may be raised by a witness. The motion was denied.

In the case of the Thomson-Houston Electric Co. v. the Jeffrey

Mfg. Co., et al., 83 Fed. Rep., 614, in which there was a motion to strike a deposition from the files, the court said (I do not include much of the very lengthy opinion):

"Throughout, counsel for complainant not only noted objections to the questions, but assumed to decide finally and conclusively as to the competency, materiality and relevancy of the testimony sought to be brought out upon cross-examination, and taking the witness completely under control, instructed and compelled him to refuse to answer. In support of this extraordinary course of procedure, they cite Cleveland Fauset Co. v. Syracuse Faucet Co., 77 Fed. Rep., 210; Consolidated Fastener Co. v. Columbian Fastener Co., 79 Fed. Rep., 800. But in each of these causes the testimony objected to was in the record, and was passed upon by the court. I know of no precedent for the proposition that counsel may play the role of chancellor, and, upon their own judgment, close the mouths of witnesses.)"

Mr. BAKEWELL: That was on the instruction of counsel to the witness not to answer, was it not?

The MASTER: Yes.

(Continuing to read:) "What is said of examiners in this extract (the extract not included) applies with much greater force to counsel for the respective parties, retained as they are for partisan services, and therefore utterly incapacitated and unfit to exercise judicial functions in the case, however capable they might be if in a situation to be entirely unprejudiced and impartial.

221 For the reasons stated in Blease v. Garlington, courts do not suppress testimony, unless it be grossly and flagrantly impertinent and scandalous. The result of suppressing it is to expunge the testimony from the record, which would deprive the party affected of opportunity for relief in the Appellate Court."

I have not heretofore, in any matter before me, been compelled to examine so carefully and so fully the position which I have always taken, that all the testimony offered must be included in the record in order to give an appellate court an opportunity to pass upon the relevancy or materiality of the testimony offered. But in this case, as this objection strikes at the very root of the proceedings, I have thought it proper, and thought it my duty, to carefully examine this question, and I find that my views which I have entertained hitherto are fully supported by the authorities in the cases.

It might possibly be objected that in some of the decisions which I have quoted, there was a distinction between an auxiliary court holding in another jurisdiction for the taking of testimony to be used elsewhere, but I do not think that that would make any difference with the propriety of the view which I entertain.

I do not see how any court could be more auxiliary than the court held by a master in taking testimony for his action, or for presentation to the Appellate Court, or to the court which gives him his authority, and my opinion is that it is proper that the Master should receive the testimony which is offered, whether he considers it material or not, unless there be a question of personal privilege in the matter, because otherwise his ruling cannot be understood, and, as-

was held in Blease v. Garlington, the court could not pass upon the propriety of the ruling of the Master because the testimony was not in court.

In addition to the authorities which I have undertaken to examine in regard to this matter, the court in sending this case to me, has directed me to proceed upon the testimony already taken in the main case, as well as testimony which may be produced here before me.

In view of that order, I have examined the exhibits which were filed in the main case, and which are in the custody of the Clerk of the Circuit Court.

I find that in all instances of the exhibits of the shoes, the name of the "Hamilton-Brown Shoe Company" is stamped
222 upon the sole of the shoe, and I think in all instances, the name "The American Lady" is included within the circle formed by the belt and buckle, although there may possibly be some other form of it.

But I also find in examining those exhibits, that *that* are some of them in which, upon the silk facing inside the upper part of the shoe, there is plainly and clearly stamped, "Hamilton-Brown Shoe Company, Makers." Of course, shoes so marked (under the decree sending this case to me) are not to be inquired into, but this leads me to the conclusion that when the court sent this case to me with that restriction in the order, "limited to shoes sold by the defendant since the filing of the bill in this case, and which were marked with the name 'The American Lady' and not accompanied by any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company," the court purposely made the distinction between shoes stamped with "Hamilton-Brown Shoe Company" upon the sole, and those which had also accompanying them "other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company," showing to my mind that the court had based this order upon the exhibits which were filed in the case, all of the exhibits being stamped upon the sole with the Hamilton-Brown Shoe Company's trade-mark, and "The American Lady," but some of them also having upon the silk inside lining, at the top of the shoe, the words, "Hamilton-Brown Shoe Company Makers," and I find from the examination of the exhibits, and from the order of the court, that shoes which are stamped upon the sole "Hamilton-Brown Shoe Company" on the trade-mark, the belt and buckle, with the words, "The American Lady" inside of the oval formed by the belt, are not those shoes which the court considered to have been "accompanied with other matter clearly indicating that the shoes were the manufacture of the Hamilton-Brown Shoe Company," unless the shoes were also accompanied, as in the case of some of the exhibits, with the words, "Hamilton-Brown Shoe Company Makers."

My conclusion is that since the shoes (as were furnished on an exhibit here at the first hearing in this case) come under the decree they may be examined into.

(Defendant's Exceptions to Master's Ruling on Question of Introduction in Evidence of Certain Exhibits.)

Mr. BAKEWELL: Counsel for the defendant excepts to the Master's ruling in this respect, for the following reasons:

223 That in the opinion as dictated on the record by the Master, the Master seems to have lost sight of—and certainly in accordance with my recollection of what he has dictated on the record, he has not specifically referred to the fact that under the testimony taken before him it appeared by the cross-examination of Mr. McElroy, that all "The American Lady" shoes sold by the Hamilton-Brown Shoe Company since the date of the filing of the bill, as to each pair of the same, were packed in a carton which has been offered in evidence and marked, "Defendant's Exhibit, American Lady shoe carton, Jany. 31, 1910, Henry H. Denison, Master," and it clearly appearing on the lid of said carton as follows: "Hamilton-Brown Shoe Co.'s American Lady," and on the end of said carton the name "American Lady" with strap trade-mark of the Hamilton-Brown Shoe Company, upon which strap trade-mark appear the words, "Hamilton-Brown Shoe Company, Makers." It thus appearing that "The American Lady" shoes sold by the Hamilton-Brown Shoe Company since the date of the filing of the bill not only bore on the sole of each shoe the name "American Lady" and the name "Hamilton-Brown Shoe Company" but that each of said pair of shoes as sold by the Hamilton-Brown Shoe Company since the date of the filing of the bill was "accompanied with other matter clearly indicating that such shoes were the manufacture of the Hamilton-Brown Shoe Company."

In connection with the direct examination of the witness McElroy before the Master, the complainant introduced in evidence only one pair of shoes, and which we can show (if not already shown on the record), is one of the cheapest pair of shoes manufactured by the Hamilton-Brown Shoe Company, marked with the name "American Lady."

Each of these shoes bears on the sole thereof the strap trade-mark of the Hamilton-Brown Shoe Company, and on the strap trade-mark appear the words "Hamilton-Brown Shoe Company" and in the center the words, "American Lady."

There are leather facings on the inside of the top of each of these particular shoes (there is one pair, or two shoes, in evidence), nothing appearing on the said facing.

Except, possibly, as to shoes of that particular grade, it is a fact (as can be shown if necessary) that all the other shoes marked with the name "American Lady" and sold by the Hamilton-Brown Shoe Company since the filing of the bill in this case, have marked

224 on silk or satin facing, or on other parts of the shoes, the name "Hamilton-Brown Shoe Company" associated with the word "Makers."

As before stated, defendant excepts to the ruling of the Master as dictated on this record, because it does not seem to have taken into

consideration the carton, "Defendant's Exhibit, American Lady Shoe Carton, Jan'y 31, 1910, Henry H. Denison, Master" hereinbefore described, and which, under the evidence before the Master, accompanied each pair of "American Lady" shoes sold by the Hamilton-Brown Shoe Company since the filing of the bill in this case.

As to the authorities referred to by the Master in his opinion (none of which were submitted to us before the Master's action, and none of which appeared in the briefs of complainant's counsel, copies of which were served on us between January 31 and this date), we except to the Master's opinion, and deny that any of the authorities which he has referred to support him in the precise proposition presented before him, for the following reasons:

As to all of those cases which deal with testimony taken before an Examiner under the 67th rule in equity, it is well known and settled by the decisions that the Examiner who takes testimony under the 67th rule in equity, for proofs at final hearing before the circuit court, has no authority to pass upon the competency, relevancy or materiality of the question.

On the other hand, a Master in taking testimony on an accounting has authority under the law, to pass upon the competency, relevancy or materiality of questions.

Furthermore, none of the cases cited by the Master (except one) arose on the taking of testimony before the Master, and that case is absolutely inapplicable to the question which is now presented before the Master.

The Master's warrant in this case is the decree and is limited by its express terms.

In regard to exhibits of defendant's shoes, introduced in evidence by the complainant before the final hearing in this case, a careful examination of the record in connection with the introduction in evidence of those shoes put in evidence by the complainant, and which were marked as the Master stated, will show that those shoes all related to sales of shoes, the shoes having been purchased from third parties, and those sales taking place subsequent to the
225 filing of the bill, and objection then and there made on the record; that therefore they are not relevant or material to the issues in the case because they were not shown to have been made and sold by the defendant before the filing of the bill, and therefore not revelant or material on the question of infringement; it being the settled law that proof of alleged infringement in support of allegations of a bill must relate to a condition of affairs existing prior to the filing of the bill.

Not one of the authorities cited by the Master is in point to the precise question which arose on this record and was presented to the Master at the last hearing by the defendant's counsel.

The case of Westinghouse v. Wagner Company, to which the Master referred in the outset of his opinion, is not in point here and has absolutely no application to the question raised at the last hearing and submitted to the Master, for this simple reason: in that case, which was one for alleged infringement of a patent and the accounting had before the Honorable H. H. Denison, Master,

it was admitted by the defendant that every one of the infringing transformers accounted for was an infringement claimed for the Westinghouse patent in suit, and that every one of the infringing transformers accounted for before the Master, had been made and sold by the defendant before the filing of the bill.

In the case at bar, the defendant's "American Lady" shoes testified about before this Master on the hearing on January 31, 1910, are shoes plainly marked (I refer here specifically to the pair of shoes put in evidence by the complainant at that hearing), with the name "Hamilton-Brown Shoe Company" in association with the name "American Lady," and each of those pair of shoes (a thing not developed by the testimony in chief, but brought out on cross-examination) was placed in a box or carton marked, "Defendant's Exhibit, American Lady shoe carton, Jan'y 31, 1910," the word "Makers" in connection with the name "Hamilton-Brown Shoe Company" appearing on the end of each box, and thus (even as to the pair of shoes introduced in evidence by the complainant), it is the contention of defendant's counsel that those shoes are "accompanied by other matter clearly indicating that such shoes are of the manufacture of the Hamilton-Brown Shoe Company" and that those shoes left the possession of the Hamilton-Brown Shoe Company, in connection with every sale thereof, packed in such a box or carton.

If the contention of defendant's counsel, such box or carton being considered, be correct, then it is clearly a fact that
226 none of the "American Lady" shoes sold by the defendant since the date of the filing of the bill, are shoes contemplated by the decree and consequently are not infringing shoes, and not shoes which are to be accounted for on this accounting.

If the contention of defendant's counsel is correct in this respect, then the authorities which he cited to the Master in his briefs and in his return to the Master on January 31, 1910, and before the taking of testimony before the Master actually began, are clearly in point.

As to such non-infringing shoes, the defendant has rights which the law protects, and to go into the private affairs of the defendant in respect to the profits on such shoes would be unlawful, defendant's counsel respectfully submits, and beyond the scope of the authority and power of the Master on this accounting and (he uses the term advisedly and respectfully, an impertinent inquiry into the affairs of the defendant, absolutely unwarranted by the decree in this case), it must be as clear as the noonday sun that if the Master is right in his conclusion, then, as pointed out by defendant's counsel in his brief submitted to the Master (copies of which were served on the complainant's counsel), the defendant company is now in contempt of that part of the decree in this case which granted an injunction, although it is the opinion of defendant and defendant's counsel, that it has not in any way violated the order of the court.

For these reasons, and, as defendant respectfully submits, that it has rights which courts in analogous cases have protected parties in, and as the matter goes to the very vitals of this accounting, and

of this case, for that matter, defendant's counsel respectfully submits and asks the Master to have the transcript of this record written up, the proceedings suspended, and the pair of shoes already offered in evidence by complainant's counsel in connection with the testimony taken before the Master on January 31, 1910, as well, as the carton hereinbefore referred to, marked "Defendant's Exhibit, American Lady shoe carton, Jan'y 31, 1910, Henry H. Denison, Master," certified to the Circuit Court, that the court may be advised in the premises, and that it may be determined whether or not the hearing before the Master, which under the Master's ruling threatens to inquire in regard to the profits made by the defendant since the filing of the bill, in respect to what the defendant and defendant's counsel claims to be its legitimate business, shall be further inquired into.

Defendant's counsel also excepts to the ruling of the Master on the ground that it is against the evidence as it appears on
227 this record and against the law as applicable in analogous cases, and contrary to the decisions of the United States Court of Appeals for this circuit, not only in the case at bar, but in the case of Wrisley v. Ivory Soap Company, cited to the Master in defendant's brief, opinion by Sanborn, Judge, and that the ruling of the Master and its necessary result in going into an inquiry outside of the scope of the Master's power under the decree in this case, interpreted as that decree must be not only by the decision in the case at bar, but by the decision of the Court of Appeals for this circuit in other cases, and by the decision of the Supreme Court of the United States in analogous cases.

Having made these exceptions on the record and made this request of the Master, on account of the importance of the question arising thereunder, defendant's counsel respectfully submits that his request in regard to certifying this matter to the court on a complete transcript of the record before the Master, and in connection with the pair of shoes exhibited and the carton exhibited, hereinbefore referred to, be done.

(Master's Further Ruling on Question of Introduction of Certain Exhibits, etc.)

The MASTER: With regard to the objection of counsel, so far as it relates to the carton which was introduced in evidence, I think it is proper for the Master to further add:

I find in the examination of the exhibits before the court in this case, no uniformity whatever in regard to the carton. They are marked indifferently, in various ways. I think that none of them had the word "Makers" upon it. I am sure that none of them had the stamp which appears upon the carton offered in evidence.

In trying to arrive at the meaning of the court in the decree on which the case was sent to me, I came to the conclusion (and it seemed to be unavoidable), that the court took no cognizance whatever with regard to the cartons that were offered in evidence, but that the decision of the court was based upon the distinction be-

tween the shoes which had stamped upon them somewhere, "Hamilton-Brown Shoe Company, Makers," and those which did not have the addition of the word, "Makers" on the shoes.

Some of the exhibits of shoes were so stamped; some were not.

My opinion with regard to the decree of the court—my interpretation of it, was based upon what I conceived to be the dis-
228 tinction which the court drew between the shoes which were exhibited and which had the words, "Hamilton-Brown Shoe Company, Makers" plainly stamped upon them, and those which did not have the words, "Hamilton-Brown Shoe Company, Makers" stamped upon them.

There is no allusion to the carton at all. The carton which was exhibited here is a carton in which, according to the testimony, each of the "American Lady" shoes made since the filing of the decree was enclosed, and each one of which is plainly marked upon the upper righthand corner, "Hamilton-Brown Shoe Company, Makers" on the end of the carton.

I did not specially consider the question of ruling at the present time, whether the carton so marked would meet the requirements of the decree and "not accompanied by any other matter indicating that such shoes were the manufacture of the Hamilton-Brown Shoe Company."

This matter has not been gone into any further before me at the present time, excepting the introduction of this carton, and the question would arise whether that is matter so accompanying the shoes, as would conform to the decree.

My own opinion for the present is that it is not such matter, and my reason for so finding is, that unless there is proof presented to the Master that the carton accompanies the shoes into the hands of the purchaser, showing to the purchaser that that accompanying matter clearly indicates the fact that the shoes were made by the Hamilton-Brown Shoe Company, that it would not be admissible in evidence.

Mr. BAKEWELL: May I ask the Master here, whom he means by the "purchaser"? The purchaser from the Hamilton-Brown Shoe Company or——

The MASTER: By the purchaser I mean the wearer. I think that is the meaning of the decree.

Mr. BAKEWELL: That is excepted to.

Mr. WERNER: You mean the ultimate purchaser?

The MASTER: Yes, the wearer is the ultimate purchaser, unless he receives them by gift and that is——

Mr. BAKEWELL: Counsel for defendant respectfully submits that a careful examination of the carton in the court and introduced in evidence before the final hearing, will show that many of them, if not all of them, do bear upon them the word, "Maker"; and
229 defendant's counsel again repeats his objection and calls the Master's attention to the fact that a careful examination of the record in connection with the introduction in evidence of those exhibits, will show the Master that it does not appear from the evidence in that case, when the shoes of the Hamilton-Brown Shoe

Company introduced in evidence by the complainant in that case, were made or sold by the Hamilton-Brown Shoe Company, or when the cartons containing those shoes were made or sold by the Hamilton-Brown Shoe Company, but that it does appear in connection with their offer in evidence on the part of the complainant in that case of shoes, that it was objected to by defendant's counsel, that those shoes were not relevant or material because the evidence in relation to them showed that they related to shoes purchased subsequent to the filing of the bill of complaint in the case.

These are matters to which the defendant's counsel attempted to call the Master's attention in his brief, in connection with the citation of authorities which showed that in a suit for infringement the evidence adduced by the complainant tending to establish any of the allegations of the bill to make out an infringement, to be relevant or material, must relate to a condition of affairs clearly proven to have existed before the filing of the bill.

Defendant's counsel states that he is willing to submit to the Master authorities to show that the Master has authority to certify this question to the court, under the circumstances.

Mr. JOHNSON: We think the Master is competent to pass upon this question——

Mr. BAKEWELL: I think he is competent——

Mr. JOHNSON: —and this ought to go into the record in the language that the Master has already stated. The experience I have had in these matters is in accordance with the Master's statement.

If the Master is in doubt, the Master might—if the witness refused to answer a question—take that question to the court to pass upon, but the Master is in no doubt at all as to his opinion.

It seems to me the Master should overrule the application.

Mr. BAKEWELL: Before the Master passes on that question, and in order to clarify the record and reduce it to certainty, I ask the Master if I am correct in understanding his ruling heretofore made on the record to the effect that even on the views the Master
230 has expressed, the defendant, the Hamilton-Brown Shoe Company, does not have to account before the Master in respect to any "American Lady" shoes which bear marked on the shoes themselves, on the facings or on the linings of the shoes, or on the soles of the shoes, the word "Makers" in connection with the words, "Hamilton-Brown Shoe Company"? Of course, I refer to shoes which are also marked with the name "American Lady."

Mr. JOHNSON: We respectfully state that we do not think counsel has any right to foreclose the Master now as to rendering an opinion upon any question not as yet raised by this record, and that when the time comes to offer shoes of that character and claim an accounting for the profits so made, that then will be the proper time to hear arguments on both sides of the question, as I have no doubt you will do.

The shoes which our adversaries claim are so marked, we shall claim are not both so marked.

The MASTER: I understand that only one of the pair is so marked.

Mr. JOHNSON: And we shall present that fact to you for discussion and endeavor to influence your judgment, whatever it may be on the question, with proof that the shoes as presented to the purchaser and tried on, are presented in such a form that in a large number of instances the shoe is tried on which contains no such marking, and that the purchaser does not try on the other shoe; that *he* is not advised and does not know that the shoe is of the manufacture of the Hamilton-Brown Shoe Company.

And in addition to that, none of the shoes contained the place of manufacture, St. Louis, U. S. A., nor do they indicate, in the language of the decree, that they are not of the manufacture of the complainant.

We want to be heard on that question, and we think we ought to be before you intimate any final ruling on it at all.

Mr. BAKEWELL: We think this matter was all before the Master, and my point is that the Master will take judicial notice of the fact that the large majority of people who wear shoes have two feet, and that the Master will also remember that this was one of the precise questions that was presented to him at the last hearing, and inasmuch as the Master's opinion has not been written out, and defendant's counsel distinctly understood the Master to say in dictating his remarks, that "American Lady" shoes made by the Hamilton-Brown Shoe Company and sold since the filing of the
231 bill, which did have the word "Makers" on the shoe, were not to be inquired about, simply as this question is coming before the court: we wish to know whether we understood the Master correctly in that part of his opinion so as to reduce the question which will be presented to the court, to the minimum.

The MASTER: I was endeavoring in expressing myself upon this question, to satisfy myself with regard to the meaning of the decree of the court which sent the matter to me to determine, and from an examination of the exhibits already filed in the court, I find that some of the exhibits had the name of the "Hamilton-Brown Shoe Company, Makers" stamped upon the silk facing on the inside.

My conclusion was that the court so framed its decree, according to my interpretation, that it was not intended to include in this examination the profits derived from shoes which bore upon them the name of the "Hamilton-Brown Shoe Company, Makers" and that is my interpretation of the decree—that I am not at liberty to examine into the question of the liability to account for the profits upon shoes which were plainly marked with the name of "Hamilton-Brown Shoe Company, Makers."

At the same time, I wish to be distinctly understood that I have never hesitated and never shall hesitate to correct an error, if I find that I have made one, and if counsel can satisfy me that I have erred, and if this question should come up hereafter in such a way that counsel should question my construction of the decree of the court, I shall be open to argument, and if I find that I am wrong, I shall have no hesitation whatever in saying so, and so deciding, but my present view of this matter is as I have indicated.

(Stipulation that Record of Proceedings Before Master be Taken Down Stenographically, etc.)

Mr. BAKEWELL: At the suggestion of the Master, it is stipulated by and between counsel for complainant and counsel for the defendant, that a record of the proceedings before the Master shall be taken down stenographically and reduced to typewritten form, one ribbon copy being made and three carbon copies being made by the typewriter.

It is stipulated between counsel, as above stated, that the cost of the stenographic charges in this matter shall be taxed as costs on this accounting, and that the ribbon copy and the three
232 carbon copies of said transcript of the record before the Master shall be taxed in this case as costs on the accounting, charges for the ribbon copy and the carbon copy to be at the rate of sixty cents per page for the ribbon copy and fifteen cents per page for each of the carbon copies, and that one carbon copy of the transcript of said record before the Master shall be [supplies] to the complainant's counsel; one carbon copy to defendant's counsel, and one carbon copy to the Master, the original ribbon copy being preserved as the record of the case.

At this point adjournment was taken until February 16, 1910, at 10:30 A. M.

ST. LOUIS, February 16, 1910.

Met pursuant to adjournment as above, on Wednesday, February 16, 1910, at 10:30 o'clock A. M.

At the request of the Master, and by consent of the parties, further proceedings were continued until Thursday, February 17, 1910, at 10:30 o'clock, in order that the Master might have opportunity to examine brief just presented by Mr. Bakewell.

ST. LOUIS, February 17, 1910.

Met pursuant to adjournment as above, on Thursday, February 17, 1910, at 10:30 o'clock A. M.

Present:

Mr. Percy Warner and Mr. Simeon Johnson, in behalf of the Complainant; Mr. Luke E. Hart, in behalf of Defendant.

The following proceedings were had:

The MASTER: At the time adjournment was taken day before yesterday, Mr. Bakewell wanted to furnish me a brief (of which I suppose he furnished counsel copy), in which he wished to give the Master authorities for taking such action as to refer the matter to the court.

I have examined the brief and the authorities connected with my view of the matter, and I do not feel at liberty, of my own motion, to ask the court to instruct me with regard to my duties upon this point.

I am perfectly satisfied with the correctness of my ruling and it seems to me that it would be an improper thing, in the eyes of the court, for me to go to the court and ask for instructions upon a matter in which I am perfectly satisfied with my own ruling.

233 If it were a matter on which I was in great doubt, and there may come in the course of the hearing matters upon which I may be in doubt, and I may as well state right here now, it may be that I am wrong in my intimation that the word "Makers" is a sufficient indication that the Hamilton-Brown Shoe Company are manufacturers of the shoe—it may be that I may find that I am mistaken in my suggestion that where the name "Hamilton-Brown Shoe Company, Makers" appears upon one shoe of a pair, that it is sufficient; but for the present at least, I am satisfied with my ruling, and those questions are not involved now.

I do not think it would be a proper thing for me to do to go to the court and ask for instructions. I doubt whether the court would listen to me if I did, because I would be obliged to state to the court that I am not asking for any instructions upon a matter on which I am in doubt, and for that reason, at the present stage of the case, I think it would be unbecoming in me to refer the matter to the court upon the request of the counsel for the defendant.

At the same time, if counsel for the defendant assures me that he wishes to proceed before the court and ask the court to make a rule upon me to return my record at this time, for the purpose of the court indicating what course I should pursue in the examination, I have no objection to that course being taken.

It is a matter of right which the counsel for defendant may exercise or not, as he sees fit.

If the counsel for defendant assures me that he does intend to take that course, I will lay the matter over for such time as will be necessary for him to make the application.

Mr. WERNER: Counsel for complainant, while conceding that every possible favor and indulgence ought to be shown the defendant's counsel that is compatible with the usual and ordinary proceedings necessary for the orderly disposition of this litigation, still feels that it ought to indicate to the Master that it desires to proceed here and now, and objects to an indefinite continuance, or any continuance, of the hearing at this stage of the proceedings, for the mere purpose of allowing counsel for defendant to attempt to secure a review of the Master's ruling heretofore expressed, and for the following reasons:

1st. That the necessities, economics, conveniences and certainties for the full and fair presentation and hearing of complainant's case would seem to demand that it proceed here and now.

234 2nd. Because the witnesses and proposed exhibits are now ready for production and examination as fast as the Master can admit and consider them.

3rd. Because delay at this stage, for the purpose stated by defendant's counsel, would (with due respect) seem to be vexatious, as the Master is not asking for instructions and is bound to presume

that the court will order him to proceed in accordance with the repeated adjudications cited by the Master.

4th. Because it would seem proper to indicate to the Master as bearing on the importance of proceeding at this time, that we have testimony here which we wish to introduce and now offer to introduce, to show that many styles of "American Lady" shoes manufactured and sold by the defendant since January 29, 1906 and before November 15, 1909, were so manufactured and sold without any marking on the shoe of the name, "Hamilton-Brown Shoe Company" with or without the word, "Maker" or "Makers", though bearing the trade name, "American Lady", and without any marking indicating that the defendant was the manufacturer of the shoe.

Furthermore, we suggest that the evidence is here and is ready for production, to show that the cartons in which the defendant packed its "American Lady" shoes were, during the period in question, usually discarded by the retailer, who exhibited and sold them in cartons of his own. Even where this is not the case, the ultimate purchaser never saw the defendant's carton until at best after the purchase of the shoes was concluded, and that all of the foregoing was well known to the defendant.

Complainant furthermore *excepts* to show that the cartons of defendant, of the style offered in evidence by the defendant, were not used during the whole of the period for which this accounting is ordered. That is to say, that all the cartons used by the defendant during that period, did not bear upon them the word "Makers" as claimed by the defendant.

Finally, it would seem that in accordance with the well known rule that public policy requires that there shall be an end of litigation, that in respect to this principle we demand that we proceed, for if each and every one of these ad interim or interlocutory objections are to be made the subject of an appeal, with consequent delays, there will be no end to this litigation.

We respectfully suggest the foregoing considerations to the Master, urging, however, again, that we desire and invite
235 every possible indulgence to defendant's counsel that seems appropriate to the orderly disposition of this hearing.

Mr. HART: Defendant's counsel assures the Master that it is his desire to apply to the court for such an order, and suggests that the matter be laid over for one week to give him an opportunity to make such application.

The MASTER: If this were a matter which was only collateral to the main issue, it might be possible to proceed with the examination pending an application to have the matter referred to the court. But this motion—this proceeding, goes to the very root of the whole examination and it might be that no testimony could be introduced at the present time which would not fall under the same objection.

If I am right in my ruling, the examination will proceed. If I am wrong in my ruling, and the court instructs me differently from what my view is now, it would result that the taking of any further testimony pending this application might be unnecessary and, I think, unwise, because any testimony which I can possibly

conceive of being offered now might come under the same condemnation, if I am wrong in my position.

I regret very much that a laying over of the matter for such application would result in inconvenience to counsel or witnesses, but it seems to me that the orderly procedure in the matter, and what seems to be a proper delay for the action of the court, is a matter much more important than the inconvenience that the matter may be to the parties.

I do not think it would be proper for me, with his intimation from counsel that he is going to make an immediate application to the court, to compel him to proceed arbitrarily to hear testimony pending his action in that matter.

I think he is wrong in his procedure.

I am sure I am right in my ruling, but I do feel that it would be an improper thing for me to preclude and prevent him from making his motion to the court, and I also feel that it would not be the proper and orderly thing for me to do to arbitrarily compel him to be present and proceed with the introduction of testimony in the matter, all of which may possibly go to the same point and fall under the same ruling as I have already expressed in the case.

Of course, a court must try to consult the convenience and wishes of the parties, as well as his own convenience and wishes.

I would not for one moment be put in the attitude of preventing a review of my action by the court, and I would not for
236 one moment be guilty, as I should conceive it to be, of the discourtesy of forcing the examination at the present time pending the application and the action of the court upon my ruling.

I think it would be much better if the counsel can agree upon a time to which this should be laid over, for the purpose of this application, and if they cannot, I shall be obliged to nominate some day myself.

Mr. JOHNSON: I prefer that the Master should nominate some day.

Mr. WERNER: Respectfully maintaining the position we have indicated, we will say for complainant that we do not think that the request for a week's delay, as suggested by defendant's counsel, is at all unreasonable, for the purpose which he has in view, of course, and we would suggest that when your Honor adjourns, if you do adjourn for the purpose mentioned, that you adjourn for a time certain so counsel from abroad may attend.

The MASTER: As counsel for defendant has assured me that application will be immediately made to the court, I will adjourn the hearing until one week from today, February 24, 1910, at 10:30 o'clock.

Motion on behalf of Hamilton, Brown Shoe Company, Defendant, that the Special Master in this case, Henry H. Denison, be ordered not to proceed with the Accounting in this case in respect to any Shoes sold by said Defendant since the filing of the Bill (January 29, 1906) marked with the name Hamilton, Brown Shoe Company and with the words American Lady, or marked as just stated

and also packed, as sold by Defendant from the date aforesaid, in Cartons plainly bearing the name of the Defendant thereon, thus clearly indicating that the Shoes so sold by Defendant, since the date aforesaid, are shoes emanating from the Hamilton, Brown Shoe Company, Defendant, and not "The American Girl" Shoes emanating from the Wolf Brothers & Company, Complainant.

Also motion for security for costs.

As grounds for its motion set forth in the above [*en*title], defendant, Hamilton, Brown Shoe Company, states:

That the interloctuory decree heretofore entered in this case, to-wit, on November 15, 1909, (which is the Master's warrant in this case) must be interpreted in the light of the majority opinion of the United States Court of Appeals for this Circuit, ren-
237 dered by Munger, J., concurred in by Van Devanter, J., reported in 165 Fed. 413, and in the light of the decisions of the United States Supreme Court specially referred to in that opinion, at page 418 *and* 165 Fed., said decisions being: Howe Scale Co. v. Wycoff, 198 U. S. 118 and Donnell v. Herring, etc. Co., 208 U. S. 267

That so interpreted the following things are clear:

That the defendant does not have to account before the Master in respect to any shoes sold by it since the date of the filing of the bill, marked with the name American Lady and also marked with the name Hamilton, Brown Shoe Company, because shoes so marked "plainly indicate that it" (the name "American Lady") "was not being used with the secondary signification" (to use the language of said opinion in this case) with the majority opinion of the Court of Appeals attached to the words "The American Girl" as applied to shoes, i. e., was not "indicative" that defendant's shoes, so marked and sold are "of the origin and manufacture" of the Wolf Brothers & Company, complainant.

That in the said majority opinion of the Court of Appeals in this case it was distinctly held (see 165 Fed. 415, 418):

(*a*) That the name "The American Girl" used by complainant "as applied to women's shoes is descriptive merely, viz., shoes manufactured in America and to be worn by women, and not an arbitrary or fanciful name to indicate maker; hence the name 'The American Girl', as applied to shoes, is not the subject of a valid trade mark."

(*b*) That therefore defendant only had to account for such of its shoes, sold since the filing of the bill as it might be shown to have sold which were marked with the words American Lady and not accompanied with such distinguishing marks or matter (such as defendant's name thereon) as would plainly indicate that the shoes so marked [emanated] from the Hamilton Brown Shoe Company.

That it was plainly decided by the said majority opinion of the Court of Appeals in this case, as appears from its said opinion as well as from the two said decisions of the United States Supreme Court (see 165 Fed. 418) which it cites, that if this defendant marked its American Lady shoes, or accompanied them, with defendant's name,

then, as to such shoes, so marked, defendant did not have to
238 account in any way to the complainant—that such shoes, so marked, were beyond and outside of any decree that could be lawfully entered in this case.

That this is plain not only from said majority opinion of the Court of Appeals in this case, but because both of the said decisions of the United States Supreme Court upon which the majority opinion of the Court of Appeals rests in this case, as a reference to these decisions will show, Held, as did the majority of the Court of Appeals in this case:

(*a*) That the name in question was not a valid trade mark, and therefore that the complainant had not the exclusive right to use it.

(*b*) That the defendant might use that name, as applied to the articles in question, when it also applied its own name to the goods in question; for, in such a case, the name of defendant on defendant's article would indicate that they were the goods of defendant, and thus there could be no question of selling the goods of defendant "as and for" the goods of complainant—the essential prerequisite of "Unfair Trade" as distinguished from a strict "trade mark" case.

That in the first of said cases cited in the majority opinion of the Court of Appeals in the case at bar, at page 418 of 165 Fed., that is to say, the case of Howe Scale Co. v. Wycoff, 198 U. S. 118, it appeared (see page 123 of 198 U. S.) that each one of defendant's articles, like defendant's said shoes in the case at bar, were plainly marked with the name of the defendant company.

That in view of that fact and of the fact that the Supreme Court held that the complainant had not exclusive right in the name there in question as a trade name (the name Remington), the Supreme Court held that the defendant could not be prevented from continuing to use the name Remington on its machines, because the mere name of the defendant on its machines plainly and sufficiently indicated, within the meaning of the law applied to cases of "Unfair Competition", that the goods of defendant were not the goods of the complainant.

That in the second of said cases cited by the majority of the Court of Appeals at page 418 of 165 Fed., that is to say, Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, the Supreme Court held:

(A) That the name "Hall" there in question was not a name to which either party could hold the exclusive right.

239 (*b*) That the name "Hall" could be used by both parties as part of their corporate names.

(*c*) That all that the other party could be enjoined from doing was from representing in any way that it was the successor of the original company, or that its goods were the product of the original company.

That in said last-named decision of the Supreme Court in Donnell v. Herring-Hall-Marvin Safe Co., relied upon by the Circuit Court of Appeals in the case at bar, the only other case cited by the Supreme Court other than the said case of Howe Scale Co. v. Wycoff, 198 U. S. 118, already considered, is the decision of the Supreme Court in Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169. In the

Singer case the Supreme Court held (see page 203 of 163 U. S.) that complainant had no exclusive right to the use of the name "Singer" and therefore the defendant had a right to use the words "Singer" on its sewing machines, and that infringement only resulted from the failure of the defendant to plainly mark its machines with the full name of the defendant company. It appears from the statement of facts in this case, at pages 175 and 176 of 163 U. S., that the defendant, whose name originally was Standard Manufacturing Company, was afterwards changed to June Manufacturing Company, but that the defendant had never used its full name on its machines, on which machines it had also placed the name "Singer", but that it had used on its machines an oval brass plate of exactly the same shape as the one found on complainant's machines and attached at the base of the arm, in the same position as the Singer Company had placed its plates; and that on this brass plate, in close imitation of the brass plate of the Singer Company, the defendant had first used the initials "S. M. Co.", which might readily have been taken for "Singer Mfg. Co." and afterwards used the initials "J. Mfg. Co". This clearly indicated fraud, and nowhere on the defendant's machine did the full name of the defendant company appear. It was under such circumstances that the Supreme Court found that while the defendant had the right to use the name "Singer" as the name for its machine, it had been guilty of fraud in connection with the circumstances above detailed, and that thereafter it must be enjoined from using the word "Singer" on its sewing machines, without clearly and unmistakably specifying on said machines that defendant's machines marked with the name "Singer" were the product of the defendant company.

240 That the majority of the Court of Appeals for the Eighth Circuit, composed of the same Judges who rendered the majority opinion in the case at bar, that is to say, Judges Munger and Van Devanter, in the case of Rice, Stix Dry Goods Co. v. Scriven, 165 Fed. 639, a case decided November 19, 1908, (two days after the decision of the same Judges in the case at bar), held that the complainant had no exclusive right to the name "Elastic Seam" as applied to drawers, and that the defendant, who sold drawers made by the Premium Mfg. Company, which drawers bore upon them the words "Elastic Jean Drawers", did not infringe the good-will of the complainant because:

(*a*) Complainant had no exclusive right to the word "elastic" or to the words "Elastic Seam".

(*b*) That on defendant's drawers, upon which appeared the words "Elastic Jean Drawers" also appeared the word "Premium", which sufficiently indicated that the defendant's drawers were made by the Premium Mfg. Company and not by the Scriven Company, the complainant. Besides marking its drawers as above stated, and in the manner illustrated at page 647 of 165 Fed., the defendant placed its drawers in cartons, as did the complainant, and the cartons of the defendant did not bear the defendant's name or state in express terms, any more than did the drawers themselves, that they were made by the defendant, but these cartons, as did the drawers them-

selves, bore upon them the word "Premium" in addition to the words "Elastic Jean Drawer-". In that case the majority opinion of the Court of Appeals for this Circuit Held that there was no infringement and that the defendant had sufficiently marked its drawers and the cartons containing them so as to "indicate" that they were not the product of the Scriven Company, the complainant; and in the latter case the same Judges constituting the majority of the Court of Appeals as constituted the majority of the Court of Appeals in the case at bar, by specific reference to the case of Singer Mfg. Co. v. June Mfg. Co., showed that the defendant by putting the word "Premium" on its drawers and on the cartons containing the same, which word was the characteristic word of the defendant's name, had thereby sufficiently "indicated" that its "Elastic Jean Drawers" were not "Scriven's Elastic Seam" drawers.

That the interlocutory decree in the case at bar, as appears from the decree itself, is in the following words:

"The mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the appeal of the plaintiff from the
241 decree entered herein on February 3, 1908, and the opinion of said Court of Appeals having been filed in this court, it is now, in pursuance of said mandate and opinion, ordered, adjudged and decreed as follows:

1. Said decree entered herein on February 5, 1908, is set aside.

2. The defendant, Hamilton, Brown Shoe Company, its servants agents, officers and employees, are perpetually enjoined from using the name 'The American Lady' as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Brothers & Company, and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408 or 397, or the catch-phrase "With the character of the woman" or any other phrase in simulation of the phrase 'A shoe as good as its name'.

3. The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded.

4. This case is referred to H. H. Denison, Esq., as Master, upon the evidence already taken in this case and the exhibits in evidence in this case, and such further evidence as may be offered before the Master by the parties to this action, to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits, since the commencement of this suit for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case and which were marked with the name 'The American Lady' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton, Brown Shoe Company."

That notwithstanding the terms of the said decree, construed as this decree must be by the decision of the majority opinion of the Court of Appeals in the case at bar hereinbefore referred to and reported in 165 Fed. 413-418, and by the decisions of the Supreme

Court of the United States hereinbefore referred to, as well as by the decision of the same Judges constituting the same United States Circuit Court of Appeals for this Circuit in the case of Rice, Stix Dry Goods Co. v. Scriven, 165 Fed. 639, hereinbefore referred to; nevertheless, the Master in this case, H. H. Denison, Esq., has exceeded his authority under the said decree, and notwith-
242 standing the objections of record made by the defendant's counsel, proposes to allow the complainant to inquire into, and compel the defendant to account to the complainant for, the profits that the defendant has made on shoes sold by the defendant since the filing of the bill of complaint in this case with the name American Lady, even though each of said shoes, as well as the cartons containing every pair of said shoes, bear plainly marked thereon, in connection with the words "American Lady", the name "Hamilton, Brown Shoe Co." That this threatened action on the part of said Master is contrary to the law applicable in this case, and contrary to the terms of the interlocutory decree in this case, when the said decree is construed, as it must be, in the light of the decision of the majority of the Court of Appeals in this case, and in the light of the decisions to which we have referred, which are exclusively decisions of the United States Court of Appeals for this Circuit or decisions of the Supreme Court of the United States, two of which are cited in the opinion of the majority of the United States Court of Appeals in the case at bar, as warrant for the conclusion reached by the majority of the United States Court of Appeals in the case at bar in its ultimate conclusion that the defendant might not use the name American Lady on its shoes unless it also used its own name thereon; for this, as we contend, is the only lawful interpretation that can be placed upon the majority opinion of the Court of Appeals in the case at bar, and is clearly what the majority of the United States Court of Appeals in the case at bar meant to decide and did decide, so far as the question here at issue is concerned.

Defendant herewith presents, in connection with this motion, a pair of shoes such as exhibited before the Master in the taking of the testimony already had before the Master, each of which is plainly marked on the sole thereof with the name American Lady and with the name Hamilton, Brown Shoe Company, as well as the carton marked "Defendant's Exhibit, American Lady Shoe Carton, January 31, 1910, H. H. Denison, Master", referred to in this motion, which carton plainly bears on the lid thereof the words "Hamilton Brown Shoe Co.'s American Lady," and which carton bears at the front end thereof, among other things, the words American Lady and the the name Hamilton, Brown Shoe Company; and defendant also presents to the Court, in connection with this motion, a copy of the transcript of the record of testimony already taken before the Master, that the Court may see for itself what has already taken place before the Master, and that the Master does propose to proceed with this accounting, unless otherwise
243 ordered by this Court, and to compel the defendant to account for all its American Lady shoes sold since the date of the filing of the bill in this case, which are marked as the aforesaid pair

of shoes is marked, and each of which pair of American Lady shoes, as sold by the defendant since the filing of the bill in this case, were placed in a carton like the said carton hereinbefore referred to.

To illustrate these matters in a more simple form, defendant attaches to this motion as an exhibit, marked Exhibit A, a reproduction of the mark on the sole of the pair of defendant's American Lady shoes put in evidence by the complainant before the Master, said mark showing the strap trade mark of Hamilton, Brown Shoe Company and on said strap trade mark the words Hamilton, Brown Shoe company and the words American Lady in the center of said strap trade mark. Also, an exact duplicate of the label on the lid of the carton put in evidence before the Master, hereinbefore referred to and marked "Defendant's Exhibit, American Lady Shoe Carton, January 31, 1910, H. H. Denison, Master", the said label here attached and being a duplicate of the label on the lid of said carton being marked Exhibit B. Also, a label showing the matter which appears on the end of said carton bearing the name American Lady, the picture of Martha Washington, the strap trade mark of Hamilton, Brown Shoe Company bearing the words Hamilton, Brown Shoe Company on the strap, and also in the center of the strap, on a red background, the word "Makers", and said label (a duplicate of the label on the end of said carton) is hereto attached and marked Exhibit C.

Defendant moves the Court, under the circumstances, and in view of the fact that if the Master be permitted to proceed with the accounting as herein indicated the defendant will not only be put to large and unnecessary expense but that its private affairs, outside of the scope of this accounting, will be inquired into, under the extraordinary and usual circumstances of this case, to order:

That the Master be instructed not to permit this accounting to proceed in respect to any American Lady shoes sold by the defendant since the filing of the bill of complaint in this case which shoes were marked with the name Hamilton, Brown Shoe Company; and not to proceed with the accounting in this case as to shoes so marked and sold by the defendant since the date of the filing of the bill of complaint in this case, which shoes, as sold by the defendant since the date aforesaid, were placed in cartons bearing upon said car-
244 tons the name American Lady and the name Hamilton, Brown Shoe Company, or the words Hamilton, Brown Shoe Co.'s American Lady".

Defendant further states that before the first hearing before the Master was commenced on the morning of January 31, 1910, a stipulation was made between the counsel for complainant and counsel for defendant in this case, which was duly filed in this Court and appears of record, which is in the following words: It is hereby stipulated and agreed by and between the parties to this cause that after the mandate from the United States Circuit Court of Appeals in this cause was filed in the United States Circuit Court, and before the order was entered by the United States Circuit Court referring this cause to the Special Master for an accounting, the defendant, Hamilton, Brown Shoe Company, did make due and lawful tender

of the sum of one dollar, lawful money of the United States, to the complainant, The Wolf Brothers and Company, in full settlement of all damages and profits which the complainant may be entitled to recover upon said accounting."

Defendant also states that, as appears from the record in this case, the complainant in this case is a citizen of the State of Ohio, being a corporation duly created and existing under and by virtue of the laws of the state of Ohio, and therefore is a non-resident complainant and a citizen of another State; that the Master's fees and expenses incident to the accounting, as already had, will amount to a considerable sum; that notwithstanding the offer and tender made by the defendant to the complainant before this accounting was commenced (evidenced by the stipulation set forth above), the complainant has refused to accept the same and insists upon continuing this expensive accounting. For these reasons the defendant respectfully asks that this Court make an order now on the complainant that the complainant, within five days of the order of this Court shall give security, satisfactory to the Court, to pay all the costs and expenses, incident to this accounting, including the Master's fees; and to that end the defendant respectfully prays that this Court make an order now requiring the complainant to deposit with the Clerk of this Court at least the sum of Two Thousand Dollars or in lieu thereof good and sufficient bond, with sureties to be approved by this Court, in the sum of Four Thousand Dollars, said security or said bond for costs to be increased, within the discretion of this Court and upon proper application made by the defendant, from time to time as to this Court may seem meet and proper; or for such order as this Court may deem just in the premises.

245 Defendant also prays that pending the decision of this Court on this motion the Master be ordered to stay all further proceedings on this accounting. And defendant will ever pray.

(Signed) PAUL BAKEWELL,
Solicitor for Defendant, Hamilton, Brown Shoe Company.

St. Louis, Feb. 21, 1910.

Exhibit A is a reproduction of the mark on the sole of defendant's American Lady shoes.

Exhibit B: an exact duplicate of the label on the lid of the carton put in evidence before the Master, being a picture of a lady, bearing the words "Hamilton-Brown Shoe Co.'s on the top, and American Lady" on the bottom of said picture.

Exhibit C is a label which appears on the end of said carton bearing the words "American Lady Special" and also a picture of Martha Washington; also the strap trade mark of the Hamilton-Brown Shoe Company.

ST. LOUIS, Feb. 24, 1910.

Met pursuant to adjournment as above on Thursday, Feb. 24, 1910, at 10:30 A. M.

By consent of the parties adjournment was taken to Thursday, March 3, 1910, at 10:30 A. M.

(Memorandum Opinion of Court on Motion of Defendant to Direct Master Not to Proceed Further with Accounting, etc.)

Memorandum of opinion delivered from the bench in the above entitled cause by Hon. David P. Dyer, U. S. District Judge, on Monday, February 28, 1910.

This is a motion on behalf of the defendant to direct the Special Master in this case, heretofore appointed by this court, not to proceed with the accounting in respect to any shoes sold by the defendant since the filing of the bill, and marked with the name "Hamilton-Brown Shoe Company," and "American Lady," and also packed in cartons so marked, sold by the defendant from the time of the making of the order.

This was a proceeding originally brought by Wolf Brothers against Hamilton-Brown Shoe Company, for an alleged infringement of what they claimed to be a trade mark. When the bill was presented to me in the Circuit Court it was dismissed. The case then went to the Court of Appeals, where the decision of this
246 court was reversed by a divided court. When this mandate of the Court of Appeals was received here a Master was appointed to take an accounting of the profits on all shoes sold after the filing of the bill not bearing the mark of the manufacturer thereon.

The Master is now proceeding to take testimony under this reference.

It is claimed by the defendant in this motion that the name "Hamilton-Brown Shoe Company" stamped on the bottom of the shoes is sufficient to indicate that they are the product of the Hamilton-Brown Shoe Company, and that this mark does not in any wise indicate that they are the complainant's shoes.

I have gone over the case with a view of trying to reach a conclusion as to what the Circuit Court of Appeals, meant by its finding. In that connection I have compared the shoes filed as exhibits by complainant in this motion with the shoes filed as exhibits in the original case, and which were before the Court of Appeals, together with the boxes filed as exhibits in these cases.

The shoes on the bottom show the words "Security Welt"—"Hamilton-Brown Shoe Co. American Lady."

On the boxes appear the words "American Lady Special" on the outside, and on the inside the words "Hamilton-Brown Shoe Co., Makers." The exhibits before the Court of Appeals when it decided this case had upon the bottom of the shoes the words "Hamilton-Brown Shoe Company, American Lady," and on the inside of the shoes were marked the numbers and the words "American Lady, Hamilton-Brown Shoe Company, Makers."

The court held as I understood it and now understand it, that the defendant company could make the shoe and use the words "American Lady" as distinguished from the words "American Girl" used by the complainant, provided it was shown from the

shoe thus made that it was the manufacture of the Hamilton-Brown Shoe Co.

The shoes now offered do not show nor indicate that the Hamilton-Brown Shoe Company was the manufacturer thereof.

I am satisfied that the Court of Appeals meant by that decision that the Hamilton-Brown Shoe Company could sell the shoe bearing the words "American Lady" provided that it was accompanied by a clear indication that it was the manufacture of the Hamilton-Brown Shoe Company.

The motion will be overruled.

247 To the Honorable the Judges of the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri:

Petition on the part of Hamilton, Brown Shoe Company that this Court Set Aside so Much of its Order in this Case Entered February 28, 1910, as Overrules Defendant's Motion that the Special Master in this Case, Henry H. Denison, Esq., be Ordered to Proceed no Further in the Accounting in Respect to Shoes Sold by the Hamilton, Brown Shoe Co., Since the Filing of the Bill of Complaint in this Case, and Which Shoes Were Marked with the Name "American Lady" and with the Name "Hamilton, Brown Shoe Co.", and Which Shoes as Sold by Defendant, Since the Filing of the Bill, Were Placed in Cartons Plainly Bearing the Name "Hamilton, Brown Shoe Co." on the Lid of said Cartons and on the End of said Cartons Plainly Bearing the Words "Hamilton, Brown Shoe Co. Makers": and for a Reconsideration, Before More than one of the Judges of this Court if Possible, of Defendant's Motion, so far as the Above Matter is Concerned, Which Motion of Defendant was Filed in this Court Heretofore, to wit, on February 21st, 1910.

For grounds of this petition, defendant states:

That on the argument of the settlement of the decree in this case the complainant's counsel presented a form of interlocutory decree, an exact copy of which is hereto attached and marked "Exhibit A"; and that at the same time the defendant's counsel presented a form of interlocutory decree, an exact copy of which is hereto attached and marked "Exhibit B," the said form of the said last named decree having been based, as defendant's counsel believes, upon that part of the decision of the majority of the Court of Appeals in this case (see 165 Fed. pp. 417-418) which is in the following words:

"In some respects the markings upon the bottom of defendant's shoes and upon the cartons and boxes in which the shoes were placed were in simulation of those of complainant; but, as the simulation in these respects was discontinued by defendant upon the bringing of this suit, we will not extend this opinion by pointing out the similarity.

Legitimate competition in trade is not only the right of every person, but to be commended, when of public benefit. It is only

when competition is deceptive that it is condemned by the law.

While the term 'The American Girl' as applied by com-
248 plainant and its predecessors, was not subject to exclusive appropriation by them, it had, nevertheless, by their long-continued use of it, come to have a secondary meaning, indicative of the origin and manufacture of the shoes to which it was applied, and had come to be recognized in the trade as meaning that such shoes were those of the complainant and its predecessors. Whatever of good will and advantage resulted from this was the property of the complainant, and, while others were entitled to use the same or any similar term, because of its being common property, they could do so only on condition that they accompanied it with such distinguishing marks or matter as would plainly indicate that it was not being used with its secondary signification; that is, as pointing to the complainant as the manufacturer of the goods to which it was applied. Howe Scale Co. v. Wycoff, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481.

Complainant is not guilty of such laches as to deprive it of an injunction; but we think an accounting should be limited to the time since the commencement of this suit.

Complainant is entitled to a decree enjoining the defendant from using the name 'The American Girl' as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's, and from using, in connection with such name, as applied to its shoes for women, the numerals mentioned, or the catch phrase 'With the character of the woman,' or any other phrase in simulation of the phrase 'A shoe as good as its name,' and also to an accounting as before stated.

The decree of the Circuit Court is reversed, with directions to enter a decree in accordance herewith."

That after argument of counsel for complainant and counsel for defendant on the settlement of the decree, heretofore, to wit, on November 15, 1909, the interlocutory decree in this case was entered which interlocutory decree, except as to filling out the name of the Master (the name of the Master having been agreed to by counsel for complainant and counsel for defendant) is exactly like the form of decree presented by defendant's counsel and attached hereto as Exhibit B."

This petition is presented by defendant, because defendant and its counsel verily believe that if the order made herein on Feb-
ruary 28, 1910, stand, and in pursuance thereof the Master
249 be permitted to proceed with the accounting in respect to shoes sold by defendant since the filing of the bill in this case, marked as to the shoes themselves and as to the cartons containing every pair of such shoes as hereinbefore stated, the result will be a miscarriage of justice and an irreparable injury will be done to the defendant before defendant can have remedy, by appeal, in the United States Circuit Court of Appeals for the Eighth Circuit; that in the meantime, if the Master be permitted to proceed

with this accounting in respect to the defendant's shoes marked as hereinbefore stated, the private affairs of the defendant company, which are its trade secrets entitled to protection under the law, will be gone into by evidence which is irrelevant or immaterial to any inquiry which it was intended by the majority opinion of the U. S. Court of Appeals in this case should be inquired into on any accounting ordered in pursuance of the mandate and majority opinion of the said court, this inquiry into the private affairs of the defendant company, irrelevant and immaterial to the proper inquiry before the Master, being matters of privilege and privacy and in the nature of trade secrets, which, under the decisions of the U. S. Court of Appeals for this Circuit in the cases of Dowagiac v. Lochren, 143 Fed. 214; Electric Co. v. Hamilton, Brown Shoe Co., 165 Fed. 285; and First National Bank v. Abbott, 165 Fed. 855, cannot be gone into on this accounting.

This petition is also presented because if the Master be permitted to proceed with this inquiry and compel the defendant to account for all the profits made by defendant, since the filing of the bill, on shoes sold by defendant marked with the name "American Lady" and also plainly marked on the shoes themselves, as well as on the cartons containing every pair of such shoes, with the name Hamilton, Brown Shoe Company, contrary, as defendant and its counsel believes, to the intention of the majority of the Court of Appeals in its decision in the case at bar when that decision is interpreted in the light of the facts and of the decisions of the United States Supreme Court in Howe Scale Co. v. Wycoff, 198 U. S. 118, and Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, the result will be a miscarriage of justice in this case. That the probable and almost necessary result will be that the Master will report and recommend a judgment for a large amount against defendant for shoes sold since the filing of the bill and marked as above stated; and if this Court should adhere to its ruling made on February 28, 1910, in overruling the part of defendant's motion hereinbefore referred to, this Court would then confirm the Master's report, with
250 the probably inevitable result that a judgment of this court would be rendered against this defendant for profits made on its shoes marked as hereinbefore stated, since the filing of the bill in this case, amounting to a very large sum of money.

Therefore, under the conditions stated above, not only would the private affairs of the defendant have in the meantime been inquired into, in respect to privileged matters irrelevant and immaterial to the proper scope of the inquiry on the accounting, as defendant and its counsel firmly believe, which injury to the defendant would have been accomplished and could not be remedied on appeal, but also if a final judgment and decree were entered as hereinbefore stated, before the defendant could perfect its appeal to the United States Circuit Court of Appeals for this Circuit, it would be compelled to give a bond for a very large sum in respect to profits improvidently inquired into.

For these reasons, defendant respectfully petitions this Court as hereinabove prayed, and also asks this Court, in view of the importance of the questions arising, not only in respect to the large

amount involved but also in respect to the privileged matter, affecting the defendant, which the Master must needs inquire into, if the order of this Court made on February 28, 1910, hereinbefore complained of, stand, that more than one of the Judges of this Court sit in the consideration of this petition, and in the reconsideration of defendant's motion heretofore filed in this cause, to wit, on February 21, 1910, and in this connection defendant, invokes all that it has stated in its said motion filed herein on February 21, 1910.

Defendant also files herewith a memorandum of the remarks or opinion of this Court rendered herein on February 28, 1910, in passing upon defendant's said motion filed herein on February 21, 1910, and marks the same "Exhibit C"; and in that connection defendant states, in respect to the remarks of this Court in its said opinion to the effect—

"The exhibits before the Court of Appeals when it decided this case had upon the bottom of the shoes the words 'Hamilton Brown Shoe Company, American Lady,' and on the inside of the shoes were marked the numbers, and the words 'American Lady-Hamilton-Brown Shoe Company, Makers."

That said pair of shoes, so far as the record before the United States Court of Appeals for the Eighth Circuit shows, were not shoes shown to have been sold by defendant until after the filing of the bill in this case.

251 Therefore, defendant prays as hereinbefore stated, and will ever pray, and prays the Court that until this petition is disposed of the Master be ordered to suspend any proceedings on this accounting until the further order of this Court.

(Signed) PAUL BAKEWELL,
Solicitor for Hamilton, Brown Shoe Company, Defendant.

March 1, 1910.

UNITED STATES OF AMERICA,
State of Missouri, City of St. Louis, ss:

Paul Bakewell, being first duly sworn, on his oath states: That he is the solicitor for the defendant in this case; that he has prepared and read the foregoing petition; that the said petition is made in the utmost good faith; that, so far as said petition relates to matters stated on information and belief, or matters of opinion, he verily believes it to be true; and that, so far as said petition relates to matters of facts, it is true in point of fact.

[SEAL.] (Signed) PAUL BAKEWELL.

Sworn to and subscribed before me, this first day of March, 1910.

[SEAL.] (Signed) GEORGE BAKEWELL,
Notary Public.

My term expires February 5, 1913.

Exhibit A.

(SEAL.) George Bakewell, Notary Public.

(Form of Interlocutory Decree on the Mandate of the Court of Appeals Presented by Complainant.)

The mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the appeal of the plaintiff from the decree entered herein on February 3, 1908, and the opinion of said court of appeals having been filed in this court, it is now, in pursuance of said mandate, ordered, adjudged and decreed as follows:

1. Said decree entered herein on February 3, 1908, is set aside.

2. The defendant, Hamilton-Brown Shoe Company, its servants, agents, officers and employees, are perpetually enjoined from using the name "The American Lady", as applied to its shoes for
252 women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Bros. & Company, and from using in connection with such name, as applied to its shoes for women, the numerals, 403, 404, 407, 408, or 397 or the catch phrase "With the Character of the Woman" or any other phrase in simulation of the phrase "A Shoe as Good as its Name".

3. The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded.

4. The case is referred to —— —— upon the evidence already taken and such further evidence as may be offered by the parties to ascertain and report the damages, since the commencement of this suit, to which the plaintiff is entitled, and the profits for which the defendant is liable under the ruling and opinion of the Circuit Court of Appeals in this case.

Exhibit B.

(SEAL.) George Bakewell, Notary Public.

(Form of Interlocutory Decree on the Mandate of the Court of Appeals Presented by Defendant.)

The mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the appeal of the plaintiff from the decree entered herein on February 3, 1908, and the opinion of said Court of Appeals having been filed in this court, it is now, in pursuance of said mandate and opinion, ordered, adjudged and decreed as follows:

1. Said decree entered herein on February 3, 1908, is set aside.

2. The defendant, Hamilton-Brown Shoe Company, its servants, agents, officers and employees, are perpetually enjoined from using the name "The American Lady", as applied to its shoes for women,

when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Brothers & Company, and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408 or 397, or the catch-phrase "with the character of the woman" or any other phrase in simulation of the phrase "A shoe as good as its name."

253 3. The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded.

4. This case is referred to —— —— as Master, upon the evidence already taken in this case and the exhibits in evidence in this case, and such further evidence as may be offered before the Master by the parties to this action, to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case and which were marked with the name "The American Lady" and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton, Brown Shoe Company.

[SEAL.] (Signed) DAVID P. DYER, *Judge.*

Nov. 15, 1909.

EXHIBIT C.

[SEAL.] George Bakewell, Notary Public.

(Memorandum Opinion of Court on Defendant's Motion That Special Master Be Ordered Not to Proceed Further with Accounting, etc.

Memorandum of opinion delivered from the bench in the above entitled cause by Hon. David P. Dyer, U. S. District Judge, on Monday, February 28th, 1910.

This is a motion on behalf of the defendant to direct the Special Master in this case, heretofore appointed by this Court, not to proceed with the accounting in respect to any shoes sold by the defendant since the filing of the bill, and marked with the name "Hamilton-Brown Shoe Company" and "American Lady", and also packed in cartons so marked, sold by the defendant from the time of the making of the order.

This was a proceeding originally brought by Wolf Brothers against the Hamilton-Brown Shoe Company for an alleged infringement of what they claimed to be a trade-mark. When the bill was presented to me in the Circuit Court it was dismissed. The case then went to the Court of Appeals, where the decision of this

court was reversed by a divided court. When this mandate
254 of the Court of Appeals was received here, a Master was appointed to take an accounting of the profits on all shoes sold after the filing of the bill, not bearing the mark of the manufacturer thereon. The Master is now proceeding to take testimony under this reference.

It is claimed by the defendant in this motion that the name "Hamilton-Brown Shoe Company" stamped on the bottom of the shoes is sufficient to indicate that they are the product of the Hamilton-Brown Shoe Company, and that this mark does not in any wise indicate that they are the complainant's shoes.

I have gone over the case with the view of trying to reach a conclusion as to what the Circuit Court of Appeals meant by its finding. In that connection I have compared the shoes filed as exhibits by Complainant in this motion with the shoes filed as exhibits in the original case, and which were before the Court of Appeals, together with the boxes filed as exhibits in these cases. The shoes on the bottom show the words "Security Welt-Hamilton-Brown Shoe Company-American Lady". On the boxes appear the words "American Lady Special" on the outside, and on the inside the words "Hamilton-Brown Shoe Company, Makers". The exhibits before the Court of Appeals when it decided this case had upon the bottom of the shoes the words "Hamilton-Brown Shoe Company, American Lady", and on the inside of the shoes were marked the numbers, and the words "American Lady-Hamilton Brown Shoe Company, Makers".

The court held, as I understood it and now understand it, that the defendant company could make the shoe and use the words "American Lady" as distinguished from the words "American Girl", used by the complainant, provided it was shown from the shoe thus made that it was the manufacture of the Hamilton-Brown Shoe Company. The shoes now offered do not show nor indicate that the Hamilton-Brown Shoe Company was the manufacturer thereof.

I am satisfied that the Court of Appeals meant by that decision that the Hamilton-Brown Shoe Company could sell the shoe bearing the words "American Lady", provided it was accompanied by a clear indication that it was the manufacture of the Hamilton-Brown Shoe Co.

The motion will be over-ruled.

255 ST. LOUIS, March 3, 1910.

Met pursuant to adjournment as above on Thursday, March 3, 1910, at 10:30 A. M.

By consent of parties adjournment was taken to Thursday, March 10, 1910, at 10:30 A. M.

Memorandum of Remarks in the Above Entitled Cause by Hon. David P. Dyer, U. S. District Judge, on Thursday, March 3, 1910.

Mr. BAKEWELL: If your Honor, please, in connection with the case of Wolf *vs.* Hamilton-Brown Shoe Company, I first desire to

ask permission to file a petition for a review of the order of the court of February 28, 1910, a copy of which I served on the other side, and if the court will permit——

The COURT: I came down this morning feeling very unwell and I am not disposed to take up anything that would detain me on the bench for any length of time.

Mr. BAKEWELL: I ask leave to file it. I do not care to argue the matter.

With your Honor's permission and the consent of the other side, I will file this with a brief in support of it, a copy of which I will give to the other side. I do not care to make any oral argument at all.

The COURT: That may be done and I will consider it when I can.

I decided the matter the other day on what I considered to be the decision of the Court of Appeals. Of course it is my duty to follow up that decision.

It is known to counsel that when this case was originally presented I heard it and dismissed the bill. The Court of Appeals reversed it and undertook to decide what should be done. It is my duty to obey that decision, whatever it is.

I appreciate what was said by counsel the other day about the matter. I had hoped that I might be able to have the views of another Judge, if I could have him with me upon the bench to determine whether I was right in my construction of the Court's decision. I understand there is to be another Judge here tomorrow and I may take occasion to consult him and if necessary have him come and hear this matter in open court. I think the matter sufficiently important to give it that attention.

I can see the scope to which this inquiry goes, and I can see that if the indication upon the shoe sold by the Hamilton-Brown
256 Shoe Company is a compliance with the decision of the Court of Appeals (which I do not think it is)—if that is sufficient, I can see the examination ought not to go on.

The Judge of this court does not claim infallibility and if I find I am wrong about anything, I hope I will always have the courage to say I am wrong. But because of the two opinions delivered in that case in the Court of Appeals, I have been at a loss to know exactly where we are. However, I considered the majority decision. In the meantime, counsel will await the final action of the court in this matter.

Mr. BAKEWELL: If the court should desire oral argument he will let us know?

The COURT: I will be frank to say that I will be very glad if I can be able to have another Judge with me to hear the arguments you made the other day, because I do not wish to do an injustice to either side. I might lean too far either way in trying to find out what the Court of Appeals meant——

Mr. BAKEWELL: If the court should desire oral argument I shall be glad to make it.

The COURT: I will see. I am perfectly willing to hear this matter again, in fairness to both sides.

ST. LOUIS, March 10, 1910.

Met pursuant to adjournment on Thursday, March 10, 1910, at 10:30 A. M.

By consent of the parties adjournment was taken to March 17, 1910, at 10:30 A. M.

ST. LOUIS, March 17, 1910.

Met pursuant to adjournment as above, on Thursday, March 17, 1910, at 10:30 A. M.

On account of the absence of the witness, W. F. McElroy, from the city, it was consented by all parties that adjournment should be taken until Thursday, March 24, 1910, at 10:30 o'clock A. M.

ST. LOUIS, March 24, 1910.

Met pursuant to adjournment as above on Thursday, March 24, 1910, at 10:30 A. M.

By consent of the parties adjournment was taken until Monday, March 28, 1910, at 10:30 A. M.

257 ST. LOUIS, March 28, 1910.

Met pursuant to adjournment as above on Monday, March 28, 1910, at 10:30 A. M.

By consent of the parties adjournment was taken until Thursday, April 7, 1910, at 10:30 A. M.

(Testimony for Complainant.)

ST. LOUIS, April 7, 1910.

Met pursuant to adjournment as above on Thursday, April 7, 1910, at 10:30 A. M.

Present:

Mr. Henry H. Denison, Special Master.

Messrs. Percy Werner and Simeon Johnson, appeared in behalf of the Complainant.

Mr. L. E. Hart appeared in behalf of the defendant.

The following proceedings were had:

BERTHA BLOME, a witness of lawful age being duly produced, sworn and examined testified on behalf of the complainant as follows:

Direct examination.

By Mr. WERNER:

188 Q. Miss Blome, will you state your full name?
A. Bertha Blome.
189 Q. And your residence?
A. Clayton, Missouri.
190 Q. And your occupation?

A. I am a stenographer.

191 Q. You are in the employ of the interrogator?

A. Yes, sir.

192 Q. Miss Blome, I will ask you whether on or about February 15, 1910, you went over at my request, to the "Shoe Mart," for the purpose of purchasing a pair of "American Lady" shoes?

A. Yes, sir, I did.

193 Q. I will ask you to see whether you identify the shoes which I now hand you as being the shoes you purchased there, and if so, how?

A. Yes, sir, these are the shoes I bought. I identify them by my initials and by the date on them which I put on myself.

194 Q. You put it on yourself?

A. Yes, sir.

195 Q. I believe you have a memorandum there of the serial number?

A. No, there is no memorandum of the serial number here; there is, 115 3 O, if that is the number.

258 196 Q. Yes, that is what I mean. Do you identify those shoes now?

A. Yes, sir, it is the same number and the same pair of shoes.

197 Q. Now, I will ask you what about the carton from which you have taken these shoes: where did you procure that and when?

Mr. HART: The defendant objects to this testimony because of the fact that it does not appear when this pair of shoes, stamped on the sole with the name "American Lady," enclosed within the belt band, which bears upon it, the name "Hamilton-Brown Shoe Company" left the factory of the Hamilton-Brown Shoe Company; when they were sold by the Hamilton-Brown Shoe Company, nor the condition with respect to the accompanying matter, such as the carton in which such shoes were sold by the Hamilton-Brown Shoe Company.

It is absolutely immaterial what kind of carton these shoes were sold in by some other person than the Hamilton-Brown Shoe Company. We are only concerned in this inquiry with the manner in which the shoes were sold by the Hamilton-Brown Shoe Company and the carton in which such shoes may have left the Hamilton-Brown Shoe Company, and such inquiry must be limited to the time since January 29, 1906.

Mr. WERNER: We will expect to follow up this with other testimony showing the connection and relevancy.

The MASTER: With regard to that objection I cannot see how this testimony can be relevant, unless it is to be shown hereafter that these shoes were sold during the period of time for which the court has ordered the inquiries to be made, but it will be received subject to the objection.

Mr. HART: Exception is taken to that ruling.

Mr. WERNER:

198 Q. (Question read as follows):

Now, I will ask you what about the carton from which you have taken the shoes: Where did you procure that and when?

A. The shoes were first wrapped up in paper, but I asked the clerk to put them in a box and I noticed that he put in a different box than the one from which he took them, which was just like all the other boxes on the shelves. But this box is a different kind of a box.

199 Q. Were all the boxes on the shelves in the store uniform, or alike?

A. Yes, sir.

259 200 Q. Were they in appearance like that?

Mr. HART: I make the same objection.

A. Not exactly, no, not the same color.

Mr. WERNER:

201 Q. You think they were not the same color?

A. No, I looked at the others. This was not taken from the shelves, it was taken from where they wrapped shoes.

202 Q. But the shoes were taken from the shelves?

A. Yes, sir.

Mr. WERNER: I ask the stenographer to mark those shoes and the carton for identification.

Mr. HART: You are not offering them in evidence?

Mr. WERNER:

203 Q. Can you describe the boxes that were on the shelves; did you examine them or not?

A. They were plain white boxes, with numbers on them. That was all I noticed.

204 Q. That they were plain, no printing on them that you could see on the face?

Mr. HART: I make the same objection to that.

A. I could not see from where I was sitting; they had numbers on them.

Mr. WERNER:

205. Q. Similar to the end of this carton (showing witness carton)?

A. Yes, sir, but they were different colors.

Mr. HART: I make the same objection to that.

Mr. WERNER: I offer the shoes and the carton in evidence and ask that they be marked for identification.

Mr. HART: My objection to the introduction in evidence of the shoes identified by the witness is made on the ground that it fails to appear when the shoes were sold by the Hamilton-Brown Shoe Company. That is, it fails to show that they were sold by the Hamilton-Brown Shoe Company within the time limited within this accounting. It fails also to appear in what condition the shoes were with respect to the marking and accompanying matter at the time they were sold by the Hamilton-Brown Shoe Company and

that the shoe- themselves are plainly marked on the sole of each shoe with the name "American Lady" encio ed within the belt trademark of the Hamilton Brown Shoe Company which bears
260 upon it in plain type the name "Hamilton-Brown Shoe Company;" and for the further reason that it does not appear that the defendant is liable to account in any way for those shoes.

Cross-examination.

By Mr. HART:

206 Q. I believe you said you were in the employ of Mr. Werner, counsel for the complainant?
A. Yes, sir.
207 Q. And you went to the Shoe Mart at his request?

Mr. WERNER:

208 Q. Either directly or indirectly.

Mr. HART:

209 Q. You went there at Mr. Werner's direction, did you not?
A. Do you mean his direct instructions?
Mr. WERNER: You can just state exactly the facts.
A. No, it was Mr. Wolf who spoke to me about it.

Mr. HART:

210 Q. One of the officers of the complainant company suggested that you go to the Shoe Mart and purchase a pair of shoes?
A. Yes, sir.
211 Q. You knew when you purchased this pair of shoes you were purchasing a pair of "American Lady" shoes, did you not?
A. Yes, sir.
212 Q. And you knew they were marked on the sole with the name "Hamilton-Brown Shoe Company"?
A. Yes, sir, I looked at them.
213 Q. And you were not under the impression at the time that those shoes were the product of the Wolf Bros. Company, complainants? In other words, you did not go there for the purpose of purchasing a pair of shoes manufactured by the complainant, the Wolf Brothers Company?
A. I did not think about that matter at all.
214 Q. You just went there to buy a pair of "American Lady" shoes?
A. Yes, sir.
215 Q. And you knew they were manufactured by the defendant the Hamilton-Brown Shoe Company? That was your understanding was it not?
A. I cannot answer that directly.
216 Q. Did you have any understanding in the matter at all?
A. No, I did not think about that part of it.
Mr. WERNER: She was simply asked to buy a pair of "American Lady" shoes.
261 A. No, I did not think of that.

Mr. HART:

217 Q. Did you know at that time that the Hamilton-Brown Shoe Company manufactured the "American Lady" shoes?

A. I knew they put their name on some of the shoes, with the "American Lady" name on also.

218 Q. You knew that the "American Lady" shoes you were going there to purchase were the product of the Hamilton-Brown Shoe Company?

A. Did I know at that time?

219 Q. Yes. That was your impression, was it not?

A. No, I don't think it was. I did——

220 Q. But you said you did not understand that the shoes you were going there to purchase were the product of the Wolf Brothers Company, complainant in this case?

A. That I did not understand it?

221 Q. You had no understanding to that effect?

A. I don't think I can answer that, exactly.

Mr. WERNER:

222 Q. You were simply directed, then, by Mr. James Wolf, to go to the Shoe Mart and buy a pair of "American Lady" shoes; is that the fact?

A. Yes, sir.

223 Q. That is a fact?

A. Yes, sir.

224 Q. Mr. Wolf was in my office at the time you did this?

A. Yes, sir.

Mr. HART: I did not understand that the Master ruled on my objection to your offer.

The MASTER: I received them subject to the objection. I did not see the relevancy; unless it is shown that——

Mr. HART: You reserve your ruling for the present?

The MASTER: Yes, sir.

NOTE.—The shoes offered were marked by the Master, "Complainant's Exhibit No. 2, April 7, 1910, Henry H. Denison, Master".

The carton offered was marked by the Master, "Complainant's Exhibit No. 3, April 7, 1910, Henry H. Denison, Master".

JOHN H. MAIZE, a witness of lawful age, being duly produced, sworn and examined on behalf of the complainant, testified as follows:

262 Direct examination.

By Mr. WERNER:

225 Q. Mr. Maize, please state your full name, age and residence.

A. John H. Maize; I am 25 years of age and reside at 4532 Cook Avenue at the present time.

226 Q. And your business is what?

A. I am Superintendent of the Shoe Mart Company.

227 Q. How long have you held that position?

A. Two years last January 1st; practically that time.

228 Q. What did you do prior to that time?
A. I was engaged at the Shoe Mart Company.
229 Q. In what capacity?
A. Well, the capacity was general. It was looking after the stock, the goods that came in; ordering goods, and looking after the orders, mail orders.
230 Q. When did that connection with the Shoe Mart commence?
A. Well, at their opening, or a few days before.
231 Q. When the Shoe Mart was started?
A. Yes, sir, I was with them a few days prior to their opening. Some of these matters, such as mail orders, it was impossible—there were none at that time.
232 Q. When did they start business?
A. They opened for business on Nov. 1st, I think it was.
233 Q. November first of what year?
A. 1906, I believe.
234 Q. November, 1906; that is your recollection?
A. Yes, sir.
235 Q. They were a newly incorporated company at that time?
A. Yes, sir. But I cannot state positively now whether October 1st or November 1st.

Mr. HART: I object to the question as to their being an incorporated company. The articles of incorporation would be the best evidence of that.
The MASTER: The objection is overruled.

Mr. WERNER:

236 Q. Your best recollection is that it was in the fall of 1906?
A. Yes, sir.
237 Q. 1906 is the year?
A. Yes, sir.
238. Q. Prior to that time what were you doing?
A. Prior to that time I worked with the Hamilton-Brown Shoe Company.
239 Q. In what capacity?
263 A. In the capacity of a stenographer.
240 Q. In which department?
A. In the advertising department.
241 Q. And how long had you been with them in that capacity?
A. Well, about somewhere near 21 months; possibly a little more or a little less.
242 Q. Is that the whole of your term of service with the Hamilton-Brown Shoe Company?
A. Yes, sir.
243 Q. Now, then, in the fall of 1906 you went with the newly opened Shoe Mart?
A. Yes, sir.
244 Q. Who were the officers at that time?
A. The same as at the present time.
245 Q. Who are they?
A. Mr. D. S. Ralston; M. C. Furchgott and W. C. Teasdale.

246 Q. Then those three gentlemen and yourself constitute the four officers that have been the same during all this period?
A. I am not an officer.
247 Q. Mr. Ralston is what?
A. Mr. Ralston is President.
248 Q. Mr. Furchgott is what?
A. Vice President and Secretary.
249 Q. And Mr. Teasdale is what?
A. Treasurer.
250 Q. What, if any, connection did Mr. Ralston have with the Hamilton-Brown Shoe Company before he went with the Shoe Mart?
A. I don't know just what his capacity was, but he helped Mr. Teasdale there as sort of an assistant, I would say, in the business for a time.
251 Q. Mr. Teasdale, prior to the forming of the Shoe Mart, had what connection with the Hamilton-Brown Shoe Company?
A. He was the advertising manager.
252 Q. And Mr. Ralston was his assistant?
A. Well, I should presume so. He helped there in the office.
253 Q. And you were the stenographer?
A. Yes, sir.
254 Q. And what was the connection of Mr. Furchgott with the Hamilton-Brown Shoe Company?
A. He had none whatever.
255 Q. Where did he come from?

Mr. HART: That is objected to. I cannot see the purpose of going into the details of the Shoe Mart business. I think the relevancy of this matter ought to be shown before we go any further. The details of the business of an independent corporation not connected with the Hamilton-Brown Shoe Company are absolutely immaterial and irrelevant to any issues in this case.
264 The MASTER: The objection will be overruled, and the testimony taken subject to the objection.

Mr. WERNER:

256 Q. You know of no connection which Mr. Furchgott had with the Hamilton-Brown Shoe Company?
A. He had none, no, sir.
257 Q. Do you know where he came from, what business it was?

Mr. HART: I think we are entitled to some showing as to the relevancy of this.
Mr. WERNER: I will withdraw that question.

258 Q. I will ask you to state whether, and to what extent, Mr. Ralston and Mr. Teasdale, if you know, have continued their connection with the Hamilton-Brown Shoe Company since their connection with the Shoe Mart?

Mr. HART: That is objected to. I think they ought to be more specific—whether they mean financial connections or what.
Mr. WERNER: He may state.

Mr. HART: I want to know and I ask if this question is limited to the connection with the advertising department.

Mr. WERNER: In any capacity.

The MASTER: The objection is overruled.

Mr. HART: Defendant excepts to the ruling.

The MASTER (to the witness):

259 Q. You may state if you know.

A. Mr. Ralston has no connection at all. Mr. Teasdale I understand owns some stock, but I don't know.

Mr. HART: That is objected to. We do not want any understandings.

Mr. WERNER:

260 Q. You have no knowledge?

A. No, sir.

261 Q. You are superintendent of the Shoe Mart?

A. Yes, sir.

262 Q. And you have been connected with it since the fall of 1906? Do you recognize these shoes and this carton as coming from your place of business? Are there any marks on either (handing witness shoes and carton)?

A. (After examining shoes and carton.) Yes, sir, the carton came from our place. The shoes have our mark on them and our name on the inside.

265 263 Q. You are referring to exhibits introduced this morning? Complainant's Exhibits No. 2 and No. 3, before the Master, which have been handed to you?

A. Yes, sir.

264 Q. Has your method of displaying and selling your goods been substantially the same from the time you started there?

A. Yes, sir.

265 Q. Your establishment is at four hundred and something Washington Avenue?

A. No. 507 Washington Avenue.

266 Q. You have arranged on your shelves in that store room, to which the public has access, the various shoes you handle, placed in uniform cartons?

A. Yes, sir.

267 Q. That uniform carton is like this exhibit which has been introduced as Complainant's Exhibit 3, except a different color?

A. No, sir, it is not like it in any particular.

268 Q. In what does it differ?

A. It is a different shape and different size and a different color.

269 Q. Who makes it for you?

A. The Holman Paper Box Company made it, according to special instructions.

270 Q. And continue to make them?

A. We have not ordered any for possibly a year or more.

271 Q. Because those that are on your shelves are kept on your shelves, are they? That is, your custom is when you sell a pair of

shoes you leave the carton undisturbed on your shelves and either wrap up the shoes or put them in another carton? Is that it?

A. Yes, sir.

Mr. HART: That is objected to because of the fact that it is leading. The record in this case will show that practically nine out of every ten questions put by complainant's counsel are leading. We have a right to have the witness examined in the proper manner and ask for an answer of yes or no.

Mr. WERNER: I shall be very careful in my questions.

The MASTER: The objection, if insisted upon, will be sustained, as to the form, but I expressed my opinion that the form of question is wholly immaterial in an examination of this kind. This is not before a jury.

Mr. HART: I take an exception to the remarks of the Master.

The MASTER: If counsel insists upon strict formality of the questions I will have to sustain it.

266 Mr. WERNER:

272 Q. Mr. Maize, please state what appears on this uniform carton in which your goods are contained in your public storeroom.

A. A small ticket.

273 Q. Where is that small ticket put?

A. On the end.

274 Q. On which end?

A. The end that is out.

275 Q. That is, the small rectangular end, the cartons being laid on the shelves?

A. Yes, sir.

276 Q. What, if any, printed matter in addition to that small ticket is there?

A. None whatever.

277 Q. And the ticket contains what, if any, printed matter?

A. It contains our stock number, width, size, and the price.

278 Q. Then the name "Shoe Mart" or "American Lady" or "Hamilton-Brown Shoe Company," I take it, does not appear on that uniform carton you use in the store?

A. No, not on the carton. We have an imprint that is printed in this green ticket—our name, I believe: "Patent applied for", or something to that effect: I cannot state the exact wording.

279 Q. The green ticket being the ticket you spoke of as being pasted on the end of the box?

A. Yes, sir, with something to the effect I have stated; "Shoe Mart System", I believe.

280 Q. Now, when you get shoes from the different manufacturers, what do you do with the original cartons in which they come from the manufacturers?

A. They are all bursted up and given to the waste paper companies, except a few we need in delivering our packages.

281 Q. In what part of your establishment are the shoes taken out of the original cartons and the cartons destroyed?

Mr. HART: That is objected to as absolutely immaterial.

The MASTER: The objection is overruled.

To which ruling of the Master the defendant, by its counsel then and there duly excepted.

A. They are taken out on the main floor when the shoes are put on sale.

282 Q. And the shoes then put into your uniform boxes?

A. Yes, sir.

283 Q. That, I understand, has been the method since your connection with that business? I believe you said that?

A. Yes, sir.

284 Q. So that if an "American Lady" shoe comes from the Hamilton-Brown Shoe Company in one of their cartons, that
267 carton is discarded and the shoe put on your shelves in your own carton?

Mr. HART: I make the same objection to that question.

The MASTER: The same ruling will apply.

To which ruling of the Master the defendant, by its counsel then and there duly excepted.

A. The shoes are put in our carton.

Mr. WERNER:

285 Q. Now, I ask you to examine the pair of shoes handed to you, identified as "Complainant's Exhibit, number 2" of this date, and ask you whether you can state where those shoes were manufactured, and from whom they were purchased by the Shoe Mart?

Mr. HART: That is objected to because of the fact that the shoes are plainly marked on the sole of each shoe with the name "American Lady", enclosed within the belt trade mark of the Hamilton-Brown Shoe Company, which bears upon it in plain type the name "Hamilton-Brown Shoe Company".

The question is objected to for the further reason that it is incompetent, irrelevant and immaterial.

The MASTER: The objection is overruled.

To which ruling of the Master the defendant, by its counsel then and there duly excepted.

A. My not seeing the shoes made, it would be impossible for me to say the exact point where they were made, but they were purchased from the Hamilton-Brown Shoe Company, and I have seen the same shoes which we have bought, in the works of the 21st Street factory.

Mr. WERNER:

285 Q. To the best of your knowedge, you may state whether or not that shoe is the product of the Hamilton-Brown Shoe Company, and whether you purchased it from the Hamilton-Brown Shoe Company.

A. We purchased it from them and it is their own manufacture.

286 Q. I will ask you whether your Company, the Shoe Mart, purchase all their ladies' shoes exclusively from the Hamilton-Brown Shoe Company, or otherwise?

A. They have never purchased them all from any one manufacturer.

Mr. HART: That is objected to because of the fact that it does not relate to the "American Lady" shoe, and this accounting
268 is limited solely to the "American Lady" shoes, and any testimony concerning any other shoes or the methods of the Shoe Mart, is wholly immaterial, encumbers the record and consumes the time of the Master and the counsel.

The MASTER: The objection is overruled.

To which ruling of the Master the defendant by its counsel then and there duly excepted.

Mr. WERNER:

287 Q. I will ask you (limiting the inquiry to the "American Lady" shoes), whether you purchased, or have since the time you started in, any "American Lady" shoes that were manufactured by any manufacturer other than the Hamilton-Brown Shoe Company?

A. No, sir; all the "American Lady" shoes we have ever had were manufactured by the Hamilton-Brown Shoe Company; purchased from them.

288 Q. How about whether they were manufactured by them, if you know?

A. As far as I know they were manufactured by them. Of course I did not see each actual shoe going through the works and would not be able to identify it if I had.

289 Q. Who attends to the advertising of the business of the Shoe Mart?

Mr. HART: That is objected to as absolutely immaterial in this inquiry.

This accounting relates entirely to the conduct of the Hamilton-Brown Shoe Company and the sale of its shoes. What the Shoe Mart may have done, or whether it has any advertising done at all or not, is absolutely immaterial in this accounting. I think there ought to be some limit to the right of counsel to cumber this record.

The MASTER: This objection will be overruled and the testimony will be taken subject to the objection.

So far as I am able to see so far as the examination has gone, I do not see that any of this examination is material, unless it is hereafter shown that it relates to the sale of shoes by the Hamilton-Brown Shoe Company, which were sold within the limits of time prescribed by this decree.

(Last question read, being number 289).

A. Mr. Furchgott, principally.

Mr. WERNER:

(290) Q. You are familiar with the local advertisements of Shoe Mart?

A. Yes, sir.

269 291 Q. The Shoe Mart is a local retail dealer, is it not?

A. Yes, sir.

292 Q. Now, state to what extent, if you can, the "American Lady" shoe is advertised in the city of St. Louis, by the Shoe Mart? That is, I do not care for figures, but in what manner?

Mr. HART: That is objected to for the same reason. This accounting is limited to the conduct of the Hamilton-Brown Shoe Company, and what any retail dealer, whether the Shoe Mart or any other concern did, is absolutely immaterial in this accounting.

Mr. WERNER: Perhaps I ought to refresh your Honor's recollection by saying that we have here the testimony of Mr. Teasdale, who stated on May 15, 1907, that he was the Treasurer of the Shoe Mart, and "I also act in an advisory capacity to the Board of Directors of the Hamilton-Brown Shoe Company," on blue, page 451 of the transcript of the record in this case.

Mr. HART: I do not see how that makes this testimony relevant. Mr. Teasdale may have been a stockholder in the Shoe Mart and in the Hamilton-Brown Shoe Company, but what the Shoe Mart may have done is entirely separate from the conduct of the Hamilton-Brown Shoe Company, and it does not appear that we are responsible to them.

The MASTER: I do not see the relevancy of it myself, so far as the examination has proceeded, but it will be taken subject to the objection if the counsel assures me that he expects hereafter to connect it with the Hamilton-Brown Shoe Company sales in Cincinnati to make it relevant.

Mr. WERNER:

293 Q. My inquiry related to the methods of advertising the "American Lady" shoe; that is, as done on bills boards, newspapers and street car advertising, quite extensively.

A. Yes, sir.

294 Q. Can you state whether, in connection with this character of advertising of the "American Lady" shoes, the name "Shoe Mart" or the name "Hamilton-Brown Shoe Company," either or both are used?

Mr. HART: I object for the reason heretofore stated and for the further reason that some samples of such advertising matter would be the best evidence.

Mr. WERNER: I think so, too, but you cannot bring bill-boards in here.

270 Mr. HART: You can bring photographs. There is some way of reproducing them, instead of depending upon the recollection of the witness.

The MASTER: The objection may be overruled.

A. The name "Shoe Mart" appears with all of our advertisements.

295 Q. In connection with the "American Lady"?

A. Yes, sir.

296 Q. And the name "Hamilton-Brown Shoe Company" does not appear——

Mr. HART: I make the same objection to that.
The MASTER: The same ruling will apply.

A. Not as a rule.
297 Q. Not at all, so far as you know?

Mr. HART: That is objected to for the same reason.
The MASTER: The objection is overruled.
Mr. HART: And it is objected to for the further reason that it is leading and putting the answer into the mouth of the witness.
The MASTER: The objection is overruled because the previous answer of the witness was not responsive to the question.

Mr. WERNER:

298 Q. Where do you obtain your "American Lady" plates which you use in advertising, if you know?

Mr. HART: The same objection is made to that, for the reasons heretofore stated.
The MASTER: The same ruling will apply to that,
To which ruling of the Master the defendant by its counsel then and there duly excepted.

A. The plates are made by an artist, at our suggestion.

Mr. WERNER:

299 Q. At the suggestion of the Shoe Mart?
A. Yes, sir.
300 Q. What, if any, "American Lady" plates do you get from the Hamilton-Brown Shoe Company?

Mr. HART: I make the same objection to that.
271 Objection overruled; to which ruling of the Master the defendant by its counsel then and there duly excepted.

A. We never got any to my knowledge.

Mr. WERNER:

301 Q. Now, referring to the Exhibit, this pair of shoes which you have in your hands: is there anything on those shoes from which, either directly or indirectly, you can tell from your records when those shoes were purchased from the Hamilton-Brown Shoe Company?
A. No, there is nothing to tell the date that this particular pair was purchased.
302 Q. On the shoes?
A. No, sir.
303 Q. Is there anything on your records at the store?
A. As to the date? I think not, of this particular pair.
304 Q. As to the period, as to the month or the year?
A. No, sir, because these shoes are made——

Mr. HART: That is objected to. He has answered no.

Mr. WERNER:

305 Q. If not, why not?

A. Because all shoes of this style are alike. It is impossible to identify one pair from another.

306 Q. Do you keep any record in your office of the serial numbers purchased from time to time?

A. No, sir.

307 Q. What record do you keep of the shoes purchased?

A. We have our order record and we keep a card with the style number and price.

308 Q. Do you keep any record showing the serial number which you obtain?

A. No, sir.

309 Q. They were purchased since November, 1906, you are satisfied with that?

Mr. HART: That is objected to. The witness stated he has no record of it and he has no knowedge or information.

Mr. WERNER: Of course they were not purchased before he went into business.

(Question 309 read.)

Mr. HART: It is objected to as calling for the conclusion of the witness.

Mr. WERNER: I will withdraw the question.

310 Q. Can you give us the number of "American Lady" shoes that you purchased from the Hamilton-Brown Shoe Company since you have been in business?

272 A. No, sir, I cannot.

311 Q. Your records show that?

A. They would not show the "American Lady" separate from the others.

312 Q. From what others?

A. We purchase a great many shoes made at the "Sunlight Factory" and [alst] the "American Gentleman Factory."

313 Q. You do not think you have a separate record of the "American Lady" shoes that you ordered?——

A. No, sir, I know we have not.

314 Q. —that you ordered from time to time and which orders were filled by the Hamilton-Brown Shoe Company?

A. Well, there was the duplicate order for them.

315 Q. Then you can go to your duplicate order and find out every "American Lady" shoe; that is, the numbers you have ordered since you were in business, that were filled by the Hamilton-Brown Shoe Company?

A. If we can find all the orders we can tell how many were ordered, but we cannot tell how many were filled by the orders.

316 Q. I suppose your bills would tell you what you paid for, would they not?

A. The bills would show the amount, but they don't show the "American Lady" shoes separate from the others. The men's shoes and ladies' shoes are included in the same bills.

317 Q. Can you tell approximately how many thousand pairs of "American Lady" shoes you sold in a year?

Mr. HART: That is objected to.

The MASTER: The objection is overruled.

To which ruling of the Master the defendant by its counsel then and there duly excepted.

A. No, sir; I have no idea.

Mr. WERNER:

318 Q. State whether or not when they bill you for the shoes they send you, the bills are itemized, showing the different styles, the "American Lady" shoes being itemized separately from the others?

A. They are itemized showing the different styles, but there are other ladies' shoes besides the "American Lady" shoes in them.

319 Q. But you say every bill is itemized, showing so many "American Lady" shoes?

A. No, sir.

320 Q. Will you bring, at a subsequent hearing here before the Master, a sample bill of shoes, containing items of "American Lady" shoes purchased between the fall of 1906 and November 1, 1909; and also, if you can, a statement of the number of "American Lady" shoes which it appears from your records you purchased from the Hamilton-Brown Shoe Company during that period?

273

A. We have no record of the number of pairs and I don't know how it would be possible to get a record.

321 Q. I will ask you whether you have any shoes manufactured specially for you by eastern manufacturers?

Mr. HART: That is objected to as going into details which have no concern with the Hamilton-Brown Shoe Company, as far as the record shows, and it is wholly immaterial.

Mr. WERNER: I expect to show the connection later.

The MASTER: I do not see the revelancy of that, Mr. Werner.

Mr. WERNER: I expect to follow it up by asking whether he has any "American Lady" shoes manufactured by any eastern manufacturer.

The MASTER: The objection will be sustained if the question is put in the form in which it now is.

Mr. WERNER: I will now put the second question.

322 Q. Please state whether or not any "American Lady" shoes, so branded, are manufactured for you by any eastern manufacturers?

A. No, sir, none.

323 Q. I wish you would state who bills the "American Lady" shoes to the Shoe Mart, the factory or the jobbing house of the Hamilton-Brown Shoe Company?

Mr. HART: That is objected to.

Objection overruled; to which ruling of the Master the defendant by its counsel then and there duly excepted.

A. They are billed from the store.

Mr. WERNER:

324 Q. From the jobbing end. State, if you know, whether the "American Lady" shoes pass through the jobbing house before coming to you, or whether they are sent direct from the factory to your place of business?

Mr. HART: That is objected to.

Objection overruled; to which ruling of the Master the defendant by its counsel then and there duly excepted.

A. I don't know anything about whether they unload them at the store or not.

274 Mr. WERNER:

325 Q. I will ask you to state whether or not the "American Lady" shoes which you handle and sell in St. Louis are made especially for you—the Shoe Mart, by the factory?

A. Yes, sir.

326 Q. How is that indicated on the shoe?

A. It is indicated by our name on the inside of the shoe.

327 Q. So that all the "American Lady" shoes that are manufactured by the Hamilton-Brown Shoe Company for you, contain on the upper inner face lining a mark which the Hamilton-Brown Shoe Company put in, the words "Shoe Mart. Reg. U. S. Patent Office"?

Mr. HART: That is objected to as leading and immaterial.

The MASTER: The objection is overruled.

To which ruling of the Master the defendant by its counsel then and there duly excepted.

Mr. WERNER:

328 Q. Is that understanding correct?

A. Yes, sir; they put our name in the shoes. We furnish the label. It does not always have that exact reading. We had some labels that read a little different than that.

329 Q. By "label" you mean a silk or woven label sewed inside at the top facing?

A. Yes, sir.

330 Q. Do you handle infants' shoes?

A. Yes, sir.

331 Q. With the trade mark "Hamilton-Brown Shoe Company" on?

Mr. HART: That is objected to unless it is confined to "American Lady" shoes.

Mr. WERNER:

332 Q. Do you handle infants' shoes which you purchase from the Hamilton-Brown Shoe Company, that have their trade mark on?

Mr. HART: That is objected to.

The MASTER: I do not see the relevancy there.

Mr. WERNER: I want to show by this witness, your Honor, that some shoes which they handle are marked and sold with the trade mark of the Hamilton-Brown Shoe Company on the strap which appears in evidence are manufactured by eastern manufacturers.

The MASTER: As that would be corroborative of the testimony of Mr. McElroy, going to show that the Hamilton-Brown Shoe Company had the stamp of the Hamilton-Brown Shoe Company put on the sole of shoes which were manufactured by eastern factories, the question may be answered.

275 Its relevancy, of course, is for the purpose of showing, I presume, that the stamp of the Hamilton-Brown Shoe Company on the sole of the shoe is not necessarily an indication that it is made by the Hamilton-Brown Shoe Company's factory; is that correct?

Mr. WERNER: Yes, sir; that is the idea.

(Question 332 read.)

A. We don't purchase infants' shoes from the Hamilton-Brown Shoe Company.

333 Q. Then I will ask you whether you purchase any shoes with the name "Hamilton-Brown Shoe Company" trademark stamped on the shoes, which are manufactured by eastern manufacturers?

Mr. HART: That is objected to.

A. No, sir.

Mr. WERNER:

334 Q. Do you know—of any style of shoe which you handle?

A. No, sir, no style at all.

335 Q. Other than "American Lady"?

A. No, sir, we do not, unless it would be a single pair, or something like that. Sometimes we need a size and send up to the store and get a single pair of shoes, or in a case like that.

336 Q. What kind of a shoe?

A. It would be a cheap shoe.

337 Q. What kind of cheap shoe is manufactured by eastern manufacturers for the Hamilton-Brown Shoe Company——

Mr. HART: I make the same objection to that.

A. I have no knowledge.

338 Q. —on which their name and trade mark appears on the shoe?

A. I don't know.

339 Q. There are some you said?

A. I presume so; I don't know.

340 Q. Do you handle any of them at the Shoe Mart?

A. No, sir.

341 Q. You say you have handled single pairs?

A. No, sir, I do not. I say we may have gotten a single pair.

Mr. HART: Your Honor, this witness has stated this thing. Are they going to be permitted to cross-examine their own witness?

What is the use of going on with page after page of cross-examination of their own witness? When the witness states a fact, what is the use of going on with testimony of that character?

276 The MASTER: The objection is overruled.

Mr. WERNER: That is all, if the witness does not know.

Cross-examination.

By Mr. HART:

342 Q. The name "Shoe Mart" appears on this shoe, just below the top facing of the shoe for the right foot: the words "Shoe Mart" appear at different places on the shoes you buy from the Hamilton-Brown Shoe Company, do they not, and in some cases they do not appear?

A. No, sir, not always.

343 Q. So when Mr. Werner stated in his leading question, to which you replied yes, that the shoes always had this right under the upper top facing, that was not correct, was it?

A. I did not understand the question that way. I understood it was that they bore that label. Sometimes it may be in the other shoe.

344 Q. When you purchased these shoes and when you handled them, you know they were the product of the Hamilton-Brown Shoe Company, did you not? That they came to you from the Hamilton-Brown Shoe Company?

A. Yes, sir.

345 Q. You did not understand that they were the product of the complainant in this case, the Wolf Brothers Company, of Cincinnati, did you?

A. No, sir.

346 Q. You were not deceived then, and did not purchase them believing them to be the product of the complainant Company?

A. No, sir.

347 Q. When those shoes came to you from the Hamilton-Brown Shoe Company they were in a carton, bearing on the top the picture of a lady and the name "Hamilton Brown Shoe Co's. American Lady", were they not?

A. Yes, sir.

348 Q. And on the front of that carton are the words "American Lady"—the front end of the carton?

A. Yes, sir.

349 Q. And the belt trade mark of the Hamilton-Brown Shoe Company, bearing the words "Hamilton-Brown Shoe Company" and enclosing the word "Makers" on the back ground: is not that a fact?

A. The belt. I cannot say what that word that is enclosed in the belt always is.

350 Q. I show you a carton that has been offered in evidence in this case, marked "Defendant's Exhibit American Lady" Shoe Carton, Jany. 31, 1910" which bears at the upper right hand corner the word "Makers" on a red background enclosed within the

belt trade mark bearing the words "Hamilton-Brown Shoe Company; at the end of this carton appear the words "American Lady"; I will ask if that is not the carton in which the "American Lady" shoes are uniformly delivered to the Shoe Mart Company by the Hamilton-Brown Shoe Company?

277 A. It is.

351 Q. That is the carton?

A. Yes, sir.

352 Q. And the lid of this carton is the lid that appears on all the cartons of "American Lady" shoes that come to your store from the Hamilton-Brown Shoe Company: that is a fact, is it not?

A. Yes, sir.

NOTE.—At this point Mr. Baker enters.

353 Q. And a great many of the "American Lady" shoes that come to your store from the Hamilton-Brown Shoe Company, which bear upon them the name "American Lady" also bear upon the silk facing of the shoe for the right foot, the name "American Lady" accompanied by the belt trade mark bearing the name "Hamilton-Brown Shoe Company" and enclosing the word "Makers": is not that a fact?

A. It is where we do not specify a special top facing.

354 Q. But that is true in a great many cases?

A. Yes, sir.

WILLIAM F. BLOECHER, a witness of lawful age being duly produced, sworn and examined on the part of the complainant, testified as follows:

Direct examination.

By Mr. WERNER:

355 Q. State your full name.

A. William F. Bloecher.

356 Q. And your age?

A. I am 31 years old.

357 Q. Where do you reside?

A. At 3950 North 20th Street, St. Louis, Mo.

358 Q. What is your business?

A. I have charge of the men's shoe department, under Mr. Swope, of the Swope Shoe Company.

359 Q. How long have you been employed by the Swope Shoe Company?

A. For seven years.

360 Q. Where were you in business prior to that time?

A. Prior to that, for three years, in business for myself.

361 Q. What familiarity have you with the method of conducting the retail shoe business in the city of St. Louis?

A. Practically everything that is——

Mr. HART: That is objected to.

The MASTER: The objection is overruled; that is preliminary.

A. Practically everything that is done in regard to the retail business. I am familiar, in other words, with everything that has to be done.

Mr. WERNER:

362 Q. For how many years?

278 A. I have been born and raised in the business.

363 Q. How many years have you been actively engaged in it?

A. You might say, sixteen years.

364 Q. You heard Mr. Maize'- testimony, did you?

A. Yes, sir.

365 Q. You heard his testimony particularly with reference to the manner in which shoes were received from the manufacturer and then placed on the shelves in the retail store?

A. Yes, sir.

366 Q. Please state what the custom is in the retail trade as you say you know it?

A. You speak in the line——

Mr. HART: That is objected to because it is entirely immaterial what their custom may be in this regard.

The MASTER: I do not see the materiality of it at present but it may be answered.

Mr. HART: Furthermore, it does not appear that this concern has purchased shoes from the Hamilton-Brown Shoe Company, and what the custom may be in regard to other shoes and their production, is absolutely immaterial. We are concerned here with only the "American Lady" shoes.

The MASTER: If that is the objection, the objection may be overruled.

To which ruling of the Master the defendant then and there duly excepted.

(Previous question read):

Mr. WERNER:

367 Q. That is, with reference to the use of cartons in the retail stores.

A. Well, you will find all retail stores have their own size cartons that they use nowadays. We have not but one or two manufacturers that send us cartons that we have to change. Ours are all furnished, one size and color, from each manufacturer, bearing no advertising whatever.

368 Q. And where the manufacturer does not send you your own carton?

A. They are immediately changed——

Mr. HART: I make the same objection.

The objection is overruled.

A. —they are immediately changed into our own cartons and put on sale.

Mr. WERNER:

369 Q. Then what is the appearance of your store, with reference to the cartons used?

A. All one size and one color.

279 Mr. HART: The same objection is made to that.

Mr. WERNER:

370 Q. How long has that custom prevailed?

Mr. HART: The same objection.

Objection overruled; to which ruling of the Master the defendant by its counsel then and there duly excepted.

A. I think that has prevailed for at least ten years, to my knowledge, downtown.

Mr. WERNER:

371 Q. What other retail shoe dealers here in St. Louis can you mention, that adopt that custom, if you know?

Mr. BAKEWELL: That is objected to as incompetent, the witness not having qualified to testify as to what practice prevails in other shoe stores.

Furthermore, I respectfully submit that this inquiry is absolutely foreign to anything the Master is entitled to inquire into in this accounting.

We are dealing here simply with the question of liability for profits or damage of the Hamilton-Brown Shoe Company to this complainant, in respect to shoes sold by the Hamilton-Brown Shoe Company.

The MASTER: It seems to me right here, that this testimony is wholly irrelevant to the matter under inquiry, but as counsel has stated that he proposes to show its relevancy, the objection will be overruled and the testimony will be taken subject to the objection.

Mr. HART: I think it is absolutely impossible for them to show its relevancy and I think they ought to indicate how and——

The MASTER: That is their lookout, not mine.

A. Well, I can name you the Brandt Shoe Company; Reid Shoe Company; Hammond & Son Shoe Company; Walk Over Shoe Company; Century Shoe Company and the G. H. Boehmer Shoe Company.

Mr. WERNER:

372 Q. The Shoe Mart?

A. The Shoe Mart, and the Mitchell Shoe Company.

Mr. BAKEWELL: I submit that it is improper for counsel to put them into the mouth of the witness and I ask for a ruling on the propriety of it.

Mr. WERNER: Mr. Maize has testified on that.

280 The MASTER: No ruling is necessary. It has appeared before the Master heretofore this morning that that same cus-

tom was adopted by the Shoe Mart. The interjection was harmless.

Mr. WERNER:

373 Q. Are there any others which you care to mention?

A. No, I don't believe there are any others.

374 Q. Now, I will ask you to state, if you can, the object of the retailer in discarding the manufacturer's cartons and in having his own cartons manufactured and used by him uniformly.

Mr. HART: The same objection is made to that.

The MASTER: I will make the same ruling.

To which ruling of the Master the defendant by its counsel then and there duly excepted.

A. In the first place, it advertises no other shoes but his own.

Mr. WERNER:

375 Q. Whose own?

A. The retailer's own; not to advertise the manufacturer's name, but his own name, is the reason they do away with those cartons; and in the second place, to have them all one size and one color.

376 Q. Why do they want them all one size and color?

Mr. HART: The same objection is made to that.

The MASTER: The objection is overruled.

To which ruling of the Master, the defendant by its counsel, then and there, duly excepted.

A. For no other reason only for the appearance of it that I can see.

Mr. WERNER:

377 Q. Now, what experience have you had in the actual selling of shoes to customers?

A. What experience have I had?

378 Q. Yes.

A. I sell shoes every day.

379 Q. That is your present business?

A. Yes, it is and has been ever since I have been able to do anything.

380 Q. Please state to what extent the carton on a shelf of a retailer figures in the sale of a pair of shoes to a retail purchaser?

chaser?

281 Mr. BAKEWELL: I want to put an objection here on the record, with the Master's consent and with the consent of the opposing counsel.

I ask that this following objection apply to any question that may be asked of this witness, or any other witness, for that matter, in relation to any custom, practice, method or alleged method of dealing by any retailer. The objection is this:

That on this accounting it is utterly irrelevant and immaterial to any issue in this case what any particular retailer may do in selling

his shoes or even what it may be claimed or alleged is the practice among retailers.

In this accounting, the United States Circuit Court of Appeals in this case, having held that there is no trade name or trade mark in the name "American Girl" and the infringement, if any, consisted simply in unlawful competition and as it appears from the evidence already had in this case that the defendant is a manufacturer of shoes and only sells its shoes at wholesale, there can be no accounting here in respect to any shoes sold by the defendant since the filing of the Bill of Complaint, marked with the name "American Lady" unless it be shown that in the sale of those shoes the defendant has sold the shoes "as and for" the shoes of the Complainant. Therefore, the very fact that all of the defendant's shoes, sold since the date of the filing of the Bill of Complaint in this case, have been sold in cartons bearing upon the cartons the name "Hamilton-Brown Shoe Company" prominently on the lid of the carton, and the name "Hamilton-Brown Shoe Company" on the end of each carton, associated with the word "Makers"; and also the fact that the name "Hamilton-Brown Shoe Company" appears on the shoes as sold by the defendant, and the word "Makers" appears on many of those shoes on the inner lining; these facts themselves show that in the sale of these shoes at wholesale the defendant has not sold these shoes "as and for" the shoes of the Complainant.

Under the interlocutory decree in this case and in view of the decision of the United States Circuit Court of Appeals in this case, this is not a trade mark case at all, but simply one for alleged unlawful competition in business.

Under the decision applicable to such state of facts, what the dealer may or may not do, or whether or not the dealer or retailer uses the carton in selling his shoes, is immaterial; but the burden is on the Complainant to show on this accounting that the defendant in selling any of its shoes marked with the name "American
282 Lady", since the date of the filing of the Bill of Complaint, has sold said shoes "as and for" the shoes of the Complainant.

In the absence of the Complainant showing that as to any "American Lady" shoes sold by the defendant since the filing of the bill of complaint, that said shoes were sold by the defendant "as an- for" the shoes of the Complainant, the Complainant is not entitled to recover any damages or profits in respect to such shoes.

I make this objection now to this question and to save repetition of the same, preserve the objection of record, with the consent of Complainant's counsel and the Master and I ask that this objection stand as applicable to all the testimony of this witness or to the testimony of any other witness that may be produced on behalf of the Complainant.

Mr. WERNER: We consent to that. The objection may be regarded as an objection to all the testimony to be offered.

The MASTER: The objection will be considered as applicable to the examination of this witness and to any similar testimony from other witnesses, as requested by the counsel for the Defendant,

but the objection will be overruled and the testimony will be taken subject to the objection, upon the understanding by the Master that in the testimony hereafter it will be shown by the counsel for Complainant to be material and relevant. So far as the Master is at present able to see this testimony is not pertinent to the issue before the Master.

(Previous question read.)

A. We carry one pair of a size on the shelf. After a pair is sold the carton is placed back in stock and that shoe wrapped in paper or in a similar carton of our own, at the bundle counter. The next morning we go over our stock, putting stock in these cartons that are empty.

The MASTER:

381 Q. Do you mean by that answer that the empty box is refilled with another pair of shoes?

A. Yes, sir, with another pair of shoes.

Mr. WERNER:

382 Q. I will ask you whether the retail purchaser sees those shoes until after the purchase is concluded?

A. What?

383 Q. I will ask you whether the retail purchaser sees those shoes until after the purchase is concluded? If the retail purchaser sees the carton?

283 Objected to by defendant's counsel as immaterial.

A. He simply sees the carton on the shelf.

Mr. WERNER:

384 Q. I believe you said they were removed from the carton.

A. We never remove a carton from the shelf, simply take the shoe out of the carton.

385 Q. As to the original carton which is discarded, the manufacturer's carton, before each shoe is put into your own carton, what opportunity does the retail purchaser ever get to see that original carton?

A. None whatever.

Cross-examination.

By Mr. BAKEWELL:

386 Q. You say you are with the Swope Shoe Company of St. Louis?

A. Yes, sir.

387 Q. How long have you been with them?

A. About seven years.

388 Q. Do they deal in "American Lady" shoes?

A. No, sir.

389 Q. How about the Brandt Shoe Company?

A. No, sir.

390 Q. And never have been since you were there?
A. No, not in "American Lady" shoes.
391 Q. Never dealt with "American Lady" Shoes?
A. No, not with "American Lady" shoes.
392 Q. Are you prepared to state as a matter of fact, that even in St. Louis there are not retail shoe houses that deal in shoes that have been largely advertised, where they do keep the shoes in the cartons?
A. Well, if I understand you right, you mean that there are retailers selling shoes that are largely advertised, where they do not change the carton?
393 Q. Yes.
A. In a small way there are.
394 Q. Give me some instances?
A. I could give you instances: for instance, west, or north, or south, these small dealers never change their cartons.
395 Q. How about the downtown district?
A. I don't know of any downtown dealer that does not.
396 Q. How about the "Walk Over" Shoe?
A. They have a carton of their own.
397 Q. Are not the "Walk Over" shoes sold in an original carton by the dealers?
A. Sure, they are.
398 Q. By the retailers?
A. Yes, by the "Walk Over" Company alone, but no one else in this town.
399 Q. Do you know of anyone else but the "Walk Over" Company that sells the "Walk Over" shoe?
284 A. No, sir.
400 Q. How about the "Queen Quality" shoe?
A. I know that Brandt handles them and sells them in their own carton, not in the "Queen Quality." They have stock cartons, each of them.
401 Q. Do you know of any other concern—any one retailer that does not sell in original cartons?
A. The one shoe you spoke of?
402 Q. Yes.
A. I don't know of anyone else that is handling them.
403 Q. Is Nugent a pretty fair size dealer?
A. Fairly.
404 Q. Will you swear that Nugent does not sell any of the shoes that it sells at retail, which are extensively advertised, does not sell them in the original cartons in which they are delivered?
A. I would not swear to anything at Nugent's because I have no knowledge of what Nugent's shoe department is.
405 Q. You do not know anything about the condition that prevails in the country outside of St. Louis?
A. Yes, to a certain extent, not all over the country, but to a certain extent, I know of some of them.
406 Q. Do you know of any retailer outside of the City of St. Louis that sells "American Lady" shoes?

A. No, sir, I do not.

407 Q. Do you know of any retailer in the City of St. Louis that sells "American Lady" shoes?

A. Do I know of any?

408 Q. Yes.

A. I only know that the "Shoe Mart" people sell them. That is about all.

409 Q. Have you been employed by the Shoe Mart?

A. No, sir.

410 Q. Do you know the regular practice that prevails there with relation to selling shoes?

A. No, sir, I do not.

W. F. McElroy, recalled, direct examination resumed by Mr. Werner:

411 Q. I want to interrogate you somewhat as to your familiarity with the records kept by your Company and the number of "American Lady" shoes manufactured and sold, and detail as to the cost, selling price, profit, and so on:

Attracting your attention to this testimony in the record in this case:

285 "Our records show sales of $1,808,271.09 of the 'American Lady' shoes during the year 1906 and up to May 1, 1907, representing 907,820 pairs."

I will ask you if you can tell me to what records those refer, factory records or your jobbing house records or both?

Mr. Bakewell: I wish to make this objection of record and with the Master's permission and the consent of Complainant's counsel I ask that it apply to any and all questions put to Mr. McElroy in relation to the "American Lady" shoes sold by the Hamilton-Brown Shoe Company since the date of the filing of the Bill of Complaint up to Nov. 15, 1909;

That all this testimony is objected to as irrelevant and immaterial to any issue before the Master under this interlocutory decree, in view of the terms of the interlocutory decree and the decision of the majority of the Court of Appeals in this case, to the extent that any such testimony may relate to any shoes marked with the name "American Lady" and sold by the Hamilton-Brown Shoe Company since the date of the filing of the Bill of Complaint up to Nov. 15, 1909, which shoes were marked on the soles of the shoes themselves, or on the inside facing of the shoes, or on the inside facing of one shoe of each pair, with the name "Hamilton-Brown Shoe Company" or, with the words "Hamilton-Brown Shoe Company, Makers" and which shoes were sold by the Hamilton-Brown Shoe Company each pair of said shoes as sold by the Hamilton-Brown Shoe Company being placed in a carton which carton bore on the lid thereof the name "Hamilton-Brown Shoe Co.'s" and which cartons bore on the end thereof the name "Hamilton-Brown Shoe Company, Makers"; and on the distinct ground that all of such testimony is irrelevant and immaterial to any issue in this case.

Furthermore, I object to any question that may be put to the witness in regard to profits in respect to the said "American Lady" shoes, marked, as to the shoes themselves, or as to the cartons containing the same, with the words stated, unless it be shown specifically in respect to each sale that in selling the shoes so marked (as to the shoes themselves and the cartons containing the same) the Hamilton-Brown Shoe Company, the defendant in this case, sold the said shoes "as and for" the "American Girl" shoes of the Complainant Company.

In other words, that in making such sales the Hamilton-Brown Shoe Company palmed off its shoes to its vendee "as and for" shoes of the Complainant.

286 Mr. WERNER: Complainant's counsel is willing that the objection shall be urged as to each of the interrogatories hereafter to be put, without the necessity of repeating it.

Mr. BAKEWELL: Defendant's counsel, in view of the record of the testimony before the Master, calls attention to the fact that it appears from Mr. McElroy's testimony that since the filing of the Bill in this case, to-wit, January 29, 1906, many of the shoes sold by the Hamilton-Brown Shoe Company between said date and Nov. 15, 1909, were marked on the inner facing of one shoe of each pair, with the name "American Lady" and with the words "Hamilton-Brown Shoe Company, Makers"; that other shoes bearing the name "American Lady" sold by the Hamilton-Brown Shoe Company between the dates specified both bore upon the sole of each shoe the name "Hamilton-Brown Shoe Company"; that the cartons containing each pair of "American Lady" shoes sold by the Hamilton-Brown Shoe Company between the dates specified both bore prominently on the end of each carton the name "Hamilton-Brown Shoe Company, Makers" and on the lid of the carton the name "Hamilton-Brown Shoe Co.'s."

This explanation is merely by way of answering a suggestion from the Master and a statement of what defendant's counsel understands to be a fact from the record.

Nevertheless, and as a distinct part of the objection specified above, defendant's counsel insists, in view of the decision of the majority of the Court of Appeals in this case and under the interlocutory decree in this case, complainant cannot recover any of the profits made by the Hamilton-Brown Shoe Company in the sale of shoes marked, as to the shoes themselves or to the cartons containing the same, in any of the manners above stated, unless the complainant also shows as to each sale of such shoes, that in selling the said shoes to its cu-tomers, the Hamilton-Brown Shoe Company did in fact sell the shoes to the customers "as and for" the "American Girl" shoes of the Wolf Brothers & Company, Complainant.

The United States Circuit Court of Appeals having held in this case that there is no trade name or exclusive right in the name "American Girl" and that therefore this is not a trade mark case, defendant's counsel respectfully submits that the Master will find on examination of the authorities, that complainant is entitled to recover no profits in this case in respect to such shoes sold by the

Hamilton-Brown Shoe Company since the date of the filing of the Bill of Complaint unless Complainant shows as to each sale that said shoes were sold "as and for" the shoes of the Complainant.

The MASTER: The objection will stand as stated in the previous objection to the examination of this witness or any other
287 witness on the same point, without the necessity of repetition and the objection is overruled. An exception will be considered as entered in every such case.

(Previous question read).

M. BAKEWELL: Defendant's counsel objects to this question for the following reason, that no such testimony has been given by this witness. On inquiry of Complainant's counsel, who puts the question, it appears that this question is based on an answer to question 30, in the testimony of Wm. C. Teasdale, Jr., which appears on page 457 of the record in the Court of Appeals in this case, which testimony was given before the final hearing of this case in the circuit court and is in no way the testimony of this witness.

Counsel for Defendant respectfully submits that while this witness may be asked with regard to facts within his knowledge, he cannot be asked in regard to testimony of others.

Mr. WERNER: The witness understands that I asked for facts within his knowledge. I suppose all the officers have knowledge of these facts shown by their records.

The MASTER: The objection is overruled.

To which ruling of the Master the defendant by its counsel, then and there, at the time, duly excepted.

(Previous question read.)

A. I am unable to answer that.

By Mr. WERNER:

416 Q. Are you familiar with the records of your company showing the number of "American Lady" shoes manufactured and sold?

A. Well, only as far as the factory is concerned.

413 Q. Then, as to the factory records, do these records show first a stock number?

A. A serial stock number.

414 Q. What does that so-called serial stock number indicate?

A. Now, if there are two numbers, there that would mix us up. One we call the "sample number" and the other we call the "serial stock number."

—. Now which of those indicates the particular style?

A. The sample number.

415 Q. So, if, for instance, in your catalogue you have fifty, sixty or eighty different styles of "American Lady" shoes, you have for each pair a so-called sample number?
288 A. Yes, sir.

417 Q. So that your "American Lady" shoes are first divided on your record by an appropriate sample number showing the particular style of that shoe?

A. Yes, sir.

418 Q. And that style, I take it, may or may not be continuously

manufactured; that is, some are taken out of the market and new ones are added from season to season. Is that correct?

A. That is a fact.

419 Q. So that your records will show, during the period to which this inquiry relates (and I will say now that all my interrogatories will relate to that period between Jan. 29, 1906 and Nov. 16, 1909) certain sample numbers so-called by you, or style numbers as my interrogatory originally put it?

A. Yes, sir.

420 Q. Then, I will ask you whether you- records next show the number of pairs or dozens of each of the sample numbers manufactured?

A. Our numbers would not probably be able to show that; we would have to get—the serial number of the shoe identifies the date and the time it was made, but a sample number is never put on the shoe. The serial number is always on the shoe.

421 Q. The serial number is the next thing you spoke of, that shows the number of pairs?

A. No, that shows the number that the shoe went through the factory. The number under which that shoe went through the factory. For instance, we will take 65, 710 and that number we enter on one pair of shoes at least, or never over 36 pairs of shoes. That number might appear on a case lot or on a one pair lot. Then that number is cancelled and is never used again.

422 Q. Then, if I get it, to trace just one single sample number without confusing ourselves—we will take [on-] single sample number; that brand or style of shoe, differentiated from all the other styles of shoes by a sample number, is manufactured and the records show by the serial stock numbers how many case lots of 36 pairs, or less than case lots, are manufactured of that particular sample or style number until it may be abandoned?

A. No, this serial stock number—if you picked out a shoe, picked it up in the country, and take this series, series A, No. 65 710, we can locate that on our books and we could tell how many of that individual shoe we made in that year.

423 Q. That is what I mean.

A. Yes.

289 At this point recess was taken until 2 o'clock.

After recess the following proceedings were had at 2 o'clock P. M.

Direct examination of Mr. McELROY continued.

By Mr. WERNER:

424 Q. I suppose your records would also disclose by that serial number when that particular shoe was made?

A. Yes, sir.

425 Q. So that the factory records, and that is all that your familiarity extends to, will show the sample or stock number and then by serial numbers, the number of shoes or cases?

A. Yes.

426 Q. Now, in addition to that, those shoes each particular style

indicated by the sample number, has a certain marking; do the records disclose that marking?

A. I don't know that I understand your question.

427 Q. Of each particular style.

A. Do y u mean to show how they are branded?

428 Q. Yes.

A. No, they do not.

429 Q. Suppose we wanted to arrive at the marking of each style or sample number; how would you ascertain that?

A. Well, the ticket that carried that case of shoes through the factory would have a designation of the particular marking on it, but those tickets are never held over probably six or twelve months, twelve months at a limit. They are burned up; they accumulate rapidly and are destroyed.

430 Q. You enter into your permanent records the sample number and the serial number, but not the markings?

A. I don't think the sample numbers are a matter of record. The only way that could be traced would be to get the style of shoe and the description and trace it that way, and by the serial number we could tell how many cases of that kind of shoe we made.

Years ago we preserved the sample ticket up in our records in the factory, on the book. We entered them under a sample number but they—that is, the store, changed those sample numbers from time to time as business required or the needs of the business and we employed a different system of checking on the books, and we needed more space on the book for the important things, and I think the sample number has been left off for five or six or seven years. It may not have gone back that far, but it is my opinion that it has for five or six years.

290 431 Q. When you speak of records, or answer in regard to records, do you refer to books kept at the factory?

A. Yes, sir.

432 Q. Or to sheets or cards?

A. To books.

433 Q. And from what are the entries in those books taken?

A. From the tickets.

434 Q. Do or do not those books show how the shoes were marked?

A. No, they do not.

Mr. BAKEWELL: Defendant's counsel [a-ks] complainant's counsel what he means by "how the shoes were marked."

Mr. WERNER: That is, the marking on each shoe, or pair of shoes, with respect to the brand "American Lady;" with respect to the trade mark "Hamilton-Brown Shoe Company" on that strap; with respect to the marking on any top facing.

A. The marks of identification?

435 Q. Yes.

A. The records would not show that.

Mr. BAKEWELL:

436 Q. They would not?

A. No, they would not.

Mr. WERNER:

437 Q. Then the only way to trace that would be to take an individual pair, bearing certains marks, and then go to your records and show how many of those were manufactured?

A. Yes, that would be the only way that we could get any line on that, that I know of.

438 Q. Generally speaking, is it not true that all your "American Lady" shoes, manufactured during the period in question, were either marked "Hamilton-Brown Shoe Company" on the trade mark, which we have grown familiar with, on the sole of one——

A. The sole of both.

439 Q. ——or both of each pair of shoes, with a top facing containing the words "Hamilton-Brown Shoe Company, Makers;" or with the stamp on the sole or soles of each pair of the trade mark alone, without the top facing; or with neither of the two identification marks? The shoes have fallen into one of those three classes with respect to their marking have they?

Mr. BAKEWELL: In view of the previous testimony the defendant's counsel asks the complainant's counsel whether he does not contemplate by his question, in conformity with the previous answers of this witness, that where the strap trade mark was used on the soles the name "Hamilton-Brown Shoe Company" appeared on the strap trade mark?

291 Mr. WERNER: Oh, yes, the trade mark includes the name "Hamilton-Brown Shoe Company," as part of their trade mark.

440 Q. It falls in one of those three classes, does it not?

(Previous question read.)

Mr. BAKEWELL: That is objected to as misleading, as the witness has not heretofore testified that any of the "American Lady" shoes sold by the Hamilton-Brown Shoe Company, since the date of the filing of the Bill, did not have upon them the name of the Hamilton-Brown Shoe Company.

Mr. WERNER: I am asking him that now.

Mr. BAKEWELL: But that question assumes a condition the contrary of which appears on the record.

Mr. WERNER:

441 Q. I am asking you if that is the condition?

A. As far as I have personal knowledge, that is the condition.

442 Q. Mr. Bakewell suggests that I have assumed that there are some shoes which contain neither the trade mark, which is the strap with the name "Hamilton-Brown Shoe Company" on it, or a top facing containing the name "Hamilton-Brown Shoe Company, Makers" on it. I did not mean to assume that, but to ask it directly as a question of you: do you know whether or not there were "American Lady" shoes manufactured and sold bearing neither of those identification marks?

A. So far as my personal knowledge goes, there was not.

443 Q. My question, to put it in another shape, is this: Were

there not, during that period, manufactured and sold "American Lady" shoes on which the name "Hamilton-Brown Shoe Company" did not appear at all?

A. I have answered that to my personal knowledge there were not.

The MASTER: I will have to ask the witness to explain that answer because to my mind it is subject to two meanings. I know there is no such shoe manufactured, but it may be interpreted that so far as you know there were none such manufactured.

(Previous question read).

The MASTER: I ask you to answer that question so as to indicate whether you mean to say that you know that none such were manufactured or whether there were none such manufactured so far as you know.

292 A. That is the point I make; none were manufactured so far as I know.

Mr. WERNER:

444 Q. What opportunities did you have of knowing the markings of the shoes?

A. I am the general manager and superintendent of the factory and my orders are that the goods be stamped that go out of the factories; they are understood that way.

445 Q. Who indicates what the stamp shall be on the shoes?

A. The indication of the stamping would be indicated by the tickets that went out.

446 Q. Who directs what stamping shall be adopted for each sample or style?

A. The original order—if they were for "American Lady" shoes they would have the "American Lady" stamp, and they would so understand it. But the carelessness of a girl in leaving that off might leave that off occasionally. We occasionally find a case of that kind brought to our attention——

447 Q. But who directs——

A. I say that the fact of it being an "American Lady" shoe directs that it shall be stamped "American Lady."

448 Q. But I am talking about the other identification marks: who directs what other designation there shall be?

A. We have these tickets made out and the form on the ticket, and the form is set up and stamped on there and at the bottom it says "How stamped"; then they would put "American Lady"; they would expect to stamp it with the regular "American Lady" stamp. Then we have what we call "American Lady" special. Sometimes those stamps are confused and they will get the wrong stamp on, or leave a stamp off, but so far as I am personally aware they went out stamped regularly.

449 Q. Stamped "American Lady" or "American Lady Special"?

A. Yes, sir.

450 Q. How about the use of the trade mark "Hamilton-Brown Shoe Company" on the strap?

A. The trade mark on the strap, it would come on the ribbon, "American Lady."

on what styles of shoes the trade mark, the strap and name, was used on the bottom of the shoes?

A. No, they would not show that.

467 Q. Or does it show on what styles they omitted to put the trade mark, strap and name, on the bottom of the shoes?

A. No, that would not be in.

468 Q. The cards themselves would have shown that if they were preserved?

A. The ticket, yes, sir.

469 Q. They were destroyed, however?

A. About every six or twelve months they are destroyed.

294 470 Q. In your accounting when are your books closed for each year?

A. They are closed between the first and tenth of December. The factory books—we start in to take a kind of inventory the last of November, as there is a great deal of counting up to do to get them closed in time for our general inventory, but we usually close our books about the tenth of December.

471 Q. I wish you would tell me how the factory bills those shoes to the jobbing department?

A. They are billed at the face value of the shoe.

472 Q. By that you mean the price that they are sold by the jobbing department to the dealer?

A. Yes, sir.

473 Q. They are billed at $2.00, $2.25 or $2.50 as the case may be, to your jobbing house?

A. Yes, sir.

474 Q. When they are thus billed, do you allow the jobbing department a discount off that price?

A. Yes, sir.

475 Q. How much?

A. 12½%.

476 Q. That is uniform during that period?

A. Yes, sir.

477 Q. Out of that 12½% the jobbing department pays its expenses and what is left is the jobbing profit?

A. Yes, sir.

Mr. BAKEWELL: That is objected to. It does not appear that the witness is familiar with the practice of the jobbing department.

Mr. WERNER:

478 Q. You are a director of the company?

A. No, sir.

479 Q. An officer of the company?

A. No.

480 Q. Are you familiar with this matter?

A. I am in a general way familiar with the——

481 Q. You are a stockholder?

A. No, sir.

482 Q. You were vice-president of the Company?

A. I was.

Mr. BAKEWELL:

451 Q. What else?

Mr. WERNER:

452 Q. What ribbon?

A. On the top band, "Hamilton-Brown Shoe Company, Makers."

453 Q. Where a top facing was used?

293 A. Yes, or if the top facing happened to be stamped, they would put on the bottom the Hamilton-Brown Shoe Company's name in the belt band.

454 Q. Wherever "Hamilton-Brown Shoe Company, Makers" was put upon a shoe, that was put on the top facing?

A. Yes, sir.

455 Q. And wherever the trade mark was used, the strap, that was stamped on the bottom?

A. That was supposed to be stamped on the bottom.

456 Q. You say you have no knowledge of any style of "American Lady" shoe that did not bear one or the other, or both?

A. I have no personal knowledge of that.

457 Q. Now, as to the use of that top facing that had "Hamilton-Brown Shoe Company, Makers" on; that was always in silk or woven, was it?

A. Yes, sir.

458 Q. And wherever that marking "Hamilton-Brown Shoe Company, Makers" was used, it was by sewing that in the top of the shoe, that woven top facing?

A. Yes, sir.

459 Q. Do your records show on which of your styles that woven top facing so marked was used?

A. Yes, our records would show that.

460 Q. Now, where, as for instance in the sample of shoes used this morning, the top facing was simply of leather, that, of course, was not used?

A. No.

461 Q. There are also so-called "low cuts" in the "American Lady" shoes?

A. Yes, sir.

462 Q. Those of course have no top facing?

A. No.

463 Q. And so do not bear that woven mark?

A. No.

Mr. BAKEWELL:

464 Q. Those low shoes would not have a woven label?

A. No.

Mr. WERNER:

465 Q. Then, if I understand you, your records will show on what styles of shoes that woven top facing was used?

A. Yes, sir.

466 Q. That I may not misunderstand, do those records show

483 Q. Up to what time?
A. Up to the 20 of this past December.
484 Q. And during the period of this litigation?
A. Yes, sir.
485 Q. As Vice-President were you not a member of the Board of Directors?
A. Yes, sir.
486 Q. So you had a certain familiarity with even the jobbing end?
A. Only in a general way.
486 Q. You do know in a general way, that the jobbing end made its profit out of what it could save out of that discount?

Mr. HART: Unless the witness has personal knowledge of these facts—no matter what his understanding may be; it is the facts we want——

295 Mr. WERNER: Well, we can call other officers.

Mr. HART: If his knowledge is not correct what is the use of having it?

Mr. BAKEWELL:

487 Q. What is your knowledge?
A. My impression and my knowledge is that they were expected to make a profit out of that.

Mr. WERNER:

488 Q. They paid you the bill that you presented to them, less that discount of 12½%?
A. Yes, sir.
489 Q. And that you said was uniform on all shoes?
A. Yes, sir.
490 Q. How did you arrive at that price that you billed them to the jobbing department?
A. How did I arrive at it?
491 Q. Yes.
A. By taking a shoe, analyzing it, and telling them what I would make a shoe of that kind for.
492 Q. In that, of course, you put your cost of material, your cost of labor, a fixed factory profit, and such other items as entered into the manufacturing end of the shoe?
A. Yes, sir.
493 Q. That your records show as to each style?
A. Well, first our sample estimate. We make an estimate on the shoe and at the end of the year we have an aggregate profit and we divided the number of shoes into the aggregate profit and then we knew about the general profit of a shoe. That is the only way we have of absolutely proving our figures.
494 Q. So that the factory end can report to the Directors from their records the factory profit on the shoe?
A. The factory profit, but not the individual profit. The aggregate profit was turned over to the Hamilton-Brown Shoe Company.
495 Q. The aggregate profit on all styles manufactured during that accounting period in that factory?

A. Yes, sir.

495 Q. Now, that we may fully understand it, let us take one sample or stock number of a shoe that you bill to the jobbing department at any particular price, say $2.50: will you analyze that price?

A. Do you mean the estimate?

497 Q. Yes.

A. The estimate on that should——

498 Q. That you bill it to the jobbing department.

A. I bill it exactly at $2.50.

499 Q. Analyze that $2.50 for me, won't you?

A. Well, I bill the shoe at the gross price, $2.50, and when they get my aggregate monthly sales to them at the store, they deduct 12½% and credit the factory with the net. If we had a
296 bill there for 100 pairs of these shoes it would be $250.00 less 12½%.

500 Q. That is what they would owe the factory?

A. Yes, sir.

501 Q. You arrived at that $2.50 how? Analyze that $2.50?

A. Why, I put down——

502 Q. You put down a fixed factory profit first?

A. No, we do not have a fixed factory profit because there are inconsistencies in making shoes. We bill a shoe and decide what profit the shoe will bear. Some may bear a better profit than others. Some may have to be made at cost. I take my leather, and material, and findings; labor, discount and fixed factory charges of superintendents, elevator boys, office boys, that I cannot charge [ligitimately] into the labor of the shoe; machine parts; all of those things have to be covered, and charge this 12½% in as a part of the shoe.

503 Q. And the factory profit?

A. No, the factory profit is—that is the difference between the actual cost of that shoe and what we bill it at.

504 Q. What is that average?

A. On the "American Lady" shoes?

505 Q. Yes.

A. On the "American Lady" shoes we have different averages; there is a fluctuation.

506 Q. Well, the *the* general factory profit that you put in as fixed; that is, original, of course?

A. Well, we would aim to get at least 5%.

The MASTER:

Q. I want to ask the witness a question here to clear up in my mind because I do not quite understand the way the witness gets at this price:

Do I understand you to mean that after you take the labor, material and the factory cost of the manufacture that there is added to that a sum sufficient to cover the expenses of running the factory, elevator boys, messengers, carriers and porters?

A. We first take the material in the shoes, the findings, and then the actual labor cost of the shoes. In addition to this we put in supplemental wages, which includes general manager, superintend-

ent, elevators, porter, carpenters, engineer and fireman, and in addition to this, charging in the 12½% that the jobbing department charges us for doing business.

The MASTER:

508 Q. So that the general salary account or wage account of the factory, is in the name of the "Supplemental Labor Account" added to the actual labor on the shoe?

297 A. Yes, sir.

Mr. WERNER:

509 Q. And in addition to the items enumerated, there is the factory profit which you say is five per cent or over?

A. We figure five per cent.

510 Q. You think it would average [fice] per cent?

A. I should say it would.

511 Q. It is sometimes as high as ten per cent, is it?

A. No, sir.

512 Q. During the period in question, all the "American Lady" shoes were manufactured in the particular factory of which you are the Manager, and designated by you as the "American Lady Factory"?

A. Yes, sir.

513 Q. Were any other shoes than "American Lady" manufactured in that factory?

A. Yes, sir.

514 Q. What shoes?

A. Well, there were different shoes manufactured in there, under different brands.

515 Q. Name some of them.

A. The "Vassar"; "Shoeze"; "Tenderfoot."

I have the exact amount of "American Lady" shoes made each year, in a record that I have prepared.

516 Q. Under the different style numbers?

A. No, just as "American Lady."

517 Q. They could be separated into the different style numbers?

A. Well, it might be, but it would be a very endless job to do it.

518 Q. But the factory profit differed on the different styles?

A. It may have, but we don't take that into consideration in the general aggregate.

519 Q. In the general aggregate at the end of the year?

A. No.

520 Q. What determines the variation when you come at the end of the year to make the general aggregate of profits on "American Lady" shoes, from that which you originally calculated when you billed the shoe out?

A. Do I understand that you mean what causes our estimates to fall short?

521 Q. Yes.

A. Rise in the price of labor or material, or faulty estimates. For instance, we estimate that to cut a case of a certain grade of shoe would take three foot of stock and we might buy stock on which

these estimates would not hold out. We often find out when
298 we come to cut the stock that the imperfections and blemishes won't permit us to cut it as close as we expected; sometimes we will make a loss of several hundred dollars in that way.

522 Q. And sometimes there has been a gain where the difference in the cost of material has been in your favor?

A. Yes, sir.

523 Q. But whether a loss or a gain from that originally calculated, it is shown by your aggregate footings on your records at the close of each year?

A. We are not able to determine. As I say, there is no prescribed amount of money that we shall make amount of profits, and if we turn in a balance sheet with a credit on the right side, we are commended; or, there may be some disappointment in it.

524 Q. I meant, at the end of the year, which is the accounting period in which you revise your figures on which you calculated a certain fixed profit, that is subject to revision?

A. Yes. The way that is handled is by raising the price of the shoe. We have these advances in material and advances in labor. As quick as we are able to advance the price of shoes we do it; generally after the season is over, and that largely accounts for these changes of sample numbers. We change the shoe around; disguise it in a way that the trade won't recognize it as the same number, and charge them a little more.

525 Q. You endeavor to make up in the next season what you have to charge off in the last season?

A. Yes, sir.

526 Q. If I correctly understood you, then at the end of that accounting period you take the total number of shoes (always talking about "American Lady"), divide into the total profit and get the profit——

A. The profit per pair.

527 Q. And then, if necessary, you revise your price for the next year?

A. Yes, sir.

528 Q. And that total number of shoes and total profit are shown on your records?

A. Yes, I assented to that. However, we do not do that, but that is a way to get at the average profit per pair. They never ask us to make any return of that kind.

529 Q. You do not actually do that?

A. No; but that is the way to arrive at the profit per pair. I have done that since this thing came up.

530 Q. Before that your records only showed the arbitrary profit that you charged?

A. The aggregate profit on all shoes of whatsoever stamp?

299 Mr. BAKEWELL:

531 Q. Whether "American Lady" or not?

A. Yes, whether "American Lady" or not.

Mr. WERNER:

532 Q. And of all shoes that were the output of that factory, whether "American Lady"; "Vassar," or anything else?

A. Yes, sir.

533 Q. Explain, then, how you made the calculation that you refer to as having recently made.

A. I took the number of pairs of "American Lady" shoes and found out the per cent of the general output of the factory, for the period in question, each year, and took that per cent of the profits.

I took the number of pairs of shoes made that year and divided them into the entire profits of the year, and that gave me the profit, per pair, that was made.

534 Q. That would be the profit per pair whether "American Lady"; "Vassar," or anything else?

A. That would, yes, sir.

535 Q. And that would be assuming that you made a uniform profit on all the shoes sent out from that factory?

A. That would be.

536 Q. That, of course, is not necessarily true?

A. It is the only thing that we have to ascertain it. We have no estimates. When we are finished for the season the estimates of that season are destroyed because they are no good to us.

537 Q. Of course you make a higher profit on the more expensive shoes?

A. Generally.

538 Q. The "American Lady" was the more expensive shoe in that factory?

A. More expensive than some. "Shoeze" was an equally expensive shoe.

539 Q. Then, of course, dividing the profit into the total number of shoes in that factory, would show a less profit on the higher priced shoes than otherwise would be shown if the records were kept distinct? It would tend to reduce the profit on the higher priced goods?

Mr. BAKEWELL: That is objected to as a conclusion.

The MASTER: That objection will be overruled.

The witness was asked to state whether that would be the fact.

To which ruling of the Master the defendant by its counsel then and there duly excepted.

300 A. Whether it would be a fact?

The MASTER: Yes.

A. It probably would be a fact.

Mr. WERNER:

540 Q. Your record from which you get the aggregate number of shoes, the output of that factory, shows how many "American Lady"; how many "Vassar"; and how many of each make?

A. Yes, sir.

541 Q. So, if I understand it, you can show us from your records the number of "American Lady" shoes, of each sample number,

but you cannot show us from your records the actual profit on the "American Lady" shoes alone?

A. No, there is no record of that kept.

The MASTER:

542 Q. Then you arrive at it by taking the pro rata of the "American Lady" shoes to the total number manufactured, and upon that basis find what the probable profit on the "American Lady" shoe is?

A. The profit on the "American Lady" shoe is never brought into question. It is aggregate profits that we turn over to the store and we have not kept any account of on what shoe we made the profit. We know that in these years we made an aggregate profit of so much. We know how many shoes we made; how many "American Lady" and how many of the various other brands.

The MASTER:

543 Q. That arrived at just what I stated. You make it then a pro rata——

A. Yes. We had no occasion to question the profits on any individual shoe until this thing came up.

The MASTER:

544 Q. Then, according to your statement, you would divide the profit pro rata according to the number of pairs that the "American Lady" pro rated to the whole manufacture?

A. That is the way we did it.

Mr. HART: In order not to confuse the record, I think if you will ask him if he did not apportion this profit on the value of the shoes, rather than the number of pairs—the billing price to the house, rather than the number of pairs, you will get the record clearer. I am not suggesting anything to the witness, only I think——

A. In one instance we have done that. In the other instance we have taken per pair. The paper that I prepared here was
301 the value of the shoe as against the entire value of the output.

For instance, in 1906 the value of the "American Lady" product of the "American Lady Factory" was 71.5% of the entire product of the factory that year.

Mr. BAKEWELL:

545 Q. That was on "American Lady" shoes?

A. Yes, sir.

Mr. HART:

546 Q. That is on the value and not on the number of pairs?

A. This was another statement I prepared to find what the shoes average per pair, profit. This statement here would be a more equitable one from the fact that this is on the volume of business, as the "American Lady" price added to the volume, the profit on the "American Lady" shoe is enhanced by this mode of figuring.

Mr. WERNER:

547 Q. What do you mean by "since this matter came up"?

A. Since this matter of the hearing before the Master came up.

548 Q. How long ago was that that you made this?

A. I made it since that first time I came down here, or about that time.

Mr. BAKEWELL: Defendant's counsel here states that, since the witness has brought up that question, at the suggestion of complainant's counsel he did try to have prepared through Mr. McElroy, a memoranda of the profits made by the Hamilton-Brown Shoe Company during the period covered by this accounting, and, since the matter has come up in this way, he presents to the Master and to the counsel, a memoranda prepared by him, from the data given to him by Mr. McElroy, with a view, if possible, to reaching a stipulation, as suggested by the complainant's counsel; part of this statement having been prepared by Mr. McElroy, as he understands it, from the personal knowledge of Mr. McElroy in regard to the matter, and part of it having been prepared by Mr. McElroy with information obtained by Mr. McElroy through the accountant of the Hamilton-Brown Shoe Company.

This is on five typewritten sheets and he presents it to the Master for what it may be worth in this connection.

Mr. WERNER: You tender that to us for examination?

302 Mr. BAKEWELL: I tender that for examination.

This is presented either as a basis of some stipulation, or as a basis to refresh the memory of Mr. McElroy in regard to matters within his own knowledge.

Mr. WERNER:

549 Q. Have you any record or did you make any tabulation as to the markings on these shoes?

A. Have I any record?

550 Q. Yes.

A. No, I haven't any record.

551 Q. We will have to go to the factory records, then, to show how many of those shoes had no woven top facing?

A. Yes, we can give you the factory records an that.

NOTE.—At this point Mr. Bakewell hands memorandum to Mr. Werner.

552 Q. Mr. Bakewell hands me a memorandum to the effect that there were made, from January 29, 1906 until November 15, 1909, without "Hamilton-Brown Shoe Company, Makers" on the top band, but marked on the sole "Hamilton-Brown Shoe Company" 306,200 pairs: your records verify that?

A. That is not a matter of record. We got the bills of the goods from the manufacturers of the top band and then we estimated what they would cut up; how many pairs of shoes we could get out of them. That is the only way we preserved that record.

553 Q. That is the way you arrived at that?

A. Yes, sir.

554 Q. And you say that was arrived at by taking the total number of pairs of "American Lady" shoes manufactured during that period and ascertaining from your records how many top facings bearing the name "Hamilton-Brown Shoe Company. Makers"——

A. No; I said that we took the invoices from the ribbon manufacturer, of the number of yards of top facing, and estimated how many pair of shoes that yardage would make.

555 Q. And that gave 306,200?

A. Yes, sir.

Mr. BAKEWELL: That is, 306,200 pairs that were not marked.

Mr. WERNER:

555 Q. That gave 306,200 not marked with the top facing?

Mr. BAKEWELL:

556 Q. But marked on the soles with the name "Hamilton-Brown Shoe Company" between January 29, 1906 and November 15, 1909?

A. Yes, sir.

303 Mr. WERNER:

557 Q. That, of course, does not include low cuts?

A. No, that is high cut entirely.

558 Q. On to this we have to add the low cuts?

A. There are no low cuts with top facing.

559 Q. That does not figure in the low cuts?

A. No, sir.

560 Q. As you explained, none of the low cuts have that top facing upon them?

A. No, sir.

561 Q. I understand that all the shoes that bore "Hamilton-Brown Shoe Company, Makers" bore it in the shape of the woven top facing?

A. Yes; otherwise they bore the sole stamp.

562 Q. Otherwise they bore the trade mark?

A. Yes, sir.

563 Q. Which did not have the word "Makers" on it, but did have the name "Hamilton-Brown Shoe Company"?

A. Yes, sir.

564 Q. So that none of the low cuts were marked "Hamilton-Brown Shoe Company, Makers"?

A. I was just trying to remember how we marked the low cuts. I don't think they were marked with "Makers". We have an embossed stamp on the inside of many of the low cuts, but I think it just has the Hamilton-Brown Shoe Company trade mark.

Mr. BAKEWELL:

565 Q. With the name "Hamilton-Brown Shoe Company"?

A. Yes, sir.

566 Q. It appears twice on the low cuts, once on the inside and once on the sole?

A. On some it is; on some it does not appear on the inside, or vice versa In some we put in one way or the other.

Mr. WERNER:

567 Q. Now, then, we have a third class that would be added on the high cuts, that did not have the top facing with the marking "Hamilton-Brown Shoe Company, Makers" on them; and the low cuts which did not have it on, and that would be the "American Lady" shoes, if any, that did not have either on; that is, the top facing or the trade mark, if there were any such?

Mr. BAKEWELL: That is objected to as leading and also assuming something that has not been proven, the witness having distinctly stated in his testimony, that so far as he knows, during the entire period of this accounting—covered by this accounting, the Hamilton-Brown Shoe Company has sold no shoes marked with the name "American Lady" that did not have the name "Hamilton-Brown Shoe Company" on the shoe, and that a great many of these
304 shoes had the words "Hamilton-Brown Shoe Company, Makers" on the facings of the shoes.

Now, about this leading question——

The MASTER: The objection will be sustained.

Mr. WERNER:

568 Q. I will ask you whether to your knowledge there was a third class?

A. To my knowledge there was not.

569 Q. That did not contain the name "Hamilton-Brown Shoe Company" on it in any place on the shoe?

A. I would say no.

Mr. JOHNSON: With your permission, may I ask a question? I do not want to interfere.

Mr. BAKEWELL: Not of the witness, unless you want it in the record.

Mr. JOHNSON: Yes.

Mr. BAKEWELL: Certainly.

Mr. JOHNSON:

570 Q. Then, as I understand you, none of the low cuts during the period we have under inquiry, had the word "Makers" at all thereon?

A. None of the low cuts.

571 Q. Although they did have "Hamilton-Brown Shoe Company" as you say, on the sole and sometimes on the inside of the lining?

A. To my best knowledge they had no word "Makers" on them.

572 Q. Will you tell us how many low cuts were made during the period we now have under inquiry, by the Hamilton-Brown Shoe Company, of the "American Lady" shoe?

A. I couldn't answer that.

573 Q. Can you get it from the records?

A. I think so, yes, sir.

Mr. WERNER:

574 Q. I will ask you whether you can furnish us when we resume tomorrow morning, a statement showing the number of "American Lady" shoes manufactured from year to year, during the period in question, and how many of those were low cuts?

A. It would be very hard. I don't think that can be gone over—when did you expect to get that?

575 Q. I will ask you when you can conveniently let us have it?

A. Oh, we could segregate that and divide it within a week or ten days, very easily. It is a big job to go through all those old volumes. We have the number of pair for each year.

305 576 Q. You have already determined the number of high cuts?

A. No, they are high cuts and low cuts; they are all shoes stamped "American Lady," and the number of pair of high cuts that Mr. Bakewell furnished you with a record of, is an estimate based on the yardage of ribbon that we purchased that had on it the name "Hamilton-Brown Shoe Company, Makers."

577 Q. That is, you subtracted those from the total number of high cuts?

A. No, we took that on a basis of ribbon yardage.

578 Q. You subtracted the number of woven pieces that you would get from your ribbon yardage, from the total high cuts?

A. We knew that high cuts only took the ribbon and we knew if we got 5,000 yards it would make so many shoes, or 30,000 yards, or whatever the case might be, and that was the way we came to the number that bore of high cuts that were made in that manner.

Mr. BAKEWELL:

579 Q. That is, with the facing?

A. Yes, sir.

Mr. WERNER:

580 Q. And then you gave us that number I read; that was the number of high cuts without the facing?

A. Yes, the number of high cuts with the facing, without the name.

Mr. HART:

581 Q. Without the word "Makers"?

A. Yes, sir.

Mr. WERNER:

582 Q. By subtracting that from the total output you would have the low cuts, would you not?

A. No.

583 Q. Why not?

A. Because there was a short period during the whole time that a certain amount of high cuts were made without the word "Makers," but there were hundreds of thousands of pairs of high cuts during that time with that word "Makers" so we couldn't subtract that.

584 Q. So it would take you longer to find that out and you would have to go through the books to get the number of low cuts?

A. Yes, sir.

585 Q. I will ask you to prepare such a statement of the total number of low cuts during the period.

Can you give us the total number, from year to year, of all "American Lady" shoes?

A. Yes, sir.

586 Q. Just the number of shoes.

A. The number of pairs?

587 Q. Yes; say January 29, 1906 to December 10, 1906: how many "American Lady" shoes——

A. 491,849 pairs.

306 588 Q. Now from December 10, 1906 to December 12, 1907, what was the total number of pairs of "American Lady" shoes?

A. 514,329.

589 Q. From December 12, 1907 to December 11, 1908?

A. 579,187.

590 Q. From December 11, 1908, to November 15, 1909?

A. 724,178.

591 Q. That includes the two kinds of high cuts and also low cuts?

A. That includes all kinds of high cuts. You said two kinds, did you not?

592 Q. All kinds, we will say?

A. All kinds of high cuts and low cuts bearing the name "American Lady."

593 Q. In other words, all "American Lady" shoes, the output of that factory during that time?

A. Yes, sir.

Q. How far back have you preserved your tickets showing the brandings on "American Lady" shoes?

A. Well, I would say, just offhand, twelve months; it may not be that. If they get in the way—after a case of shoes leaves our factory we figure that the ticket is practically useless. They do them up in packages and hold them sometimes for six or twelve months.

594 Q. Will you produce them for our inspection and the Master's inspection, all the tickets that you have prior to November 15, 1909?

A. As far as we have them?

595 Q. Yes.

A. Yes, sir.

596 Q. Together with the number showing the number of low-cuts?

A. Where do you want those brought or sent to?

597 Q. Which you said you would——

A. There is no distinction made in the preservation of tickets, low cuts, or high cuts.

598 Q. But I meant the aggregate number of lowcuts, during the

whole period for which I asked before which you said you could get.

Mr. BAKEWELL:

599. When do you want those presented?

A. Do you have any idea of what kind of receptacles you would have to have for those tickets?

Mr. WERNER: No.

A. Those tickets would fill this room.

Mr. BAKEWELL: I would suggest to the Master that this inquiry ought to be directed to the counsel. I do not know anything about these tickets.

307 The MASTER: The witness has just said that there was such a supply that would about fill this room, and that would make it a physical impossibility to bring them all here. If there is any such number of those tickets and they are to be inspected and examined by the Master it seems to me——

Mr. JOHNSON: We do not expect to have your Honor examine a room full of tickets, but we do want to exhibit to you some of those tickets, taken at random from any date or period within that time, that they have the tickets, to show you how the markings are.

Mr. BAKEWELL: I want to say this; this accounting is directed to the Master to take an account. I do not think it is for the counsel to go and make this inquiry. It is a question for the Master. Therefore, this inquiry should be directed to the defendant's counsel and submitted to the Master. The Master is the one to determine as to the extent of the investigation of the records of the defendant. It is for the Master to do and not for the counsel.

Mr. JOHNSON: I want to say it is all important to us to show the markings on the shoes. The record shows that with knowledge of this pending litigation they have destroyed tickets that would give us information of how these shoes were marked since the commencement of this suit. It also shows by the answer of this witness that his impression is that they have them for twelve months.

With all due courtesy to the counsel and to preserve the amenities, and to give proper notice both to counsel and to make the proper request, but that is not the question whether the tickets are not all——

Mr. BAKEWELL: I object to the insinuation of this counsel that these tickets have been destroyed because of this pending investigation, when the proper reading of the record shows that those for the last six months would fill this room. The witness has already shown that it has been the practice of the company for years to destroy these things after a certain time, and therefore I object to the insinuation of counsel and I want the record to show the unwarranted insinuation of counsel.

Mr. WERNER: It is not an insinuation but a [bald] statement that they were destroyed. No question of the purpose——

Mr. HART: Why do you not direct your request to counsel instead of to the witness and put it on record and then let counsel have the opportunity to respond to your request?

ruling on these tickets, that defendant's counsel may be permitted to cross-examine the witness regarding these tickets.

Mr. WERNER: We permitted that once and it is interrupting the direct examination. I think we will have to conclude our direct examination first.

Mr. JOHNSON: We will say for the first ten days of the earliest period that you preserved the tickets.

A. That would be—if we have them back to that time, it would be the first ten days of February, or any furthest ten days we have. If we have the first ten days of February, 1906, you would like to have them?

601 Q. Yes, the earliest ten days you have them.

A. We can send you those.

Mr. JOHNSON: This statement that Mr. Bakewell supplied, I suppose may lead to some result. I don't know whether it will or not. If it meets with the approval of the Master and counsel on the other side, I suggest that we adjourn until tomorrow.

Mr. BAKEWELL: I would like to ask the witness some questions in regard to this statement.

Counsel for complainant objects hereto.

The MASTER: I think that the suggestion of the counsel was reasonable and he will be allowed to ask some questions with regard to this memorandum.

Mr. JOHNSON: May we take a respectful exception to that ruling?

The MASTER: Certainly.

Cross-examination.

By Mr. BAKEWELL:

602 Q. Mr. McElory, in regard to the tickets that we have had a discussion about here, I understand you to have given your testimony in regard to those tickets as to your general recollection of them; am I correct in that?

A. Yes, sir.

603 Q. In view of the insinuation made by the complainant's counsel in this record, I will ask you to state whether or not if any of the tickets have been destroyed covering the period of this inquiry, to-wit, since January 29, 1906, whether or
310 not they have been destroyed because of the pendency of this suit?

A. Oh, certainly not.

Mr. JOHNSON: I never said so.

Mr. BAKEWELL:

604 Q. For how many years, as far as you know, has it been the custom of the Hamilton-Brown Shoe Company to make these tickets?

A. To make them?

605 Q. Yes.

A. Oh, as long as we have been in the shoe business. We have to have tickets to carry the shoes through on, to make them.

Mr. JOHNSON: We request counsel and the Master to have before the Referee at the next hearing, the tickets covering
308 the period within the inquiry, so far as they have been preserved, and as they suggest that it would be inconvenient to bring them here, that we adjourn to the factory where they are kept, we naming the date we require. It would be within the Master's power to limit us as to a reasonable number of tickets and a reasonable period of time.

Mr. BAKEWELL: Counsel for defendant objects to the production of said tickets before the Master on the ground that the witness has already stated that if the tickets for the past twelve months are preserved they are so many in number that they will fill this room, which is a room of considerable size, and that the only inquiry on this accounting that the Master seems disposed to go into on this inquiry is the number of "American Lady" shoes sold by it since the filing of the Bill of Complaint in this case, not marked in accordance with the decree, and the profit on those shoes, and that question cannot in any way be solved or assisted by these tickets. Therefore, if the Master chooses himself to examine such of the tickets as may have been preserved, defendant's counsel has no objection to that, but he does object to complying with the request of complainant's counsel and submits that it is an improper request and is not calculated to throw any light on the [*ligitimate*] inquiry in this case.

Mr. JOHNSON: I can only say in reply to counsel that if these tickets disclose (as we expect they will) that a large number of these shoes were manufactured with certain marks or branding, that will aid the Master very materially in determining whether or not those not branded in accordance with the Circuit Court of Appeals should not be accounted for——

A. I do not believe that those tickets if we could get them all, would identify how those shoes were marked. I think the mark will simply be "American Lady" regardless of whether the shoes have one brand on them or not.

Mr. BAKEWELL:

600 Q. Regardless of whether the shoes are marked with the name "Hamilton-Brown Shoe Company" or the word "Makers"?

A. Any ticket that we have there we will be glad to show you. It is going to take up an immense amount of room, as Mr. Wolf probably knows.

The MASTER: Would it not facilitate the matter, Mr. Werner, if you were to ask the witness what is the form and the contents of those tickets?

A. Make the date of the tickets that you want and I will get them anywhere that we have the tickets.

309 Mr. JOHNSON: Reserving our rights to make further demands, we will put in four or five days in there that we want the tickets for.

Mr. BAKEWELL: We would ask the Master before making any

606 Q. How long has it been the practice of the Hamilton-Brown Shoe Company to destroy those tickets?

A. We are very much crammed for room in all of our factories and just as soon as anything becomes burdensome, that is useless, we destroy it. We have no stated time. A foreman expects, or is liable to have a call made on him at almost any time within, say thrity or sixty days—generally it comes within a week—as to how that case of shoes was made. There may be some mistake and he would look up his ticket to find it. But the tickets are destroyed, I should say, after six or twelve months, just as they become burdensome, for want of space.

607 Q. How long has it been the practice of the Hamilton-Brown Shoe Company to destroy those tickets?

A. Twenty-five years; ever since I have been with them.

608 Q. So it is not because of the pendency of this suit that any of these tickets have been destroyed, is it?

A. Certainly not.

609 Q. They have been destroyed in the regular course of business, have they?

A. Yes, sir.

610 Q. What was the purpose in having these tickets at all?

A. You mean originally?

611 Q. Yes.

A. It is the description of the shoe, telling how the shoe should be made.

612 Q. What is your present recollection as to whether or not those tickets would be a correct indication of whether or not the shoes made, bore upon them the name "Hamilton-Brown Shoe Company"?

A. I don't think there is any evidence on the ticket that they have that. I think those tickets are marked, my recollection is that they are marked "American Lady," that is put on the shoe when it is stamped; that means "American Lady" shoe.

311 613 Q. According to the best of your recollection what would the tickets show as to whether or not any of the "American Lady" shoes, made since the filing of this bill, bore upon them the words "Hamilton-Brown Shoe Company, Makers"?

A. No, there would not possibly be any record on the ticket to show that that was the case.

614 Q. I handed Mr. Werner at this afternoon's session, the following memorandum which I will ask to be read into the record:

"'American Lady' shoes made from January 29, 1906, to Nov. 15, 1909, without 'Hamilton-Brown Shoe Company, Makers' on top band, but marked on the soles with the name 'Hamilton-Brown Shoe Company,' 306,200 pairs, amounting to $39,469.18 factory profit."

You gave me that memorandum?

Mr. JOHNSON: We object to this method of cross-examination. As I understand the rule in the Federal Courts the cross-examination is confined to matter brought out in the chief examination. We have made no examination whatever as to any statement contained in that memoranda handed to Mr. Werner.

Mr. BAKEWELL: But you read the memoranda.

Mr. JOHNSON: But not the profit in any way.

Mr. BAKEWELL: I simply want to show where I got that memoranda.

Mr. JOHNSON: We do not think it is competent or relevant at this stage of the inquiry.

The MASTER: The objection is overruled. You may proceed with the question.

(Previous question read.)

A. It was prepared on my order.

Mr. JOHNSON: We move to exclude it, on the statement of the witness that it is purely hearsay and not any knowledge whatever on the part of the witness, with reference to the matter contained therein and we ask that it be excluded.

The MASTER: That objection will be sustained unless the inquiry and the answer show that it was prepared from the books.

Mr. BAKEWELL:

615 Q. What do you know of your own knowledge in regard to the statements that memorandum contains?

312 A. I know they are correct. I had them prepared by the bookkeeper.

Mr. JOHNSON: We move the exclusion of that answer on the ground that it discloses that the witness has no knowledge of it at all; it was prepared by someone else. It is data under the control of someone else.

The MASTER: The motion is overruled.

To which ruling of the Master, the complainant by its counsel then and there, at the time, duly excepted.

Mr. BAKEWELL:

616 Q. You were asked in your direct examination in regard to the "American Lady" shoe sold by the Hamilton-Brown Shoe Company since the filing of the bill of complaint: I now ask you to refer to defendant's exhibit "American Lady" shoe carton, which has already been offered in evidence and dated January 31, 1910, marked "Henry H. Denison, Master," which bears upon the lid the name "Hamilton-Brown Shoe Co.'s" and on the end thereof the strap trade mark with the name "Hamilton-Brown Shoe Company, Makers" in white letters on a red background in the center of said trade mark:

Are you able to state of your own knowledge whether or not since the filing of the bill in this case, all the "American Lady" shoes that have been sold by the Hamilton-Brown Shoe Company were packed in cartons like the carton referred to and having on the end thereof the said strap trade mark bearing in the center of the said strap trade mark the word "Makers"?

Mr. JOHNSON: That is objected to on the ground that this has already been permitted in cross-examination irregularly, as we think.

It was also gone over in presenting the matter to Judge Dyer. We submit it is not proper for the opposing counsel to now cross-examine with reference to the cards, or with reference to the so-called statement prepared by the witness and handed to Mr. Werner; and the present cross-examination is not germane to anything we brought out whatever, and is now incompetent and irrevelant.

The MASTER: The objection will be sustained. This has all been gone over with regard to the carton before.

Mr. BAKEWELL: I am not here on the question of what was gone over before Judge Dyer.

The MASTER: You have asked this same question before.

313 Mr. BAKEWELL: We have made further inquiry and we have the date of the bill when we purchased the labels and we propose to offer that in evidence.

Mr. WERNER: It is not proper cross-examination.

The MASTER: I do not think that is proper at this time, Mr. Bakewell.

Mr. BAKEWELL: Defendant's counsel excepts to the ruling of the Master.

Defendant's counsel here states that he wishes to show by this witness that the end labels for all of these cartons containing "American Lady" shoes, such as the end label on defendant's exhibit "American Lady" shoe carton, January 31, 1910, have been used since the filing of the bill, on all the "American Lady" shoe cartons in which all "American Lady" shoes sold by the Hamilton-Brown Shoe Company have been sold; that this has an important bearing on the ultimate question on this accounting.

That is to say, as to whether or not the "American Lady" shoes sold by the Hamilton-Brown Shoe Company since the filing of the bill were in fact sold by the Hamilton-Brown Shoe Company "as and for" shoes of the complainant.

Since the examination already had before the Master and since before the question was taken to the Circuit Court, counsel for the defendant has had this matter investigated and is ready to produce through this witness a bill for these end labels showing the same were ordered and purchased long before the filing of the bill and that it has been the universal practice of the Hamilton-Brown Shoe Company ever since before the filing of the bill in this case to mark its cartons with the end labels hereinbefore specified, the end label having distinctly upon it the name "Hamilton-Brown Shoe Company, Makers".

I offer to produce that evidence here on the cross-examination of this witness and I submit that it has an important bearing on the case.

The MASTER: But the witness has not yet been surrendered on cross-examination and objection being made to this testimony being introduced at this time and it being beyond and outside of the liberty which I gave for cross-examination a few moments ago, I think it should be deferred until the proper cross-examination of the witness begins.

I do not wish to be understood as ruling that it is not competent or that it will be excluded at the proper time.

314 Mr. BAKEWELL: This is all the cross-examination on these particular points before the witness is ultimately surrendered for cross-examination.

Mr. JOHNSON:

617 Q. You have been vice president of this company for quite a period of time, have you not?

A. Yes, sir.

618 Q. And were at the time of the commencement of this suit?

A. Yes, sir.

619 Q. You did not destroy these tickets yourself, did you?

A. No, sir.

620 Q. What I refer to are these tickets that bear the stamp: but you did have knowledge of the pendency of the suit, did you not?

A. I had knowledge of the pendency of the suit.

I don't say these tickets are destroyed now, but I say it is our general custom to destroy tickets as soon as they get in the way and that has usually been about every twelve months.

621 Q. When you investigate, you will let us know tomorrow when we assemble again, whether they have been destroyed since the commencement of this suit?

A. Yes, sir.

622 Q. But you answered Mr. Bakewell that it was your invariable practice to destroy these tickets?

A. I say so far as my personal knowledge of it goes, it has been. Years ago they used to come to me and ask me if they should destroy the tickets, but they have not asked me that to my recollection, for eight or ten years. And the custom prevailed of destroying the tickets as soon as they are in the way, holding them for a period of about twelve months.

623 Q. As superintendent of the factory you would know?

A. I am not superintendent; I am the general manager.

624 Q. As such officer would you have knowledge of that custom?

A. Yes, sir, but so far as it is carried out at this time I don't know positively. I can ascertain this.

625 Q. It would be your own judgment that it would be more prudent to have kept the tickets?

A. How is that?

626 Q. It is your own judgment that it would be better to preserve them, is it not?

A. (No answer.)

Mr. BAKEWELL: That is objected to.

At this point adjournment was taken to Friday, April 8, 1910, at 10.30 o'clock A. M.

FRIDAY, ST. LOUIS, April 8, 1910.

Met pursuant to adjournment as above on Friday, April 8, 1910, at 10:30 o'clock A. M.

Present, parties as before, except Mr. Bakewell.

315 The following proceedings were had.

Direct examination of Mr. McElroy resumed.

By Mr. JOHNSON:

627 Q. Mr. McElroy, have you produced the tickets that we asked you to bring into court yesterday?

A. The first ten days of the furthest date back. I think it runs from the first to the tenth of January, 1909.

628 Q. Have you looked at them at all?

A. No, I just glanced at them to see that the tickets were the dates that he specified.

629 Q. You have produced them for our inspection, have you?

A. Yes, sir.

630 Q. I will ask Mr. Wolf to pick out what he wants while we go on with something else.

On January 29, 1906, who had charge as General Manager of the "American Lady" factory?

A. I had.

631 Q. And who had charge as general superintendent?

A. Mr. J. T. Johnston; John T. Johnston.

632 Q. What were his duties at that time?

A. His duties were the geenral following up of the work.

633 Q. Can you not state a little more generally, Mr. McElroy?

A. He took all his orders from me.

634 Q. He took all his orders from you?

A. Yes, sir.

635 Q. Now, at the factory, who would have charge of the books, such as they were, that were kept there?

A. Why, some girl would check off the work and record these tickets.

636 Q. On a book?

A. Yes, sir.

637 Q. What books really were kept at the factory, books of original entry?

A. Books of original entry, an invoice book that billed these goods to the store; and what we term as a "packing book"; a book that we enter the description of the shoe in, packing book; just a copy of that with the case number to check it up.

638 Q. Was a cash book kept out there?

A. A petty cash book, yes, sir.

639 Q. Was any journal kept there?

A. No, no journal.

640 Q. As I understand you, there is only one customer of "American Lady factory"?

A. Yes, and that was the Hamilton-Brown Shoe Company.

641 Q. Was any ledger kept there?

A. No ledger—well, we have a general ledger to keep our accounts, to show our discounts and purchases from different concerns.

316 For instance, if we should buy a bill of $10,000 from an eastern leather house, we would enter that $10,000 charge up and show the discount we got on it in order to show our profit.

642 Q. You would keep the invoice?

A. Oh, yes.

643 Q. Where would the entries be made relative to those bills?

A. In our general ledger.

644 Q. Would there not be a book of original entry that they would be first entered in and then posted from that?

A. We post our bills from a—we post them in a book, an inventory book.

645 Q. What other books did you keep at that time? I am asking for all your books of original entry, so you will name them.

A. There is a book in the cutting room first, that these tickets are entered in as soon as we get them in the department. They are entered first in a book in the office, a gen-ral entry book; then they are entered again in the cutting room, and then there are no more general entries of the ticket until it comes to the packing—well, yes, probably there would be; there would be a book in almost every department where this shoe was entered under this number and the description.

646 Q. Go ahead: I am just tracing the work through the process of manufacture by means of books and tickets?

A. Then lastly in the packing room.

647 Q. How does it start out? The ticket is the first, is it? Who makes out the first ticket?

A. The young lady in the office.

648 Q. Do you know who she was at the time?

A. No, I don't know; I don't know whether she is there now or not.

649 Q. Under whom did she work, immediately; who would know, Mr. Johnston?

A. I imagine so. We change the detail of the work occasionally. For instance, we used to make all the tickets out in the main office, but as the business grew and our quarters became cramped there, we sent the tickets up to the cutting room and had them made out there and brought back and entered in the main entry book in the office. That is a matter of detail that shifts around from one department to another. We would probably be able to locate that girl.

650 Q. Then, as I understand you, from the day I first asked you about, January 29, 1906 (I am running through 1906 only)——

A. I could not say positively the manner of detail in any one year. I am taking it as our present system is with these little changes that may have occurred from time to time.

651*a* Q. Mr. Johnston would be able to tell us more specifically as to the particular year?

A. Probably he would.

317 652 Q. And the books in which these various things were recorded during 1906 are still in existence, are they not?

A. The original entry books are, but the small memorandum books that are kept on the floors are probably not.

653 Q. Now, then, having the ticket first start out, it goes through the various steps that you have taken through the various floors?

A. Yes, sir.

654 Q. I suppose with a rack until it finally lands as you told me, in the packing room?

A. Yes, sir.

655 Q. And a record was kept in books all the way through on each floor?

A. Yes, sir.

656 Q. Of its progress, and which you think are still preserved?

A. No, I don't think those books are, but I say the book of original entry.

657 Q. That is, what was on the original ticket?

A. Yes, the original entry of the ticket that we check off and made our charges from; those books are still in existence.

658 Q. Now, speaking of 1906, what would be on the ticket, if you can recollect?

A. I would not have any recollection at all further than that is the general form of ticket.

659 Q. A ticket of about that size (indicating)?

A. Just the same form.

660 Q. After having reached the packing room what is done next in recording?

A. The shoes are packed and that ticket is entered by this stock number first (indicating) as it appears here, 66307, series G, Dongola Oxford, Patent tip, price $1.85; "American Lady" stamp.

661 Q. What book is that entered in?

A. That is entered in the inventory book and is also in the packing book.

662 Q. Permanent records are kept of those, are they not?

A. They are from time to time. I should imagine that the duplicate invoice books probably are in existence today.

663 Q. For the year 1906?

A. I should say they probably are.

664 Q. After that what is the next book that records the history of that rack of shoes?

A. What is the next book?

665 Q. Yes.

A. There is no other book.

666 Q. What becomes of the shoes, are they put in bins?

A. No, in cartons, in cases, and the cases are sent to 12th & Washington Avenue.

318 667 Q. What is there to show you the quantities of shoes that you send cases of to the Washington Avenue place?

A. Our books.

668 Q. What particular books are those?

A. It would be the packing book, and the invoice that we bill them.

669 Q. For instance, suppose you ship them in one day, January 29, 1906, 10,000 pairs of shoes; how would that be invoiced to them?

A. It would be invoiced to them by those tickets. Each individual ticket would be an item.

670 Q. On one general bill?

A. It would be a detail bill. Each case of shoes under a serial number would be an item of that bill.

671 Q. And it might be large or small according as your production was——

A. The general bill would be large or small. I understand you mean the general bill? Just exactly what we packed and were able to ship out.

672 Q. Would you wait for orders from them to ship?

A. Oh, no, ship twice a day.

673 Q. All you produced?

A. All goods in condition to be shipped. Sometimes a case of shoes are run through and a pair will be damaged and we have to have that pair of damaged shoes replaced or repaired; that might hold that case—a case that was packed on Jan. 29th, might by some delay not be billed to them until the 15th of February. It might be held there for some reason, for getting hold of a back shoe or a pair of shoes that have been damaged in the process of making, and would be held in there from two days to two weeks.

674 Q. You do not wait for particular orders to ship?

A. No, no orders.

675 Q. You give them such of the product of your "American Lady factory" as you think is in condition to ship?

A. Well, no. Many times—we receive a list from our jobbing department every morning of goods they need and I am supposed to hurry those goods, and if we have other goods in process of making that they are not in a hurry for I sidetrack them and hold them up.

676 Q. How did they give you those orders in 1906?

A. I cannot recall that.

677 Q. Would there be any written communication?

A. Nothing more than that; there is no record of it kept; just a little memorandum the boy on the floor mailed to me.

678 Q. How would special orders be recorded?

A. They would be recorded just the same way.

679 Q. Just the same?

319 A. Not in the same book because if we had a special order—the yellow tickets represent a special order, and those buff tickets——

680 Q. How about the red ticket?

A. They represent a special order—I don't know exactly what those red tickets are.

681 Q. There are four colors of tickets——

A. That would not be just to say there are four colors; there might be a half of a dozen colors.

682 Q. There are different colors of tickets?

A. Yes, sir.

683 Q. Tell us in your own way what those colors represented during the time about which I am inquiring.

A. I cannot go back as far as that, but I imagine the tickets are the same. The buff color represents a foreign order; that peculiar yellow ticket [represented] a city trade order. The red ticket represents any special order, domestic special order.

684 Q. What color is this (indicating)

A. That is a manila.

685 Q. What does that represent?

A. That represents stock.

686 Q. What do you mean by "special order"?

A. An order that is taken from a customer that they are unable to supply the shoes out of our regular stock from the jobbing department.

687 Q. And would you have a list preserved of what was manufactured specially under those tickets?

A. Oh, yes.

688 Q. And that would be preserved for the year 1906?

A. The special orders are very much more carefully handled than the regular orders. I mean by that we don't use so many books; the business is much smaller on special orders and therefore a book for special orders that would date back to 1906, there would probably be only two or three volumes, not one volume a year; while of the others there are several volumes.

689 Q. You think those books are still preserved?

A. Yes, I am confident of that.

690 Q. And the initial book of all the others, as I understand it?

A. I think so.

691 Q. Now, just in order to get this in shape to leave it: would "Shoe Mart" be a special order?

A. Yes, they would be.

692 Q. Would there be any designation of numbers that would enable you to tell as to special orders?

A. Oh, yes, we can tell special orders.

320 693 Q. What I am trying to get at and I want to be perfectly fair with you; we find some shoes that do not have any serial letter. For instance, the Shoe Mart shoe that was introduced yesterday has a number but no serial letter.

A. You see, our stock orders we run to 100,000 and then stop. We never get to 100,000, we run to 99,999. We want five numbers. Our machines have place for five numbers and we run through 99,999 numbers and then stop and go back, and to keep from being mixed up as regards numbers we put a series on them, A, B, C, D, E, F, G, and our special orders are so comparatively small that it is not necessary to use a serial number.

694 Q. You are able to do that without confusion?

A. Yes, sir.

695 Q. Then, if I get it right, you started to manufacture the shoe with number one?

A. No, Number 1,000 probably (that is not testimony; that is simply figurative).

696 Q. You are approximating this, I know. You think you start with a number that would have four figures?

A. Yes, sir.

697 Q. And whatever that might be when you once started, how would you progress?

A. We would run them numerically to 99,999.

698 Q. Would you skip any?

A. No, none at all.

699 Q. Then when you got to 99,999 what would you do?

A. Start back with series B.

700 Q. Would you first start one with A?

A. I cannot say positively that it was A. When we first started that did not figure as a factor because our business was so much smaller than it is now. We never expected to reach the 100,000 mark, but it finally got so that we had to start those serial numbers.

701 Q. Is there any way of telling what you started with?

A. In business?

702 Q. Oh, no, I mean with "American Lady" shoes.

A. We have started these numbers over several times since we have been making "American Lady" shoes.

703 Q. I know, the numbers; but you have changed the serial letter have you not?

A. Yes, sir.

704 Q. What I am trying to get at, so we will not be confused——

A. I don't think we could give you the serial number we started "American Lady" shoes; that is a long time; it is 10 years ago. We can give you the January 29, 1906, very nicely.

Mr. HART: I think that ought to be confined to the time covering this accounting.

321 The MASTER: They have merely asked the question. They have not asked that to be produced.

Mr. HART: Why should they confuse the record?

The MASTER: I do not think it does. It simply is a method of examination, I take it, to get at the conduct of the business within the limits prescribed by this decree.

Mr. JOHNSON:

705 Q. What I want to call your attention to, unless you tell us definitely, is what numbers you started with, whether they were numerals alone, without the serial number; that these shoes that were specially ordered will in some measure have the same numbers as those that you started with, if you started without any letter?

A. Yes, that is true.

706 Q. You have to tell us so we may know, because we hope to have some shoes that have numbers—on special orders—without any letter at all; hence the reason I am asking you this.

A. Well, the special orders have no serial numbers.

707 Q. In my inquiry directed to you, I want to know if you can, without probing to any great extent, what your starting point was, to see if that had a letter or simply a letter with a number, or a number alone?

A. If you make that as flexible as you made the ticket proposition, I may be able to give it to you. I may be able to give you the start.

708 Q. I am making it just as flexible as we can. Give me approximately, if you can, so we can tell whether you started with a number without a letter; or with a number and a letter: You think you could do that?

A. I think I can do that.

709 Q. Jumping now from that starting point up to Jan. 29, 1906, can you give us the serial number with which the business started on that particular day?

A. Oh, yes.

710 Q. What was the number of that?

A. I cannot do it off-hand.

711 Q. You can telephone for it and can get it, can you not?

A. You want to know what the "American Lady" serial number was on January 29, 1906?

712 Q. Yes.

Mr. HART: I object to him doing so unless he examines the books himself. I object to information obtained over the telephone. Unless he makes an examination of the books I will object to his testifying to any statements made to him by any one else.

322 The MASTER:

713 Q. Would it be in the ordinary course of business, if you went to the factory yourself, to get the information from a bookkeeper?

A. I would have the bookkeeper get it; that is the ordinary course of work. I always ask them to produce those things and they bring me the books.

The MASTER:

714 Q. Were you just now proposing to call the bookkeeper by telephone?

A. Is the bookkeeper there?

(Previous question read.)

A. I would have to ask Mr. Johnston, the superintendent, to have the "American Lady" stock book of the year 1906 produced and let me know the nearest entry to January 29th, what that might be. There might not be an entry made on January 29th; a stock order is made up and might be entered on January 26th or February 10th; it might be February 1st or it might be actually on that date.

The MASTER:

715 Q. I am merely asking this question for the purpose of getting at the course which you would pursue in getting that information.

If you were to call up the factory by telephone now, would you get that information in exactly the same way and from the same party from whom you would get it if you went to the factory in person?

A. If I went to the factory the modus operandi would be to ask the porter to get down these back files or back books, these discarded books, and then the young lady there would pick out 1906.

716 Q. And you would examine it yourself?

A. Mr. Johnston would probably bring it over to me and I would examine it myself.

The MASTER: I will sustain the objection to calling up by telephone.

Mr. JOHNSON:

717 Q. It can be done and you can get it for us, approximately, if there was any number on the 29th of January; you can tell us after that examination of the nearest date?

A. Yes, the first date after January 29th. You don't want any time before?

718 Q. Well, if it was one day before and ten days afterwards, it would be easier to get the day before than the ten days after.

—. ——.

323 719 Q. Do you know of your own personal knowledge, approximately, what numbers were used in the year 1906, during any period of 1906?

A. No, sir.

720 Q. Or 1907?

A. No, I have no familiarity with it.

721 Q. Or 1908 or 1909?

A. No.

722 Q. Do you know what serial number and letter was being used at the date of the entry of the decree, Nov. 15, 1909?

A. No, I don't know that.

723 Q. You think Mr. Johnston would have that——

A. Oh, I can ascertain that from personal knowledge by looking these things up and taking them down, but you readily understand that a man with as many things on his mind as I have cannot follow up serial numbers.

724 Q. Oh, certainly. The books you would look at would be what?

A. The general entry book that I told you about.

725 Q. Now, going a little further, Mr. McElroy, the goods being billed out are entered, you say, on this invoice book?

A. Yes, sir.

726 Q. And then that is posted to a ledger?

A. No, that inventory book is a duplicate book and with a carbon copy we bill the goods to the Hamilton-Brown Shoe Company.

We have wagon "A" and wagon "B." Wagon "A" is in the morning and wagon "B" is at noon, and when we send the goods—as soon as the goods are billed and the invoices corrected or tested by the young lady there, they are torn out and sent with the goods

the 31st would come the postal card back to us showing us the total receipts at the store for the month. That would be gross.

738 Q. Would that be entered anywhere?

A. Would that be entered anywhere?

739 Q. Yes, that aggregate amount of pairs and the aggregate values?

A. At the end of a month we enter it in a general entry book.

325 740 Q. In a general entry book?

A. Yes, sir.

741 Q. And those entry books have been preserved, have they not?

A. That entry book is intact for many years, because it does not take up much space.

742 Q. What would be in an entry book, generally?

A. Just from each factory——

743 Q. I am only inquiring of the "American Lady."

A. Just the number of pairs and the amount of goods we sent to the store, the gross.

744 Q. Would this jobbing department be treated as a debtor?

A. Yes, sir.

745 Q. Would they have a regular account charged against them, just the method you were telling me?

A. No, it is just a record showing that that amount of goods were sent.

746 Q. Would it have a heading or anything?

A. No, I am not certain of the heading. I imagine it is "goods sent to store from American Lady factory"; some heading of that kind.

747 Q. Now, let us get this: is every product of the "American Lady" factory sent direct to the jobbing house?

A. Yes, sir.

748 Q. General and special orders?

A. Altogether. We have no independent accounts.

749 Q. You have nothing to do with shipping them or selling them?

A. Not at all.

750 Q. This being your only customer?

A. Yes, sir.

751 Q. Do you ever ship special orders direct?

A. We never ship direct.

752 Q. Then this entry book, as we term it—is that it or what do you call it?

A. You will have to apply the term.

753 Q. Has it any backing to it, so we could identify it? Call it what you think it is; I am getting at your state of mind.

A. I think probably it is called a "record."

754 Q. This record of shipments to the jobbing department of the Hamilton-Brown Shoe Company is in existence?

A. Yes, sir.

755 Q. From 1903 on, showing each month?

to 12th & Washington Avenue and we keep a duplicate of those invoices and they notify us what their checking off amounted to, the pairs and the amounts of "A" and the pairs and the amounts of "B" and mail us a postal card the evening the goods are received, to show whether we have made any error or not, that is checked against our inventory. Another girl in the main office gets this now and she checks this postal card against the pairs on the inventory to see that they are correct.

727 Q. Where are the jobbing department charged with the value of the shoes shipped?

A. They are charged as so-n as these goods leave the factory, on this inventory that I have just made an explanation of.

728 Q. That sort of an invoice book it is pasted in?

A. No, it is torn out. It is a duplicate, perforated inventory book and we have a copy of what they get; we tear the original out and keep the copy.

324 729 Q. And then check it?

A. Yes, sir.

730 Q. After they notify you by postal card?

A. Yes, sir.

731 Q. How do you get credit for any one period of time, the total number of shipments made to the jobbing department?

A. At the end of the month we get credit for the business of the preceding month.

732 Q. Do you not charge them the amount for which you get credit in one item in some book?

A. No, they add all this together and give us a credit for the total amount, less 12½%.

733 Q. When they give you credit how is that done, in some written fashion?

A. That is written on their books and, of course, corresponds with our book, to show what the total of the month has been.

734 Q. Do they send you a statement of what the total for the month has been?

A. On this postal card. This postal card is carried from day to day showing each day the amount—for instance, on today, which is April 8th, we will bill them loads "A" and "B"; they will add it to the total of the postal card of the day before, showing the number of pairs and the total amount we have credit for on their books.

735 Q. Take January 29, 1906, for an illustration—that is about pretty near the end of a month; what would that show with reference to the notification they would give you on the 29th?

A. It would show all of the goods which had been billed to the Hamilton-Brown Shoe Company previous to that date; all of the January goods, I should say.

736 Q. Would it show amounts and numbers, too?

A. The amount and numbers of pairs.

737 Q. Then the next day, if it was the 30th, would follow the same——

A. On the 30th they would add the total pairs and total amounts that were sent to them on January 30th, to the postal card, and on

A. Yes, sir.

756 Q. From 1906 to the present time?

A. Yes, sir.

757 Q. The number of pairs of shoes with the invoice and value, gross, as you said?

A. Yes, sir.

758 Q. Shipped to the jobbing people?

A. Yes, sir.

326 Mr. HART: I want it understood whether or not the question and answer relates to the number of shoes made at that factory or the number of pairs of "American Lady" shoes made.

Mr. JOHNSON:

759 Q. I will ask you that, Mr. Johnston?

A. No, it would not show the number of "American Lady."

760 Q. The total product of the factory?

A. Yes, sir.

761 Q. What method would you have of telling?

A. We have no method other than going back over the books?

762 Q. How would that be done?

A. By going over the books.

763 Q. What books would you go over to separate "American Lady" shoes?

A. This original entry book.

764 Q. So as to tell which were "American Lady," is that right?

A. Yes, sir.

765 Q. And which were "Vassar"?

A. Well, yes, any name it would come under we could find.

766 Q. "Shoeze," too?

A. Yes, sir.

767 Q. "Tenderfoot"?

A. Yes, any name.

768 Q. I am trying to get all the shoes produced at the factory——

A. And those that bore only "Hamilton-Brown Shoe Company" stamp, without any name.

769 Q. Those you say could be obtained by taking the entry tickets?

A. Not the tickets, the entry book.

770 Q. Then we can get at the exact number from those books you have spoken about, the exact number of "American Lady" shoes, and of the other shoes?

A. Yes, sir.

771 Q. And by totaling the other shoes and deducting them from that total entry would give the "American Lady" shoes?

A. Yes, that gives "American Lady" shoes.

772 Q. Is there any way, Mr. McElroy, that you could tell from day to day the exact product of the "American Lady" factory?

A. Yes, sir.

773 Q. Is it totalled, without going over these different items in that entry book?

A. Oh, yes, but those records are not valuable and they are not kept from day to day. I don't know how far back our factory packing books are kept. They are of no value to us; after thirty days a packing book——

774 Q. What is your best judgment or recollection as to how far back those packing books are kept?

327 A. Now, I will change that. In this record book I guess there is a daily packing record or shipping record of the sort, the book we just spoke of, that can be obtained.

775 Q. And kept from 1906 on?

A. Yes, but not "American Lady" shoes, that is simply the total.

Mr. JOHNSON: I understand.

776 Q. What was the greater product of the "American Lady" factory during all the period of time about which I am interrogating? I don't mean number. I mean what was the greater quantity produced? Did you produce more "American Lady"?

A. In the ten months of 1906, 71.5%.

In 1907..... 68%

In 1908..... 64%

In 1909..... 77%

777 Q. How were those obtained, by pairs?

A. That is value.

778 Q. I am asking as to pairs.

A. I imagine the pairs would run about the same proportion.

779 Q. And the price of the shoes the same?

A. No, the price of "American Lady" shoes are a little higher; it might show a lesser percent of pairs.

780 Q. Than the other?

A. Yes, than the other.

781 Q. The prices also show on these records that we speak about?

A. The prices will show on the original entry book of every shoe that we make.

782 Q. So anyone who had access to these records could tell the exact number of "American Lady" shoes produced from day to day, from 1906 on?

A. No, you could not—you probably could by an immense amount of checking, but it would take a man ten years to check up one of those years. You could not tell the number of "American Lady" shoes packed. You could tell the general amount of shoes packed every day by this record; the packing record books would show that, but I am not prepared to say that we have any of those.

783 Q. You will tell us after you make an examination?

A. Oh, yes. They may be there, but they are not an important book and many times they are thrown away.

784 Q. If those packing books are in existence they will tell the exact number of "American Lady" shoes produced from day to day. If not, all that we have on these books are the totals?

328 A. I imagine that those inventory books that we have billed from, the original invoices that have been sent to the store, I imagine they are in existence.

Mr. HART: I think we ought not to have the assumption or presumption of the witness. If they want the description of those books they ought to have the witness examine the books instead of cumbering the record here with matter of this kind. They ought to request the witness to get the information before putting this matter on the record.

The MASTER: This whole examination is preliminary and if that is intended to be an objection it is overruled.

Mr. HART: It is intended to be an objection. The witness does not appear to be testifying from his knowledge or an examination of the books and before this matter is spread upon the record this witness ought to be permitted to examine the books so when he does testify he can testify in regard to facts and not any presumptions he may have on matters which he does not appear to have directly under his control.

The MASTER: The witness says there is a manner in which this information can be obtained and that he will obtain it.

The objection may be overruled.

To which ruling of the Master the defendant by its counsel, then and there, duly excepted.

A. I imagine the original invoices we sent to the Hamilton-Brown Shoe Company are obtainable.

Mr. JOHNSON:

785 Q. From the jobbing department?

A. Yes, sir.

786 Q. In other words, the original invoices you send contains what?

A. The description of the shoe.

787 Q. And the number of pairs of each shoe?

A. Yes, sir.

788 Q. Of all kinds?

A. Yes, sir.

789 Q. From that we could obtain the number of particular pairs of each kind?

A. As Mr. Hart says, it is a presumption; I am not sure.

790 Q. What is your best impression?

Mr. HART: That is objected to.

The MASTER: The objection is overruled.

To which ruling of the Master, the defendant by its counsel, then and there duly excepted.

A. That they can.

329 Mr. JOHNSON:

791 Q. Have you access to the various catalogues issued by the defendant, since January 29, 1906?

A. I have not.

792 Q. Who would have those, Mr. McElroy, if you know?

A. The advertising department, if they have been kept.

793 Q. Who is in charge now of that department?

A. R. H. McLoughlin.

794 Q. Who was in charge from January 29, 1906 on?

A. Part of the time Mr. W. C. Teasdale; Mr. C. W. Moore and John Hochmuth.

795 Q. Speaking of the first, Mr. Teasdale——

A. He is not with our concern now.

796 Q. Do you know where he is?

A. In Indianapolis.

797 Q. Do you know with whom he is associated?

A. I don't know.

798 Q. And Mr. C. W. Moore?

A. He is in the Commonwealth Trust Building, across from here, in the real estate business.

799 Q. And Mr. Hockmuth?

A. Is with our concern.

800 Q. How long was he associated with the advertising department?

A. I think Mr. Hockmuth was associated about two years.

801 Q. During the period of time about which I am inquiring?

A. Yes, sir.

802 Q. Have you ever seen any of the catalogues issued by the defendant since January 29, 1906?

A. Yes, I have seen them.

803 Q. Were any issued prior to that date which covered the styles sold after January 29, 1906?

A. No, I would not be able to answer that. I am not familiar with that department.

804 Q. You do not know what the method of preserving them is?

A. No, I do not.

805 Q. Have you had in your possession or under your control any of those catalogues?

A. I think I have been furnished with one each time, but that is a matter I could not swear to. I don't recall it because I don't follow it up.

806 Q. Do you preserve them?

A. Not at all.

807 Q. Do you have anything to do with them?

A. No, I have never taken any interest in them, because I have my own samples before me all the time.

808 Q. Now, having reference to these catalogues, generally: you know generally what they contain, do you not?

A. I would know in a general way that they contained our line of shoes.

330 809 Q. You mean style numbers?

A. Style numbers and descriptions of shoes.

810 Q. Would they have reference to the factories generally, where these styles are produced?

Mr. HART: Objected to unless one of the catalogues is produced. That is the best evidence.

Mr. JOHNSON: This is only a general question. I will make it competent in a second.

The MASTER: The objection is overruled.

To which ruling of the Master, the defendant by its counsel, then and there duly excepted.

Mr. JOHNSON:

811 Q. Take the "American Lady" shoe: would the catalogue refer to the "American Lady Factory"?

A. Yes, sir.

812 Q. And the styles of shoes produced at that factory?

A. Yes, segregated.

813 Q. And for each of the other factories?

A. Yes, sir.

814 Q. And where those factories were located?

Mr. HART: That is objected to.

The MASTER: The objection is overruled.

To which ruling of the Master, the defendant by its counsel, then and there duly excepted.

A. My familiarity with the catalogue, as I stated before, is not intimate.

815 Q. That is only a general question. I said I would make it competent if I could by your answer; could you tell us, having reference to these books that you have detailed so well, how many of each style number of "American Lady" shoes were produced?

A. Oh, yes.

816 Q. How would those be obtained, Mr. McElroy? I mean the number of pairs of shoes produced of each style?

A. As I stated in my testimony yesterday, I am not sure that we make a record of the style number in our books, but from the general description of the shoe, why we can identify it. If we fail to put the sample number on; if there is no sample number record in our book we can identify the shoe in our record book by the general description of the shoe in the catalogue.

331 The MASTER: The witness has testified that he can obtain that information from the books. How can it be material to ask how he is expecting to get it? What difference does it make how he gets it if he says he can get it and will do so?

Mr. JOHNSON: I was trying to see if he could give some general approximation with reference to styles. We have it with reference to totals, but not as to styles.

The MASTER: Go ahead.

Mr. JOHNSON:

817 Q. Would there be any totaling from day to day of the number of pairs of shoes of each style?

A. No.

818 Q. How would it have to be done to arrive at the total of the several styles, for a month?

A. If we were going to arrive at it for a period of a month we would have to go through the packing book. If for the period of a season we could take the order book, the entry book, and figure up

the number of pairs that were delivered to the store during that season, that would be the simplest way. If the shoes were still being delivered to the store, it would be necessary then to take a packing book, but if all the goods had been delivered it would be unnecessary to go into the detail of that.

819 Q. The best way would be to take the entry book?

A. Yes, and trace out how many shoes were ordered that year, and they were all delivered that year.

820 Q. Of course, if we asked you to make it you would not do it yourself?

A. No, I would outline the plan that it should be done under. I would tell them how to go about it. I would tell them what I wanted and explain to them my idea of the way to get at it.

821 Q. You would turn it over to Mr. Johnston?

A. Yes, and he in turn would turn it over to the girls, giving them the detail that was necessary to get this information.

822 Q. If I asked for that during the year 1905, that would be the method to be pursued to give me the number of each style made?

A. It would.

823 Q. Have you anything at all to do with keeping the books of the jobbing department?

A. No.

824 Q. They are not kept under your supervision?

A. Not at all.

825 Q. Do you know under whose supervision or control they are kept?

A. I know the general bookkeeper, but I don't know whether it is under his charge.

332 826 Q. Who is the general bookkeeper?

A. E. A. Plochman.

827 Q. Did I understand you to say yesterday—correct me if I am wrong—that the word "Makers" never appeared upon the bottom of any shoe?

Mr. HART: Within the period of this inquiry.

Mr. JOHNSON: Certainly, always, Mr. Hart.

A. My impression is it has not.

By Mr. JOHNSON:

828 Q. Then if it appeared at all, as I get it—always having reference to the period I am inquiring about, January 29, 1905 on——

Mr. HART: To Nov. 15, 1909?

Mr. JOHNSON: I don't know whether I am limiting it to that.

829 Q. The word "Makers" would appear where, if at all?

A. It would appear on the top band.

830 Q. Would that be the silk lining you were speaking of?

A. Yes, sir.

831 Q. Am I calling it the proper name?

A. Facing, or top band.

832 Q. How would your "American Lady Factory" reproduce a style? Suppose, for instance, a party has ordered from you on January 29, 1905, style 6175, and two years later he would want the same style?

A. As a rule, we would not produce it. Many times those lasts and patterns had been destroyed. That has been our policy that if we had not the material to produce it that we made no effort to do so. If you would bring it within a shorter length of time—such a thing as that on a class of goods such as the "American Lady" is not probable. That class of goods is kept right up to the prevailing styles. And, as a rule, merchants don't go back to get old styles.

833 Q. Assuming now some day—I will let you fix the day—that a man wanted within current time to duplicate a style; you say, and I think you are right, that I go too far back; from 1906 to 1910 would make a shoe of 1906 old style.

A. We would not be able to produce a shoe of that kind.

834 Q. Say within a year then?

A. The retail merchant would have his own method of doing that. If he had a doubt that we would not understand what he wanted by the written description of the shoe, he would probably take the serial number of the shoe and refer us to the serial number. You understand, serial number?

333 835 Q. I understand.

A. Because there is no other means of identifying that shoe except from his inventory, and they are careless, and in many instances he would send us the serial number if there was any doubt in his mind that we did not have the shoe in stock; and then we would look up the original entry book and find how that shoe was made.

836 Q. You mean that serial number inside of the lining?

A. Yes, sir.

837 Q. That would have, ordinarily, a number with a letter after it?

A. Yes, sir.

838 Q. And when it came into your factory you would look up this original entry book and find out how that was made?

A. Yes, sir.

839 Q. And reproduce it if you could?

A. We would know in a general way—we don't change our styles for anyone—and we know that that style was made in a certain described way.

840 Q. Branded and marked in the same way?

A. Yes, as we have only one way to brand or mark them we would know he wanted "American Lady" and we would do the same as in the others.

841 Q. You do not want me to understand that you do not have more than one brand?

A. I mean if we had changed the style of our brand, left out "Makers" or put "Makers" in, we would consider that immaterial in making that shoe and we would make it for him exactly like we are making them today.

842 Q. You would reproduce that as it was at the time he ordered, considering that an immaterial variation, but the style you would reproduce?

A. Yes, the style.

843 Q. You would give him another serial number and so far as regards general branding, you would brand that generally the same as his original was branded?

A. Yes, sir.

844 Q. Would you know how the original was branded?

A. We would know in a general way that the shoe was branded "American Lady" and on the sole "Hamilton-Brown Shoe Company", but if it happened that the shoe he got previous to that time did not have "Hamilton-Brown Shoe Company, Makers" on the top band, we would consider that immaterial and he would get the shoe today branded "American Lady" in addition to this trade mark "Makers" on the top, or vice versa.

845 Q. Or with the "Makers" off?

A. Yes.

846 Q. Would you know whether your original shoe had a top lining?

A. Yes, we would know that.

847 Q. By reference to the original entry?

334 A. No, not by the original entry, because all of our shoes have had top facings on.

848 Q. You do not mean your low cuts?

A. No, but we are assuming that this shoe is to be duplicated by serial number. If it was a serial number we could tell whether it was a high or low cut.

849 Q. Then his reference to the original number would enable you to tell what kind of a shoe it was?

A. What the material was or the style of the last. That is the basis that we would make his shoe on.

850 Q. There is more than one brand of "American Lady" shoe, is there not?

A. Oh, yes.

851 Q. Is it a branding iron or a branding machine?

A. The top facing is a woven label and the bottom stamp is simply a stamp that we heat with a flame and give it an impression and take it off in just a second. It is an automatic machine.

852 Q. Is the shoe stamped on the bottom more than once?

A. No, just once,—oh—let me see—in some instance- it is.

853 Q. What is the usual rule?

A. The usual rule is just once.

854 Q. The usual rule is once?

A. Yes, sir.

855 Q. If you stamp it twice it would be some trouble to get it on even?

A. We would have to go through two operations and a man that is paid for stamping a case of shoes where one stamp is put on, would expect double remuneration when he puts two stamps on, and naturally we would endeavor to have that obviated.

856 Q. Have you in your possession or under your control as general manager, the machines or dies which were used in stamping these "American Lady" shoes from January 29th 1906 on?

A. Well, I think in the last six months we have changed machines.

857 Q. Have you any of the dies or records of what the dies contained?

A. That I am not certain of: we have generally the dies, but when we call in a stamp or die, as you term it, we usually get it out of the hands of the stamper for fear he may use it again; they are probably destroyed.

858 Q. Do you destroy the die?

A. I say they are probably destroyed. There would be no attempt to preserve them, as we would not want them preserved. If there is any change in the stamp we would not want them to get hold of that by mistake.

859 Q. Would you be able to tell us, when you come again, whether you preserved them?

335 A. I imagine none of them have been preserved.

860 Q. You say none have been.

A. I say, I imagine they have not been preserved. There would be no reason why a die would be kept after a stamp has been discontinued.

861 Q. Who made your dies during the period of time about which I am now inquiring?

A. Well, I don't know. I know the man when I see him, but I don't know his name.

862 Q. Will you be able to tell us that?

A. Yes, sir.

863 Q. Is it a local St. Louis man?

A. Yes, sir.

864 Q. Would you be able to tell us whether this gentleman was the same party who made the matter which appeared on the cartons?

A. No, sir, it is not the same one. One is a steel die manufacturer and the other is——

865 Q. Well, I should not think so.

Who has charge of your branding department of "American Lady" factory?

A. I think it is done on the finishing room floor: the foreman of the finishing room.

866 Q. What is his name?

A. Fred Mitchener.

867 Q. How long has he been in the factory?

A. He has been in the factory for years.

868 Q. Since January 29, 1906?

A. Yes, sir.

869 Q. Now, there was one other thing I ought to have asked you about the books: at the end of the year, Mr. McElroy, with this final record book, is there any tabulation at the factory itself to see the product of that factory?

A. The number of pairs, yes, sir.

870 Q. Is there any book kept which [*shoes*] your profits at the end of the year?

A. Our profits.

871 Q. Of the entire factory?

A. Oh, yes.

872 Q. Is that kept at the factory?

A. It is kept at the store.

873 Q. Do you call the jobbing department the store?

A. Yes, sir.

874 Q. Do you get any copy of what they kept?

A. Oh, yes; I know exactly what my factor has made.

875 Q. How do you get at it? I do not want the method of getting it up, but how does it reach you?

A. In the first place we keep, as I said, a ledger at the factory and we book-keep in that ledger against them. We show our charges and what they have charged us, and make a record of our
336 payrolls, and at the end of the year we compare them. There may be some little difference in regard to the charges they have misconstrued or misinterpreted, or put other construction on. We then get together on the profits. The profits of the concern are kept so they can be easily obtained.

876 Q. What book are they kept in?

A. In our general ledger.

877 Q. When they give you this statement back and it is found to be correct, do you enter it on the general ledger as they have it?

A. Yes, we have that.

878 Q. And you have their statements from year to year, from 1906 on?

A. No, I don't think we have their statements, but we have our books to correspond with theirs. We have had our books audited by Haskins & Sells for the last five or six years until last year. We hired Haskins & Sells and made them a part of our organization, so we have the audits of our books showing the profits for each factory.

879 Q. The "American Lady" factory, you told us, would show in this tabulation on all your shoes?

A. Yes, sir.

880 Q. The jobbing department makes that calculation for you?

A. Yes, sir.

881 Q. Which you accept, if on verification you find it is right?

A. Yes, sir.

882 Q. Do you keep at the factory any cash books other than this petty cash book?

A. No, we have no outside communication with the trade at all. It is all done through the store and all we have is the petty cash book to show the small disbursements of paying help during the week and anything that a general petty cash book would show.

883 Q. You get your money for the employes from the jobbing department, do you?

A. Yes, sir.

884 Q. And you give them credit for it?

A. Yes, sir.

885 Q. As against what you have charged them?

A. Yes, sir.

886 Q. That would show, I suppose, in this general ledger, too, would it not?

A. Oh, yes.

887 Q. Your books are not very numerous, so far as your book-keeping goes?

A. They are very simple.

888 Q. You have only one customer?

337 A. Yes, sir.

889 Q. And you handle very little cash?

A. Our books are very simple.

890 Q. There would be no trouble in producing them here?

A. No.

891 Q. They would not fill the room?

A. Only one book would be in question and that would — the ledger. There is no other book to show any business between the Hamilton-Brown Shoe Company and the factory except the ledger and these inventories I have spoken about.

892 Q. This book which contained the original entries and this final book, and this ledger——

A. You speak of the "final book" and the "ledger"; what do you mean by "final book"?

893 Q. I thought the final book you had the i-voices in.

A. Those are very voluminous, and, as I say, I don't know that they can be obtained.

894 Q. The ledger which is a transcript or summing up of the months from that totaling of the postal cards——

A. That would be the record book. The books that would be of vital importance to the case would be the entry books; there would be several of those because they extend over a period of almost four years; and the record book which is a small book; and the general ledger of our factory, which is a large book.

895 Q. And the packing books, have they been preserved?

A. They would be voluminous.

896 Q. I mean in order——

A. If they have been preserved, but I have my doubt of it.

Mr. JOHNSON: We now ask opposing counsel, through the medium of the Referee, to produce these books that Mr. McElroy has just detailed for the period of 1905, the entry record and ledger relative to the "American Lady" shoes, and the packing books, if they are there, for 1906.

Mr. HART: Opposing counsel objects to the production of the books because of the fact that it does not appear that the books are relevant or material to any issue in this accounting.

This accounting is confined to shoes sold by the Hamilton-Brown Shoe Company not marked as indicated by the interlocutory decree in this case and the opinion of the Circuit Court of Appeals of this circuit, and it does not appear that those books would throw any light whatever on the shoes that were sold and not so marked.

Furthermore, this whole inquiry is out of place for the reason that it is not confined to shoes so marked. The inquiry relates
338 to the product of the "American Lady" factory, particularly to "American Lady" shoes, and there is no showing here that those shoes come within the inhibition of the finding of the Court of Appeals or the interlocutory decree in this case.

Before the complainant in this case is entitled to go into our books, it must show that we are selling or have sold shoes not marked in accordance with the direction of the Circuit Court of Appeals and the interlocutory decree in this case, and there has been no showing here to that effect.

Mr. JOHNSON: Of course, we have only to say to your Honor, that presenting us a factory that produces all kinds of shoes and telling us that these records, by tabulation, will show the number of pairs of the other shoes and of "American Lady", the only way to get at it is to find first the totals and then the others from these books, and subtract one from the other, and through your inspection or verification to tell you how many shoes have been produced during this period.

Mr. HART: It is encumbent upon the complainant in this case to produce and show that the defendant has sold shoes not marked in accordance with the opinion of the Circuit Court of Appeals and the decree in this case.

The complainant does not contend that these books would disclose, if produced, that we have sold shoes not marked in accordance with the finding of the Circuit Court and the interlocutory decree, and this is a mere fishing inquiry for the purpose of ascertaining whether or not those books would show such to be a fact, and the courts have repeatedly held that until they indicate to the court that those books would show that to be a fact, if they are produced, they have no right to go into them simply for the purpose of discovering evidence. They must indicate that the evidence exists and then they have a right to call for the production of the books for the purpose of disclosing that evidence. But for the mere purpose of disclosing facts which it does not appear would be disclosed if those books were produced, I submit they have no right to their production.

Take, for instance, the case of the West Publishing Company, the case in which the West Publishing Company was suing for infringement of a copyright.

A witness was put on the stand and he was asked what was done with the first two volumes of the work for infringement of the copyright of which the suit was brought, and he said that the first two volumes were deposited in the mail according to the copyright law, and directed to the Librarian of Congress. They asked him then if a record of that shipment was made and he said that it was.
339 Then they asked for a production of the books for the alleged purpose, as they stated, of showing that if those books were produced they would prove that this was not a fact, but the court in overruling the motion said there was no showing that the books would disclose this evidence, if the books were produced; there is a

mere showing that they may disclose it, and it is not an offer to produce evidence.

I submit this is nothing more here. They do not indicate that those books if produced will discloses that we sold a single pair of shoes not marked in accordance with the decree.

Furthermore, they don't show, as they must show before they can recover on this accounting, that we sold a single pair of shoes "as and for" the shoes of the complainant, and before they ought to be permitted to go into our books or into our records, they ought to lay the foundation for it by showing that we have sold shoes that were not marked in conformity with the finding of the Court of Appeals and with the decree in this case, and then let them work back from that. There ought to be some foundation preliminary to a request of this sort and I submit they have not laid the proper foundation for such a request.

The MASTER: The ruling that counsel invokes as to the mailing of copyright books to the Librarian of Congress, could not have any application here because the proof was ample from the statement of the publisher, that the books had been deposited in the mail, which was always required of the publisher, and the opposite party would have no right, of course, to the inspection of the books for the purpose of ascertaining whether that had or had not been complied with.

This question before me now is entirely different from that.

The court has directed me to take an accounting of "Shoes sold by the defendant, since the filing of the bill in this case, and which were marked with the name "The American Lady" and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company".

That is the extent of my examination in the accounting.

I have been directed by the Court to require the production before me of all books, papers, vouchers, documents and exhibits, in any way pertaining to or relating to the matter in controversy.

A witness has stated that the books asked for contain the entire information with regard to the production of the "American
340 Lady" shoes during the period embraced in the inquiry.

I have the impression that the witness has testified that these books will show what "American Lady" shoes were marked with the woven ribbon stating that they were "Makers".

I think that he has stated that the low cut shoes of the "American Lady" pattern do not in any instance include the words of "Makers", and I understand that the witness has stated that these can all be differentiated upon an examination of these books.

Such being the case, counsel is entitled to the production of the books, which the witness feels perfectly willing to bring here, and the objection will be overruled.

To which ruling of the Master, the defendant by its counsel, then and there, duly excepted.

The WITNESS: I want to make myself perfectly clear: that where the woven ribbon does not show the word "Makers" the sole is stamped with the Hamilton-Brown Shoe Company's trade mark.

Where the trade mark is not used on the bottom of the oxford, it is used in the stock lining.

Mr. HART:

897 Q. When you refer to the "Hamilton-Brown Trade Mark" on the sole, it bears the name——

A. Yes, the belt trade mark bearing the name "Hamilton-Brown Shoe Company".

The MASTER: It has been perfectly plain here that the trade mark is the Hamilton-Brown Shoe Company's name on the sole of the shoe, which has the belt and buckle, and the word "American Lady" inside.

Mr. JOHNSON.

898 Q. So that we may be perfectly fair—do you call this silk facing, is that what you call it?

A. Top facing. I may have used different terms. I guess they bill it as woven ribbon.

899 Q. Shall we call it "Woven ribbon"?

A. Top facing, I think is the most comprehensive term.

900 Q. You have endeavored to give us by approximation a number of pairs of shoes that contained this woven top facing?

A. Without the word "Makers"; without "Hamilton-Brown Shoe Company" or the word "Makers".

901 Q. Do you mean to say it had the woven top facing without the word "Makers"?

341 A. Yes; that is, during this period we had some woven top bands that had the name "American Lady" without the word "Makers", and I have given you the yardage of that, and taken our estimate of the number of pairs the yardage would make. You took that down yesterday.

902 Q. I did not understand that until this minute. That is, you have taken the number of yards of silk that you call "woven top facing" and found out how many pairs of shoes can be made out of it, and those you have told us certainly did not contain the word "Makers"?

A. Yes, sir.

903 Q. By that answer you do not mean to say that every other shoe without a top facing had the word "Makers"?

A. No.

904 Q. You do not mean to say that every other pair of high cuts with the facing had the word "Makers"?

A. No, because there are some leather top band shoes we have made during the last few months, such as the exhibit here, had no stamp on the top, but bore the Hamilton-Brown Shoe Company's trade mark on the sole.

905 Q. As I get it, we have one definite data to start with here is ribbon that does not contain the word "Makers" that was used and your bills show the number of yards of that?

A. Yes, and we gave you an estimate of the number of pairs we could get out of that yardage.

906 Q. And that covers that ribbon?
A. Yes, sir.

Mr. HART:

907 Q. But all other high top shoes with the silk facing bore the name "Hamilton-Brown Shoe Company" and the word "Makers"?
A. Yes, sir.

Mr. JOHNSON:

908 Q. You do not mean that all other shoes with the silk top facing contained the word "Makers"?
A. Yes, except what I have given you, contained the word "Makers".
909 Q. But there are others with leather top facing that did not contain the word "Makers" and there are quite a number of those?
A. Yes, and we can get at them. They were recently made.
910 Q. There are a considerable number of those?
A. I am not prepared to say.

Mr. HART: That is a conclusion.

Mr. JOHNSON:

911 Q. You can get at that?
A. Yes, sir.
912 Q. Those books will show it?
A. Those books won't show anything of that kind.
342 913 Q. They will show the number of yards you purchased?
A. No, you are mistaken. These books have nothing to do with that yardage.
914 Q. Your invoices will show?
A. Yes, sir.
915 Q. Will you bring those?
A. They are in one of these immense big books. I think probably I can get the invoices.
916 Q. Without bringing the books. "Shoeze" produced by this factory, do you call that a brand of a shoe?
A. Yes, sir.
917 Q. And "Tenderfoot" a brand of a shoe?
A. Yes, sir.
918 Q. Have you included the number of pairs of "Shoeze" and "Tenderfoot" in the number of pairs that you gave us yesterday as produced of "American Lady" shoes?
A. The number of pairs?
919 Q. Yes.
A. The three hundred and six and odd thousand pairs?
920 Q. For the year 1906. To make it plain: you gave us a certain number of "American Lady" shoes as having been produced for 1906?
A. 491,849 pairs.
921 Q. In that number you did not include any "Shoeze" or any "Tenderfoot"?

A. Nothing except "American Lady" shoes.

922 Q. Now, I want to call your attention to this specifically: were not "Shoeze" and "Tenderfoot" also stamped "American Lady"?

A. They were not at this time. We have taken into our "American Lady" line at different times, shoes that did not bear that name, but at that time they were not in this line.

923 Q. As to 1907, have you included in the number that you have given us, any of "Shoeze" or "Tenderfoot"?

A. Nothing that was not stamped "American Lady". "Tenderfoot" was probably dropped out after that; we did not use the name "Tenderfoot", but as we took them into "American Lady" shoes they were included in the line.

924 Q. You know there is an "American Lady Shoeze" and there is [a-] "American Lady Tenderfoot"?

A. Oh no. There never was [a-] "American Lady Tender foot".

925 Q. Well, it is described in your catalogue, did you know about that?

Mr. HART: Have you a catalogue?

Mr. JOHNSON: No. But you are clear about "Shoeze"?

A. Yes.

926 Q. And you have included in the numbers you have given us then——

343 A. Yes, wherever we have given it to you. When it was taken into the line of "American Lady" we put it in.

927 Q. In other words, you have not confined it to "American Lady" flat, but have included all——

A. Everything that was stamped and [label/ed.]

928 Q. No matter if it was a combination?

A. We have a line of "Shoeze" as "American Lady" Formerly they went out without the "American Lady" name.

929 Q. And when they went out that way you excluded them?

A. Yes, sir.

930 Q. And with the name "American Lady" you put them in?

A. Yes, sir.

931 Q. And you think these records will show that?

A. Oh, yes.

932 Q. Who would pay for this silk top facing?

A. The "American Lady" factory.

933 Q. The factory would pay for it?

A. We pay for everything in supplies; then they charge us for doing the business for us; that would be charged to the Hamilton-Brown Shoe Company "American Lady" factory.

934 Q. And you get the invoices?

A. Yes, and O. K. them.

935 Q. And pay them out of the cash that you receive?

A. Oh, no. We O. K. these bills and give a voucher for them and they go to 12th & Washington Avenue.

936 Q. The actual payment would be on the books of the jobbing department?

A. Oh, yes.

937 Q. But you would have a record of——

A. We would simply have the invoice.

938 Q. The actual payment would be down there?

A. Yes, sir.

939 Q. Your invoice, of course, would show from whom you ordered it?

A. Yes, sir.

940 Q. While the receipted bill would go to the jobbing department?

A. No, it would come back to us; we pay by vouchers. When we get a bill in we O. K. that bill from the department in the factory that it went; the party whose business it is to check those goods up would O. K. it as being correct as regards the amount of yarding. The superintendent, of course, would O. K. it as regards to price. Then the bill goes to our bookkeeper at the factory, and he has the O. K. as to the yardage and the O. K. as to the price, and he simply makes a voucher out for that amount and holds the bill, and the voucher goes to 12th and Washington Avenue and is paid.

941 Q. Have you any personal recollection of who is the party who furnished the silk ribbon?

344 A. Yes, the Kluge Weaving Company, of New York City. I don't think it is Kluge Weaving Company—I think it is E. H. Kluge & Company.

942 Q. Anybody else?

A. No. We have since changed to the German Artistic Weaving Company.

943 Q. Are they in New York also, Mr. McElroy?

A. I think they are; yes, sir.

944 Q. Did you tell us the name of your bookkeeper of your factory department? If you did, I do not want to repeat that.

A. No, I did not tell you his name.

945 Q. Will you tell me now?

A. I think his name is Ralph Burdinott. I am not certain how he spells it.

946 Q. I think you told us the name of the bookkeeper of the jobbing department?

A. Yes; E. O. Plochman.

947 Q. Have you any objection to our examining these tickets during the adjournment hour?

A. No, sir, none at all. I would ask, however, that they be kept in order. They may ask for them in their original packages.

948 Q. Did you make any calculation yourself as to this yardage, Mr. McElroy?

A. No, Mr. Johnston.

949 Q. Mr. Johnston, the superintendent?

A. Yes. That is very clear, though, you know. We can tell how many labels are on a yard.

950 Q. You could do that yourself here?

A. Yes, anybody can do that. As soon as I find out how many labels are on a yard I know one label went in every shoe.

At this point recess was taken until 2 o'clock.

After recess on Friday, April 8, 1910, the following proceedings were had at 2 o'clock P. M.:

Direct examination of Mr. McELROY continued by Mr. JOHNSON:

951 Q. Mr. McElroy, I find after a very cursory examination of these tickets, that about the earliest of them have the date on the top—a red card I am referring to—has stamped or written "American Lady Factory; Sample 6075; date Dec. 1, 1908;" Would that indicate anything to you at all?

A. Yes, that would indicate the sample number and date that the order was made out in the office.

952 Q. What would indicate it? There is a stamped date at the top there, January 2, 1909?

A. Well, I don't know what that stamp means, but it probably meant the date it got in the finishing room. I would just
345 judge from the time the shoe went in, was in the factory, but I am not able to answer that.

953 Q. But I am directing your attention to the date: as I understood you this morning, these tickets began in 1909?

A. They were made out in 1909.

954 Q. Would that indicate that they started in 1908 to be made out?

A. Yes, the shoes were cut the third of December, 1908.

955 Q. Well, then, as far as you are able to tell us, without making an examination of the tickets, approximately they would cover from December, 1908 on to 1909?

Mr. HART:

956 [—] The manufacture or the shipping?

A. The number is put on the ticket as soon as the order is made out.

Mr. JOHNSON:

957 Q. Would that be the earliest date on the ticket?

A. Yes, sir.

958 Q. Now, then, if we found numbers here that ranged say from 60,000 on to 65,000, 66, 67—I don't think there are any higher than that—say possibly to 68,000, with the letter "G" and dating as we find in this cursory examination, the earliest date on any of the tickets about November, 1908; that would indicate to you, would it—correct me if I am wrong—that those numbers, say from 60,000 on, started from November, 1909, and continued during the period of time you have the tickets?

A. Yes, sir.

959 Q. In other words, those shoes that were produced—no matter when they went out of your house—would go out with the same serial number as was on the ticket when you first put the earliest date on?

A. Certainly.

960 Q. If we found a shoe, say with that number on (indicating on ticket) whatever is may be——

A. 101.

961 Q. We would know that 101 was produced after the first date on the ticket; was manufactured after the first date on the ticket?

A. Yes, sir.

962 Q. That would be true of every number and order—you have that here from 60560 up to 68740—that would be true of all those numbers (if that is a correct statement of the numbers on them) between the dates I have inquired about? No shoe, as I understand it, is given a number of any kind until it is started in the process of making?

346 A. No shoe. The shoes are all cut before the number is given to them.

963 Q. If I wanted to find when No. 62707 was manufactured would I be certain, if I had the first date on the ticket for 62707 G, in stating that it was not started in the process of manufacture earlier than the first date on the ticket?

A. Yes, you would be correct in that assumption.

964 Q. Then it certainly was not finished and sold until after the first date on the ticket?

A. That is correct.

965 Q. You understand me perfectly on that?

A. Yes, sir. I understand you.

966 Q. And that is true during all the period of which I am now inquiring, from Jan. 29, 1906 up to the present date?

A. Up to Nov. 15, 1909?

The MASTER: Up to Nov. 15, 1909?

Mr. JOHNSON: I don't know whether we are stopping there or not. You might be required to find afterwards—

The MASTER: But my inquiry is limited between certain dates.

Mr. JOHNSON: I do not think the decree says so.

967 Q. I will limit it in this first question up to Nov. 15, 1909, and then I can put it in—this was true up to Nov. 15, 1909?

A. Yes, sir.

968 Q. And it has been true since Nov. 15, 1909, up to the present date?

A. Yes, sir.

The MASTER: This decree is dated on Nov. 15, 1909. We are not raising that question now.

Mr. JOHNSON: He said yes, but I have not offered any formal evidence. I do not believe we will be required to file a supplemental bill for an accounting provided we show here—

969 Q. Have you ascertained, Mr. McElroy, since adjournment, the serial number on the "American Lady" shoes on the date of commencing business, January 29, 1906?

A. No, I have asked for those books and they said they would send them down here.

970 Q. You can tell from that?

A. Yes, sir.

971 Q. Is there any other information that you have ascertained since, that you are able to tell without those books?

A. No, sir.

347 972 Q. Did I understand you to say that these goods were manufactured in 100 case lots?

A. Oh, no; I took that as a figure, just as an illustration.

973 Q. Was there any general average about it that you could tell?

A. No, the orders are given as they expect to need the goods and it may be in five case lots or it may be 100 or 200 case lots. I simply used that as an illustration to show how certain numbers might never come through.

974 Q. What I really am directing my question to is, if you made a certain style number, would there be any average rule, during the period about which I am now inquiring, as to whether you would make a full rack?

A. They are all made in 36 pair lots; everything except those special orders.

975 Q. That is what I really wanted to get at. How would you make the special orders?

A. In the quantity that the customer desired.

976 Q. Just illustrate.

A. From one pair to 36 pairs or 144 pairs, as many as he required, but never more than 36 on one ticket, nor anything less than one.

977 Q. Apart from these special orders which you say were indicated usually by the color of the card, you would let them go through in a rack of how many pairs, three dozen?

A. 36 pairs.

978 Q. Apart from these special orders, the serial numbers on the shoes would indicate that 36 pairs of that serial number had been manufactured?

A. Yes, manufactured.

979 Q. For instance, if I have here on a card that is not colored so as to indicate it to be a special order, that was numbered 60560 G, that would mean that there had been 36 pairs of 60560 G?

A. That is correct.

980 Q. Would it be correct if we could eliminate special card numbers, or special cards having special orders, to multiply numbers, say starting at any one number, 60,000 and odd, on January 1, 1907 and going to January 1, 1908, to multiply the numbers that should progress serially, by 36 for the total that you had manufactured during any specific date?

A. The stock numbers, yes.

981 Q. If we add to that the special orders, as to the specific number of pairs on special orders—

A. We would have to count them.

982 Q. But when we had counted them and added that to the result obtained in the way I just put to you, we would have the total number for any given period?

A. Yes, sir.

348 983 Q. For instance, if we had gone from 60,000 up to—

A. Well, no; because as I have stated, occasionally there is a

countermand on numbers; numbers are countermanded. We may find the shoe has not sold up to our expectation and they will tell me to cut a certain number of cases out; they don't want any more of them.

984 Q. Would there be any way of arriving at that?

A. The records on the books will show that.

985 Q. Would it be a shorter way to take, say if you started on January 29, 1905, with 60,000, whatever the number may be (of course, this is only illustrative) and had gone up to 70,000 to December, 1906—that would make 10,000 serial numbers that you had progressed?

A. Yes, sir.

986 Q. If you multiplied that by 36 that would give approximately what you had manufactured during those periods?

A. Provided there had been no countermands, yes.

987 Q. If you had ascertained the countermands and took them off and then added to what was left the number of pairs made on special orders, you would have the correct result, would you?

A. Yes, sir.

988 Q. Were countermands numerous during this period; I am asking only generally?

A. I would not be able to answer that, and the same thing would apply to special orders.

989 Q. Of course, you would not tell us that the countermands were as numerous as the orders?

A. Oh, no, they were nothing like that.

990 Q. Do I understand you that a special record is kept of the goods specially ordered?

A. A separate book, and they are run under different numbers.

991 Q. Are your analyses of the costs from year to year, of the shoe as you approximated when you started out to make it, put on paper?

A. Yes, sir.

992 Q. Were they preserved, say from January 29, 1905, on?

A. No, I should not think—I kept the costs along in those days myself, and after a new set of samples are made cost sheets are practically obsolete. You take off what figures are correct and destroy the sheets. Probably one season, six months' run of them are on hand at any time, because we hold them for the sake of comparison.

993 Q. Did you during the period about which I am inquiring, make a sample of every style that was catalogued?

A. Yes, sir.

994 Q. Was any record kept of what those samples were?

A. Of what they were?

995 Q. Yes.

349 A. Yes. I am not so positive that we have the book. We write up for our own use the list of samples and how they are made, so that the young lady who makes out the ticket can use it as a general description, but the sheets are badly defaced and the books are practically worn out by the time the season is over. Some

of them will have two or three seasons' samples in one book. There is no attempt to preserve them after that time. If the book we are using at the present time happened to be a book that had a sufficient amount of pages in it, why we may have it two or three seasons. A season is six months.

996 Q. Suppose, Mr. McElroy, during January 29, 1906 (and I want to be perfectly frank with you, for we have such a sample) a sample shoe was produced that had nowhere on it "Hamilton-Brown Shoe Company"; would any record be preserved in your factory of how that sample had been gotten up and marked?

Mr. HART: I submit the shoes ought to be submitted to the witness before this question is called for. The record shows that the shoes bear certain marks which enable the witness in a measure to identify the shoes, and I submit it is only fair to the witness, before putting a question of this kind (and counsel says that he has such a pair of shoes in his possession) that the shoes be submitted to the witness, and I request that the Master rule on the complainant's counsel to submit the shoes to counsel for defendant and the witness.

Mr. JOHNSON: I am only submitting a hypothetical case.

The MASTER: No, I do not think that is hypothetical when counsel has stated he has in his possession such a sample.

My recollection is that the witness has stated certainly to his understanding that every "American Lady" shoe had stamped upon the bottom of it the Hamilton-Brown Shoe Company's trade mark.

Now, if the counsel wishes to ask him with regard to a shoe which he said he has in his possession and which has no such stamp upon it, I think it is fair to the witness that the shoe should be exhibited to him and then let him answer the question.

Mr. JOHNSON: I am going to exhibit it, no matter what your Honor rules, but I want to get it straight on this record.

I will note an exception and put it in another form.

350 997 Q. Do I understand you as saying that you have a definite recollection that during the period about which I am inquiring, no shoes were produced on which the name "Hamilton-Brown Shoe Company" did not appear anywhere on the shoes, and I am talking about "American Lady" shoes?

Mr. HART: The witness has been examined on this at least a half dozen times and has stated it positively and directly in different ways, and I think if they have such shoes that it is only fair that they produce them. The witness has testified in regard to this in every conceivable manner and there is no use going over this thing several times.

(Previous question read.)

Objection overruled.

To which ruling of the Master, the defendant by its counsel then and there, duly excepted.

A. I have stated that I have no definite knowledge that any shoe went out of our house stamped otherwise.

Mr. JOHNSON:

998 Q. You mean by that, Mr. McElroy, that they did not?

A. Is that not plain English? I mean exactly what I say, that I have no definite knowledge that there was; that any shoe marked "American Lady" went out of our factory stamped otherwise.

999 Q. Would it be possible that as many as 40 styles had gone out so marked without your knowing about it?

A. I would not think it would be.

1000 Q. Would it be possible that as many as 25 styles had gone out so marked without your knowing about it?

A. I should not think so.

1*a* Q. Are you the party Mr. McElroy, who would best be able to tell us about the actual facts of how those shoes of the "American Lady" brand were marked as they went out during the period of time regarding which I am inquiring?

A. I would say that I was. I would know as much or more about it than anyone else.

2*a* Q. I am going to show you a pair of shoes before I get through; I will keep my faith with you; but now having reference to your books, tell us the number, as nearly as you can relative to January 29, 1906, the serial number appearing on any style of shoes?

A. This volume (indicating book) is number 28, marked 1905.

351 3*a* Q. You are referring, Mr. McElroy, to a book you now produce in obedience to the direction of the Master and at my request, labelled on the front "American Lady Factory; Volume 28; 1905"; and on the back "American Lady Factory; Volume 28; 1905" with initials "H. B. S. Co."?

A. Yes. The nearest to that date that an entry is made is on January 31, 1906, and the beginning of that serial number is 87982 D.

4*a* Q. Now, you have reference to page 489 of this book?

A. Yes, sir.

5*a* Q. What period of time does the book cover?

A. It goes back into——

6*a* Q. No, I mean forward; I am not so much interested in the back.

A. The last entry in this book is June 17, 1906.

7*a* Q. What is the last serial number on the book?

A. 95599 D.

8*a* Q. Referring to a stamp having the figures 5/3 to the left of this serial number 87982 D, which you have just testified to, on the same page 489 of this book you have reference to; what do those figures indicate?

A. The date that it was shipped to our warehouse.

9*a* Q. When you say "it was shipped" you mean what?

A. The 36 pair lot of patent colt blucher.

10*a* Q. Does that mean "American Lady"?

A. Yes, that means "American Lady".

11*a* Q. On the right of the same entry appears 5/3: what does that indicate?

A. Indicating the date same was packed.

12*a* Q. But those figures sometimes vary, that it is not packed on the same date?

A. One is right here. (Indicating.)

13*a* Q. These columns to the right and to the left are marked in ink, at the left "shipped"?

A. Yes.

14*a* Q. And at the right "packed"?

A. Yes.

15*a* Q. Now, Mr. McElroy, having had reference to this entering date, will you tell me whether the serial numbers E, F and G, of "American Lady" shoes were not all manufactured after January 29, 1906?

A. Yes, they would be.

16*a* Q. As to this same entry there appears after the serial number the figures "36"; what does that indicate?

A. That indicates the number of pairs.

17*a* Q. Then this column having the fraction of a figure 1½ to—these written figures what are they?

A. They indicate the sizes.

352 18*a* Q. What are the figures?

A. 1-½ to five.

19*a* Q. What does the column after the figures "36" indicate?

A. It indicates the price.

20*a* Q. I see in that column in ink, $2.50.

A. That was the selling price of the shoe.

21*a* Q. You may state whether or not that was the price at which it was billed to the jobbing house?

A. It was.

22*a* Q. Was it billed when it was shipped?

A. Yes, the same day.

23*a* Q. What does this "d" indicate?

A. Width.

24*a* Q. What does this (indicating on page —) "Vassar" mean?

A. That means the Vassar last.

25*a* Q. That method, as I understand, was pursued in making these entries during all the time that was consumed in using the balance of the pages of the book, up to page 700, which runs to June 18, 1906; is that right?

A. Yes, sir. That is right.

26*a* Q. Now have you the books that would show the total amount of shoes that were shipped from the "American Lady" factory to the jobbing house, during the month of February, because there are only two days in January?

A. Yes, we can show those two days.

27*a* Q. You produce, Mr. McElroy, a book which on the back is labelled "Factory accounts; H. B. S. Co."; and on the front cover "Factory account; H. B. S. Co." and you turn to page five of that book?

A. Yes, sir.

28*a* Q. Will you indicate what entry on page five will advise us of the total output of "American Lady" factory for the month of February?

A. In pairs?

29*a* Q. You have pointed to an entry appearing at the bottom of Page Five and the figures to which you direct our attention are 70867; is that correct?

A. Yes, sir.

30*a* Q. At the top of this page appears the column headed "American Lady pairs"?

A. That means of the "American Lady" Factory.

31*a* Q. You say that means the "American Lady" factory?

A. Yes, sir.

32*a* Q. This page contains a number of columns?

A. Yes, sir.

33*a* Q. The earliest of which to the left has a date and that is followed by lines which have the date of each and every working day of the factory during the month; that is correct, is it?

A. Yes, sir.

34*a* Q. And contains other columns concerning which we are not interested, referring to other factories?

353 A. Yes, sir.

35*a* Q. While this particular column (indicating) refers to the particular factory under inquiry?

A. Yes, sir.

36*a* Q. Is this particular book kept at the "American Lady" factory?

A. No, it is kept in our general offices, at 21st Street, our general factory office. There are four factories—a box factory—and we keep all the books, the general books, at the general factory office.

Mr. HART:

37*a* Q. Is that the factory under your supervision?

Mr. JOHNSON:

38*a* Q. That is the factory office?

A. Yes.

39*a* Q. And it is under your supervision?

A. Yes, sir.

40*a* Q. And was at the time?

A. Yes, sir.

41*a* Q. Is there anything in this book, Mr. McElroy, that will tell us the number of pairs of "American Lady" shoes that were manufactured out of this total product for the month, of 70867?

A. No.

42*a* Q. What was it that you were going to try to get for us that would show us that?

A. It would have to be picked out of this book here.

43*a* Q. "This book here" is the earlier book to which you refer, called "American Lady Factory: Volume 28; 1905"?

A. Yes, sir.

44*a* Q. You would refer to the month of February, 1906?

A. A. Yes, sir.

45*a* Q. And you will do so, will you?

A. Yes, sir.

46*a* Q. Take February first, Mr. McElroy.

A. (Witness examining book.) There was no order given us February 1st. The first order in February was February 15th.

47*a* Q. On page five of the second book which is called "Factory accounts, H. B. S. Co." under the head of February 1st, 3576 "American Lady" pairs; which you stated refers to the product of the "American Lady" factory?

A. Yes, sir.

48*a* Q. In what book will we find as to how that number of pairs was made up?

A. Well, that is next to an impossibility to go into that. If you went into that February 1st that would be——

49*a* Q. Let me put another question before you answer: Would 3576 on the books of the Hamilton-Brown Shoe Company, as indicated in the Factory Account book, on Page 5 thereof, indicate that that number of shoes had been received from the "American Lady" factory that day; that is shipped to the jobbing department?

A. Yes, sir.

354 50*a* Q. Turn to February 1st of this book; are you able to tell how many were shipped on February 1st to the jobbing department of "American Lady" shoes proper?

A. No, we would have to go into their invoices, if they have preserved them.

51*a* Q. Into their invoices?

A. Yes.

52*a* Q. Would it not be possible to dig out from these various items—say, for instance, shipping dates, the exact number shipped on any particular day?

A. Well, it would be, but we would have to go back now—let me see when we were shipping goods on February 1st——

(Here ensued colloquy among the Master and Counsel.)

53*a* Q. Was there any average production of your factory during the period of time of which we speak?

A. Do you mean that we had made up?

54*a* Q. What was the capacity of the "American Lady" factory during the period of which I am now inquiring?

A. That (indicating) shows the daily capacity. We can take the daily output and divide it by the number of working days and find out how many were produced that month. We can take each month and get at that.

55*a* Q. This 70867 appearing in the second book, called the "Factory accounts" book, then would represent approximately the production of all shoes, regardless of brands, that were produced in that factory during the month of February?

A. Yes, and following that through we would find each month.

56*a* Q. Now, then, we find on page 7 that during the month of March the total production of the factory was 85277; that is correct: is it?

A. Yes, sir.

57*a* Q. Coming to April, 1906, I find the total production of the factory was 77385, "American Lady" factory?

A. Yes.

58*a* Q. During the month of May, 1906, 72834; is that correct?

A. All those figures are correct.

59*a* Q. If I am reading the figures correctly, that is right?

A. Yes, sir.

60*a* Q. In June, 1906, the total production of the "American Lady" factory was 84,693; that is right, is it?

A. Those figures are correct.

61*a* Q. For July, 1906, 29190; for August, 1906, 50187; for September, 74227; for October, 39755; for November, 41,990 up to Nov. 30, 1906; all 1906; is that correct?

A. Yes.

355 62*a* Q. Counting from Nov. 1st to Dec. 10th, 1906, the close of the fiscal year, 121070?

A. Yes, sir.

63*a* Q. So, if we want to find the output of December up to the 10th, we would have to take the 41990 from the 121070?

A. Yes, sir.

64*a* Q. Which would be 79080 pairs.

You have at the bottom of Page 16 of this book, which is called "Factory Accounts" "H. B. S. Co." total output "American Lady" for the year 1906, 829414 pairs?

A. Yes, sir.

65*a* Q. If we go back on this same book to January, 1906, we will have to deduct therefrom all that appear in January prior to the 29th, as well as all that appear in December after the 11th, is that right?

A. Yes, that is it.

66*a* Q. I find on page one of this same book, that the production from the 11th of December, 1905 up to Dec. 30th, 1905, was 42458 pairs of shoes, "American Lady" factory?

A. Yes.

67*a* Q. That the production of "American Lady" factory for the month of January, prior to the 30th was 75,372 pairs?

A. Yes, sir.

68*a* Q. If we take 75,372 pairs and 42,458 pairs for the months of December, 1905, we have a total of 117,830 pairs?

A. Yes, sir.

69*a* Q. If we deduct that 117,830 pairs from the total number of pairs appearing on the same book, at page 16, for the current year, which is 829,414, we have 711584 pairs of shoes produced by the "American Lady" factory?

A. Yes, sir.

70*a* Q. From the period covered from January 29, 1906, up to and including Dec. 10, 1906; is that correct?

A. Yes, sir.

71*a* Q. From what records do you derive the number of pairs of other shoes than "American Lady" produced at the "American Lady" factory during that same period?

A. We take this book and go back over it and check the number of shoes that did not bear the "American Lady" stamp.

72*a* Q. Has that been done?

A. That has been done.

73*a* Q. Who did that? Mr. Johnston?

A. Mr Johnston had it done under his supervision. The young lady clerk up there did it.

74*a* Q. It is subject to verification, is it?

A. Oh, yes.

75*a* Q. Are you able to state how it was done?

A. Not in detail. In a general way I can say that he would know which of these shoes bore the "American Lady" stamp and which did not.

The MASTER:

76*a* Q. He would get that from the records?

A. No, from his knowledge of the business; of the shoes that did not bear the "American Lady" stamp.

356 Mr. JOHNSON:

77*a* Q. What you mean by that is shoes that were not "American Lady" in some form? You mean shoes other than "American Lady"?

A. Yes.

78*a* Q. Without having any reference to the stamp?

A. Not at all; it would mean "Vassar;" or "Old Ladies Bal" or "Tenderfoot;" or shoes that were not stamped at all. But that is a very clear thing to get at after he explains the system.

79*a* Q. He can explain it?

A. Yes, he can explain that to your representative satisfaction.

80*a* Q. As I understand you, that method was pursued from year to year?

A. Yes, in obtaining the figures I submitted to Mr. Bakewell.

81*a* Q. Mr. McElroy, what I do not understand and would like you to explain to us is this: why should we have percentages rather than actual number of shoes?

A. We had the actual number of shoes, but it figures easier in the general profits of the business to give percentages. For instance, in 1906, from January 29th to December 10th, we made actually 491849 pairs of "American Lady" shoes.

82*a* Q. Can you tell us why can we not tell then how many pairs of shoes of the other kind you made, by deducting that 491849 from your total production——

A. Well, you can.

83*a* Q. —of the year 1906 running the figures from December, 1905, up to the date in 1906?

A. Yes, sir.

84*a* Q. You have here on record 829414 pairs of shoes.

A. For the entire current year.

85*a* Q. Do you call that "current year" or "fiscal year"?

A. Fiscal year.

86*a* Q. 491849 pairs of "American Lady," strictly "American Lady" shoes, to be deducted from the total output of 711584 within the same period?

A. Yes.

87*a* Q. The difference would be 219735 pairs of shoes of all other kinds produced at the "American Lady" factory?

A. Yes.

88*a* Q. You would pursue the same method during all the period of time?

A. Yes, sir.

89*a* Q. Now, you were going to tell us about the percentage.

A. You can make that percentage yourself now.

90*a* Q. If I divide 219735 by 711584 I would get the percentage of the lesser number of shoes, the shoes other than "American Lady" proper?

A. No, you would get the percentage of "American Lady" shoes.

357 91*a* Q. No. I would not. You produced 219735; if I wanted to get the proportion of the smaller number of shoes, I divide the exact number of the smaller number of shoes, other than the "American Lady," by the larger figure, of the total production, and get the percentage of the shoes other than the "American Lady." If I pursued that same method with the "American Lady" proper by dividing 491849 by 711584, I would get the actual percentage of "American Lady" shoes produced during that period. Now was that the method you pursued?

A. No, we employed a method of amounts, total amount, and you have taken pairs. We took the total amount. It ought to come out nearly——

92*a* Q. You have not figured it this way?

A. No, I have not.

93*a* Q. You did not pursue that method?

A. No, I pursued amount, and you pursued the method of pairs.

94*a* Q. The price of the total product of the "American Lady" is given at page 16, is it not?

A. You mean the value of the output?

95*a* Q. Yes.

A. Yes.

96*a* Q. That appears on the last column of page 16; I see a column on this same page 16, of 1906, under the head of "American Lady" amount, and it has as the totaling for the year 1906, for the "American Lady, amount" $1,651,690 68; now, let me get your method of arriving at it. Did you get at the average price of the total product of the "American Lady" shoes by dividing the total cost as billed to the jobbing department of the 711584 pairs of shoes?

A. No.

97*a* Q. What was the method pursued at your factory during the period which I now have under inquiry, for ascertaining the average price per pair realized at the factory for the production of the shoes of that factory?

A. Dividing the number of pairs of shoes into the total amount of the sales prices.

98*a* Q. As invoiced to the jobbing department? In other words, as I understand you—and correct me if I am wrong—you have here a total of $1,651,690.68 which represents the actual amount for which you took credit as due from the jobbing department, for the whole product of the "American Lady" factory, during the period about which I am inquiring?

A. We divide the number of pairs of all kinds of shoes into the gross amounts of output.

99*a* Q. Which gross amount includes the 12½% discount allowed to the jobbing house?

A. Yes, sir.

100*a* Q. Now, then, that gave you what, the net result for the year 1906?

A. The net result?

358 101*a* Q. $2.00 a pair, was it not?

A. Yes, about two dollars a pair.

102*a* Q. Was that method of division put anywhere in exact figures on your books?

A. No.

103*a* Q. What was put on your books as showing your profits from the "American Lady" factory?

A. Our net credit from the Hamilton-Brown Shoe Company is entered on our general ledger.

104*a* Q. That is the one you are going to make me a copy of covering, say, the period of time regarding which I am now inquiring, so you shall not lose the present use of it?

A. Yes, sir.

105*a* Q. How would that appear, as one item?

A. Yes.

106*a* Q. When would it be entered?

A. On the closing of our books.

107*a* Q. That would coincide with this date, the 10th of December?

A. It might not.

108*a* Q. Would it bear that date when you closed the books, although you might not enter it at the same time?

A. Yes, I think that would bear the date of the closing of the books.

109*a* Q. Would you get a gross profit and then take from that the expenses of running the factory? Would you enter on one column the gross profits and then take off by a process of closing the books, the expenses of the factory?

A. Yes; in our accounts it would show a profit and loss entry on the ledger account.

110*a* Q. The one item would not show the net profit for the year, would it?

A. Yes, sir.

111*a* Q. Would that particular one item?

A. Yes.

112*a* Q. Who would do that figuring, you or the jobbing department?

A. The jobbing department, and as I have stated previously, we would make our books correspond. Their net aggregate to us entered as a profit or loss item would balance our books.

113*a* Q. If we wanted to get the method that it was really arrived at, we would have to go to the jobbing house, would we not?

Suppose you made $100 for the year 1906; would they give you that in one item?

A. They would give us a credit for that amount or we would get a profit and loss item to enter on our books. If it was a loss we would enter it as a loss.

114*a* Q. Just as one item?

A. Yes.

115*a* Q. Where would we get the figures by which they arrived at that net result?

359 A. From our books or theirs, either.

116*a* Q. They would make some record of the method and manner would they not, by which they reached that result?

A. I am not familiar with their method o bookkeeping?

117*a* Q. All you know is, that they give you net results?

A. They give us net profits. When they get the final results of their year's business they credit us showing their net profit, and if there is any discrepancy between these figures we get together and find out where it is; or, our bookkeepers would, rather. Our bookkeeper would enter on our books our net profit as they enter or give us credit for it. The items are bound to correspond.

118*a* Q. Do they report to you at all any of their own profits as a jobbing profit?

A. No.

119*a* Q. What you refer to has reference solely to factory profit?

A. Yes.

120*a* Q. Do they give you any statement any more than the net amount; do they give you any figuring of how it is arrived at?

A. No.

121*a* Q. How could you determine, or have you personally determined (by determined, I mean figured) the profits derived from the production of the 491849 pairs of "American Lady" shoes?

A. By percentage.

112*a* Q. Having the total profits of the entire production?

A. Yes, sir.

123*a* Q. And the percentage as you—you did not take the percentage of the production?

A. We took the percentage, not of the pairs, but of the production.

Mr. HART:

124*a* Q. The value of the production?

Mr. JOHNSON:

125*a* Q. As I get it, then, instead of having reference to the number of pairs to get the percentage you had reference to the total aggregate price?

A. That is it.

126*a* Q. And took the same proportion of the profits?

A. That is it.

127*a* Q. You have not tried the other?

A. I have not tried the other.

128*a* Q. Did you do that or was it done by the jobbing department?

A. That was done by myself and the auditor of the jobbing department of the general business; our general auditor.

129*a* Q. Was there any effort made to segregate those profits at all from year to year, of "American Lady" shoes proper?

A. You will have to put that question again.

360 130*a* Q. Take from January 29, 1906; is there anywhere on your factory records any separate estimate or keeping of the profits of "American Lady" shoes as distinct from the entire product of the "American Lady" factory?

A. There is not.

131*a* Q. Could that have been kept from day to day, the same as it was kept from year to year, or from month to month?

Mr. HART: That is objected to. It does not appear that it has been kept from month to month, or from year to year separate and distinct of the shrdlu
distinct from the other product of the same factory.

Mr. JOHNSON:

132*a* Q. It has been by percentage, has it not.

A. No, we went into the percentage of it within this last week, to use before the Master, at the request of Mr. Bakewell.

133*a* Q. As a matter of information to your stockholders or directors, were not the different brands of shoes segregated so as to be able to tell the product and profits of any particular brand of shoes?

A. No, sir.

134*a* Q. Who kept this factory account book, Mr. McElroy?

A. The factory bookkeeper.

135*a* Q. And the entries were made monthly?

A. Daily.

136*a* Q. The totalings were made monthly?

A. Monthly.

137*a* Q. And the yearly totalings yearly?

A. Yes, sir.

138*a* Q. And that method has been pursued, has it, during all the period of time about which I inquire?

A. Yes, sir.

139*a* Q. This is checked daily (indicating record) by the method of those postal cards?

A. Yes, sir.

140*a* Q. And in that way it is kept correct?

A. Yes, sir.

141*a* Q. Now, Mr. McElroy, I want to call your attention to this: if you can explain it, and if you cannot, tell us so: In this record there appears as having been produced of "American Lady" shoes from January 1, 1906, to May 1, 1907, a total of 907,820 pairs of "American Lady" shoes referring to "American Lady" shoes proper:

361 You have given us as a totaling of "American Lady" shoes proper from January 29, 1906, up to and including Dec. 10, 1905, 491,849 pairs of shoes. I want you to follow me, if you will, during the months of 1907, from January on, or rather from December on: I find in this record "Factory Accounts, H. B. S. Co.", as produced during the month of December, 1905, 38515 pairs of shoes as the total product of the "American Lady" factory?

A. Yes, sir.

142*a* Q. During January, 1907, 69941 pairs as the total product of "American Lady" factory.

During February, 72,850 pairs.

During March, 1907, 83,955 pairs.

During April, 1907, 91,939 pairs.

Are those figures correct of the production of the "American Lady" factory, during the period from Dec. 10, 1906, up to and including April 30, 1907?

A. Yes, sir.

143*a* Q. That makes a total of 357,200 pairs; are you able to tell us what the average of the production of "American Lady" shoes proper, at the "American Lady" factory was of that total production of 357,200 pairs during 1907?

A. No, I am not.

144*a* Q. Did you not figure that up, Mr. McElroy? You did figure it for the entire year, did you not, and that would be on the same basis for every month, would it not?

A. I can give it to you for the year, but I cannot give you those figures.

145*a* Q. You did figure it for the year, what percentage did you figure for the year 1907?

Mr. HART: I cannot see that this makes any difference?

A. 68%.

Mr. JOHNSON:

146*a* Q. That was the average during every month of the year, was it not?

A. Yes, sir.

147*a* Q. That would be the method; you figured no more percentage for one month than any other?

A. No, but still it might——

Mr. HART: The witness has stated that that was the average for the year. It might have run a larger average in the first months of the year or a larger average in the latter months of the
362 year. The witness simply stated 68% for the entire year, and with conjecturing and assuming I do not think we are gaining anything, so far as arriving at a definite conclusion is concerned as to how many shoes were manufactured or sold.

Mr. JOHNSON:

148*a* Q. It would not differ at all under your calculations if you figured for an entire year?

A. It would differ in an estimation taken for a certain period; it would not be fair to make another estimate for any part of that.

The MASTER: Let me ask Mr. Johnson a question: do you mean by that question to indicate that the average for the whole year would be the same for any one or two or three or four months?

Mr. JOHNSON: Yes, the way Mr. McElroy has figured it, it would.

The MASTER: No, I do not understand that he has figured for the whole year, and one month might differ from another; but [*then*] the whole year is averaged up the percentage would be a certain amount. It might, for instance, be 40% for one month and 90% for another.

Mr. JOHNSON: I don't [thinks] it makes any——

149*a* Q. It could be ascertained by percentage according to your theory, by taking the number of pairs produced for the four months of 1907 and having reference to the aggregate amount of the gross price at which it was billed to the jobbing house?

A. An average taken for a period of twelve months might not be a fair average taken for a period of two months, because in one month we might not make "American Lady" at all, and the next month we might make all "American Lady". That is particularly true where an oxford season and a high cut season is concerned.

150*a* Q. What I am endeavoring to get at, Mr. McElroy, is that these figures show that during the balance of the year of 1907, according to Mr. Teasdale's estimate—and I want you to correct it if you can, for I think you have given us exact facts—there were only 500 pairs, per day, produced of "American Lady" shoes proper, and if your figures are correct I want you to explain it, if you can, with reference to what is in this record, with reference to the 907,820?

A. In order to make an intelligent answer to that inquiry I would have to know how Mr. Teasdale arrived at his conclusion.

363 My conclusions are arrived at by taking the actual figures and dividing to get the percentage.

151*a* Q. And you do not know how he got his 907,820 pairs?

A. I haven't any idea of how he got it.

Mr. HART: I object to your assuming what Mr. Teasdale may have done. You can state the facts if you know them. If you know how Mr. Teasdale arrived at his conclusions you may state it, but I object to your indulging in any assumptions.

The MASTER: I think that is a proper position. As an objection that will be sustained.

To which ruling of the Master the complainant by its counsel, then and there, duly excepted.

Mr. JOHNSON:

152*a* Q. Certainly your figures are right for the balance of the time, according to your own figuring?

A. Yes, sir.

153*a* Q. We have for the ensuing months, for May a total pro-

duction of all "American Lady" factory shoes, 85,400; for the month of June, the same product, 70,077.

For the month of July 62,857.

For the month of August, 69,274.

For the month of September 51,867.

For the month of October 11,024.

November, 49,110, up to and including Dec. 9th.

For the period of two days to the end of the fiscal year Dec. 11th, 4,303 pairs; is that right?

A. Yes, sir.

154*a* Q. Now you begin the year 1907 with Dec. 13th, as appears on page 30 of the "Factory account" book and before going to that I will ask you if that is the correct date?

A. Yes, those dates are all correct.

155*a* Q. Your book will show the profits credited to the "American Lady factory" for the year 1907, just the same as for the year 1906, and that is true of 1908, 1909 and on?

A. Yes, sir.

156*a* Q. The method of arriving at the profits made on the "American Lady" shoes proper, was not indicated by anything on your books during all that period of time?

A. No, nothing at all.

157*a* Q. If you have made any calculation it was done in the same method you have detailed?

A. We never made any calculation.

158*a* Q. I mean, since this suit arose you say you made one in the same manner as the 1906?

A. Yes.

159*a* Q. The same is true of that method of figuring by you during all the period, 1907, 1908 and 1909, up to the present time?

A. The same methods were employed.

364 160*a* Q. During December, 1907, it is shown that you produced at the "American Lady" factory from the 13th of December, 1907, 27,130 pairs; during January, 1908, 77,203 pairs; February, 1908, 77,200 pairs; March, 1908, 109,312 pairs; April, 1908, 111,732 pairs; May, 1908, 101,099 pairs; June, 1908, 61,646 pairs; July, 1908, 69,381 pairs; August, 1908, 35,980 pairs; September, 1908, 80,344 pairs; October, 1908, 72,903 pairs; November 1908, and including eight days of December, 78,214 pairs of shoes; there do not appear to be any entries at all for the remaining days of December, so that would include 78,214 as the entire product of that factory from Nov. 2nd up to and including Dec. 12th: are those figures correct?

A. Yes, sir.

161*a* Q. And I find the total pairs of the "American Lady" factory for that fiscal year from December, 1907, to December 1908—the total pairs do not seem to be recapitulated, but the total value of that product is $1,626,959; and I find that the total amount of the invoices for the "American Lady Factory" product for the fiscal year ending December, 1907, was $— (Witness agrees to furnish these figures from general ledger.)

Now take the fiscal year beginning Dec. 10, 1908: I find that

the total amount of "American Lady Factory" product was, for the month of December, 53,062 pairs.

For January, 1909, 97,428 pairs.

February, 1909, 85,072 pairs.

March, 1909, 122,657.

April, 1909, 106,335.

May, 1909, 88,036.

June, 1909, 74,468.

July, 1909, 75,132.

August, 1909, 85,208.

September, 1909, 73,060.

October, 1909, 58,807.

November 1st up to Dec. 10th, inclusive, 104,113 pairs: are those figures correct?

A. Yes, sir.

162*a* Q. What is the total of the production in pairs? Can you give us that of the "American Lady Factory"?

A. I did not know that these had not been kept up and recapitulated.

163*a* Q. You will have that done?

A. Yes, sir.

164*a* Q. The total invoice prices to the jobbing house of "American Lady" product for the fiscal year ending Dec. 10, 1909, was how much?

A. [$—.]

165*a* Q. Now we have run this account a little further than November, 1909, and the production of the factory for these different dates can be figured out for those succeeding Nov. 15th, and those following the 10th, inclusive, and segregated, the net
365 result found by either your end of it or this gentleman, and you will co-operate with him?

A. Yes, we will co-operate with him.

166*a* Q. Did you understand that I said "sample" or "style"?

A. I understood that you said style.

167*a* Q. Mr. McElroy, I hand you a pair of shoes which are tied together with a string having thereon the tag "Catalogue No. 6332; serial number 62798 G" which I am going to ask Mr. Denison if he will not mark "Complainant's Exhibit 4" for identification, the shoes being a pair of chocolate kid, four hole tie, having in the lining of each shoe of the pair the number 62798 followed by the letter "G," and also stamped on the lining of each shoe are the figures 425, indicating the size and the width of the shoe.

There also appears on the sole of each shoe, in script, a stamp bearing the words "American Lady" alone; there nowhere appears on these shoes the words "Hamilton-Brown Shoe Company;" I ask you to look at those shoes and state if that description is not correct?

A. (After examining shoes.) It is.

168*a* Q. Now, Mr. McElroy, referring to the number 62798 G, are you able to tell us during what period those shoes were manufactured?

A. No, I am not.

169*a* Q. You will be able to tell, will you not, by reference to your records, not only when they were manufactured but when they were shipped to the factory?

A. When they were shipped from the factory?

170*a* Q. To your jobbing house?

A. Yes.

171*a* Q. And we can find from the jobbing department exactly when they were sold?

A. Hardly; I don't think so.

172*a* Q. Is it not a fact that they must have been sold after the date they were manufactured and left your factory department?

A. Yes.

173*a* Q. I would like you to tell us if you can whether or not this is not a familiar common and usual style of shoe produced by your factory since the commencement of this action, January 29, 1906, referring to the style?

A. Well, you would have to make yourself a little more explicit about a "common style."

174*a* Q. One that is sold in large quantities. I mean by style, common style, usual style, a style of which a larger number are manufactured than the average style manufactured by you during any period since January 29, 1906?

Mr. HART: That is objected to as immaterial and calling for the conclusion of the witness.

366 The MASTER: The objection will be overruled.

To which ruling of the Master, the defendant by its counsel, then and there duly excepted.

A. I would have to know when the shoe was manufactured, as a tan shoe is more salable at some periods than at others.

Mr. JOHNSON:

175*a* Q. The fact that it appears in two catalogues, number five and number six, would that indicate anything to you, Mr. McElroy?

A. No, I don't know the serial numbers of the catalogues. We can ascertain when the shoe was made; there have not been many tan shoes sold this year.

176*a* Q. You do not know when catalogue No. 5 was issued or catalogue No. 6?

A. No, I don't know anything about it.

177*a* Q. Is it not a fact that those particular shoes, that particular style of shoe, was manufactured and billed to the shipping department of the Hamilton-Brown Shoe Company since the commencement of this suit?

A. It is, yes, sir.

178*a* Q. Will you be able to tell us how many pairs of that style were manufactured?

A. Yes, sir.

179*a* Q. You will do that, will you, and report to us?

A. Yes, sir.

180*a* Q. You will be able to find out the ticket that was issued when those shoes first entered the works, were manufactured, will you not?

A. If they were made within the time we preserved the tickets, yes.

181*a* Q. I think you will find it is within the time, Mr. McElroy. Could you tell how many pairs of shoes branded precisely as those shoes are branded, were sold by the Hamilton-Brown Shoe Company since the commencement of the suit, up to and including Nov. 15, 1909?

A. I can if that shoe was branded generally that way. I had no knowledge that there was a shoe that went out of the factory branded in that manner.

182*a* Q. Does that evidence anything to you Mr. McElroy, that perhaps your knowledge of the branding of the shoes is not as good as someone else who could give us better information about it?

A. I might be able to furnish someone who can state closer to that part of it than I do.

183*a* Q. Will you endeavor to produce for us the branding apparatus that imprinted that stamp upon the shoe?

367 A. Yes, I will make an effort to.

184*a* Q. Do you know the price at which that shoe was billed to the jobbing department?

A. I do not.

185*a* Q. This record that we have examined, which is the daily record, would show, would it not, the precise date at which those particular pair of shoes went to your jobbing department?

A. Yes, the particular case.

186*a* Q. There must have been at least 36 pairs of those shoes manufactured?

A. Yes, sir.

187*a* Q. Is there any more technical manner of describing that shoe, Mr. McElroy, than I have described it in my question to you?

A. I think your description was clear.

188*a* Q. Is it not a fact that more than 50,000 pairs of shoes of that character and nature, branded as that shoe was branded, have been sent out from the "American Lady" factory to the shipping department of the Hamilton-Brown Shoe Company, since January 29, 1906?

A. I am not able to state that.

189*a* Q. Who would be able to tell us of the exact number of shoes of this identical character so shipped to your jobbing department since January 29, 1906?

A. Do I understand you to mean of that exact style?

190*a* Q. Yes.

A. Oh, we can ascertain that.

191*a* Q. By exact style, I mean not only the style as a style, but the exact manner of branding.

A. We can tell you exactly how many of that shoe was made by the Hamilton-Brown Shoe Company under No. 6232, by the description in our book.

192*a* Q. Do you mean by that, a shoe so branded by them not having the name "Hamilton-Brown Shoe Company" anywhere appearing thereon?

A. No, sir, I would be unable to do that because I did not even know that shoe went out in that condition. There is no record to show that those shoes went out stamped as that.

193*a* Q. You have told me, have you not, that it would not be possible that there could go out more than 25 styles of "American Lady" shoes, without the words "Hamilton-Brown Shoe Company" appearing thereon?

A. I made that statement, yes, sir.

194*a* Q. Suppose that I were to tell you that we had 25 styles of shoes on which the words "Hamilton-Brown Shoe Company" nowhere appeared thereon, but having the words "American Lady": what would you say as to that?

Mr. HART: That is objected to because of the fact that it makes absolutely no difference what Mr. Johnson may say. If
368 he will produce the shoes and show them to the witness then he can examine the witness concerning them, but this hypothetical question is absolutely improper.

The MASTER: I think that objection is well taken.

Mr. JOHNSON:

195*a* Q. Could it be possible that, without your knowledge, during the period of time about which I now interrogate you, from January 29, 1906, 25 different styles of "American Lady" shoes without the name "Hamilton-Brown Shoe Company" anywhere appearing thereon, could go out of your factory without your knowledge; but with the words "American Lady" appearing thereon?

A. Could it be possible?

196*a* Q. Yes.

A. Well, it might be possible, but it would not be probable. 25 styles of "American Lady" shoes could have been made while I am at this hearing that I would know nothing about; that the superintendent would know nothing about unless there was a complaint made on them. It is not probable, however.

197*a* Q. Would it be possible for a brand to be in your factory between January 29, 1906, and Nov. 15, 1909, which could be used so extensively in branding, say 25 styles of "American Lady" shoes, the brand nowhere having the words "Hamilton-Brown Shoe Company" thereon, without your knowledge?

Mr. HART: That is objected to because of the fact that it does not tend to prove any of the facts at issue in this accounting. They seem to be cross examining their own witness. I do not know whether they are trying to impeach him. This is their witness. No matter what his answer may be it does not tend to prove that they have or have not these shoes.

I think if they have the shoes they are at liberty to produce them here, but the question at this time is entirely improper; it does not tend to prove any issue before your Honor.

The MASTER: I think that that objection will have to be sustained,

but not on the ground on which the counsel bases it. It is simply calling for the opinion of this witness on a matted on which he may or may not be informed.

To which ruling of the Master, the complainant by its counsel, then and there, duly excepted.

Mr. JOHNSON:

198*a* Q. I state to you professionally, Mr. McElroy, in the presence of opposing counsel and Mr. Denison, that we have
369 25 different styles of "American Lady" shoes having on them the words "American Lady" on which the words "Hamilton-Brown Shoe Company" nowhere appear thereon:

Now, I want to ask you, having supervision of that factory, have you any knowledge of any branding irons or dies being used to that extent and on so many styles of shoes?

That is objected to; it is the same question.

The MASTER: No, it is not.

A. I have not.

Mr. HART: It is the same question asked a while ago. Mr. Johnson is not on the stand. He is——

The MASTER: The objection will be overruled.

To which ruling of the Master, the defendant by its counsel, then and there, duly excepted.

Mr. JOHNSON:

199*a* Q. Who can tell us of the branding irons relative to shoes stamped identically (so far as the absence of "Hamilton-Brown Shoe Company" is concerned), as the exhibit marked "Complainant's Exhibit 4"—I refer to "American Lady" shoe?

A. Well, in that case——

Mr. HART: That is objected to. It does not appear in this record that any such shoes were ever manufactured by the Hamilton-Brown Shoe Compnay.

The MASTER: The objection is overruled.

To which ruling of the Master the defendant by its counsel, then and there, duly excepted.

A. As I stated previously, the bottom stamp is put on in the finishing room and the heel pins are put in in the packing room—stock linings or heel pins, in the packing room; and the man who brands the bottom of the shoe knows nothing about how the shoe is going out.

This stamp here appears on the bottom of the shoe—or should appear—that had the Hamilton-Brown Shoe Company's trade mark on the inside stock lining or on the top facing. We have that stamp and use it all the time, in connection with the Hamilton-Brown Shoe Company's name.

200*a* Q. That is upon another stamp having the Hamilton-Brown Shoe Company's name in connection with the "American Lady" a stamp having both phrases on, is it not?

A. We have that stamp, but we have this stamp putting on "Hamilton-Brown Shoe Company" where the name is in the top facing.

370 201*a* Q. Your stamp, if it had "American Lady" and "Hamilton-Brown Shoe Company" would be on the same stamp, it would not be on two stamps?

A. We have though, an inside, an embossed stamp put on with silver or gold leaf, that goes on the inside of the oxford of the low cuts; sometimes with this stamp and the "Hamilton-Brown Shoe Company" on the inside of the shoe.

202*a* Q. I am referring to the sole of the shoe; you have no stamp that would have "American Lady" and "Hamilton-Brown Shoe Company" that would—you have not two stamps that would have to be put on independently?

A. Sole stamps?

203*a* Q. Yes.

A. Yes, we have.

204*a* Q. With the words "American Lady" and "Hamilton-Brown Shoe Company"?

A. Yes, sir.

205*a* Q. That being the case and you having knowledge of that—that is correct, is it——

A. We have had this stamp "American Lady" run through the shank; then we have had "Hamilton-Brown Shoe Company" on the ball; these sole stamps, as I have stated before, have been subject to changes; and then on the inside of these shoes we have a gilt or silver stamp that we put on.

Your question was who could tell, and I say that the men that stamps the bottom of the shoe knows nothing about how the shoe goes out.

206*a* Q. What I am trying to get is, whether to your knowledge, "American Lady" stamped on the shoes was the result of having a stamp in your possession which contained the words on that stamp "American Lady" alone?

A. Only, yes.

207*a* Q. You have known that?

A. Yes, we have had that stamp.

Mr. HART: That is objected to on the ground that it is not confined to the period of this accounting. I object to that question and answer and move that they be stricken out on the ground that I have just stated.

The MASTER: The objection is overruled. It has been stated over and over again that the whole examination was relative to the period covering this accounting.

Mr. JOHNSON:

208*a* Q. Do you not think, Mr. McElroy, that Mr. Johnston would be able to give us more definite information than you about these things?

371 A. He probably would, yes, sir.

209*a* Q. He having charge of the factory, of the stamps and of the method of branding?

A. Yes, sir.

210*a* Q. Personally you do not know how the shoes were stamped?

A. No, personally, I don't know how the shoes were stamped; that is, from my own personal knowledge.

211*a* Q. Except that you do know that during the period of this inquiry you had a stamp that had "American Lady" alone on it?

A. A bottom stamp, yes, sir.

212*a* Q. That has been used on shoes?

A. We have an evidence of it there, (indicating shoes).

213*a* Q. What I am trying to get you to say, if I can without misleading you—my question is: you have no personal knowledge that this stamp was put on?

A. No, I have no personal knowledge.

214*a* Q. You do not want me to understand that that was done with your knowledge?

A. No, it was not.

215*a* Q. Or that any of them were done with your knowledge, if any such exist of any "American Lady" alone, nowhere the words "Hamilton-Brown Shoe Company" appearing thereon?

A. No.

216*a* Q. Would Mr. Johnston also know about the catalogue styles?

A. No, not about the catalogue.

217*a* Q. Would he know about the styles manufactured at the factory?

A. In a general way he is closer to that. He can identify any shoe you show him in the catalogue, but the catalogue part of it he has not any intimate knowledge of.

218*a* Q. Now this jobbing house, you would not be able to tell from your personal knowledge anything of the profits of that house?

A. No, sir.

219*a* Q. Or the method of conducting their business?

A. No, except in a general way.

220*a* Q. But not sufficiently to give us figures or data?

A. Well, I have their profits on these years.

221*a* Q. That is the result of their compilation and not the result of your personal knowledge?

A. No, sir.

222*a* Q. You did not keep those books, nor were they kept under your supervision or control?

A. No, sir.

223*a* Q. Nor can you personally state that the figures are correct from your own knowledge?

A. No, not from my knowledge.

224*a* Q. Or how they were made up, as to items and details?

A. No, sir.

225*a* Q. This bookkeeper of whom you have given us the name, would be the party to tell us as to that?

A. He is the general bookkeeper, yes, sir.

372 226*a* Q. Who is the general manager of the jobbing department who would have intimate knowledge of the method of keeping the books?

A. He would be the most enlightened on that subject.

227*a* Q. Who would be able to tell us as to the advertising?

A. Covering this period?

228*a* Q. Yes.

A. Those are the men I mentioned this morning.

229*a* Q. Would they be able to tell us as to the amount spent for advertising?

A. Yes. Mr. Hochmuth could probably give you that, and Mr. Moore. Mr. Moore had a more intimate knowledge of the actual amount expended than probably either of the other men named.

230*a* Q. Your department had nothing to do with that?

A. No, nothing at all.

231*a* Q. You have no personal knowledge about it and cannot tell us anything about it?

A. Nothing at all.

232*a* Q. Or vouch for any figures given, from your own personal knowledge?

A. No, sir.

Mr. JOHNSON: I think that is all at present. I would like to get this missing data about this particular pair of shoes and as to any details we have left open.

Mr. HART: Before going on with the cross-examination we would like to have the transcript of the record.

Mr. WERNER: How would it do to go on with another witness and cross-examine this witness later on?

Mr. HART: That will be all right.

Mr. JOHNSON: I formally offer "Complainant's Exhibit No. 4" so marked by the Master, with the date April 8, 1910.

Mr. HART: Defendant's counsel objects to the introduction in evidence of this pair of shoes, for the reason that it is not shown by any testimony in this case that these shoes were manufactured by the Hamilton-Brown Shoe Company or sold by the Hamilton-Brown Shoe Company; and for the further reason that it does not appear in what manner these shoes were sold by the Hamilton-Brown Shoe Company with respect to cartons or accompanying matter, if ever sold by the Hamilton-Brown Shoe Company.

And for the additional reason that it does not appear that if these shoes were sold by Hamilton-Brown Shoe Company, that they were sold by the Hamilton-Brown Shoe Company "as and for" any shoes manufactured or sold by the Complainant.

The MASTER: The objection is overruled.

373 To which ruling of the Master, the defendant by its counsel then and there, duly excepted.

At this point the further taking of testimony was adjourned to Saturday, April 9, 1910, at 10:30 A. M.

Vol. 1, Filed Mar. 28, 1912. John D. Jordan, Clerk.

Volume II of Testimony Before Special Master.

ST. LOUIS, Saturday, April 9, 1910.

Pursuant to adjournment the following proceedings were had on Saturday, April 9, 1910, at 10:30 o'clock A. M.

Present: Same parties as heretofore.

JOHN T. JOHNSTON, a witness of lawful age, being duly produced, sworn and examined on behalf of the complainant, testified as follows:

Direct examination.

By Mr. JOHNSON:

233*a* Q. Will you kindly state your name, age and residence?

A. John T. Johnston. I was born in December of 1866. My home residence is the Buckingham Annex, St. Louis.

234*a* Q. With whom are you connected in business, Mr. Johnston, at the present time?

A. The Hamilton-Brown Shoe Company.

235*a* Q. In what capacity?

A. Superintendent of the "American Lady" factory.

236*a* Q. How long have you been so connected in that capacity with the defendant?

A. Since February, 1905, in that position.

237*a* Q. During that period of time and on have you been continuously the superintendent of the "American Lady" factory?

A. Yes, sir.

238*a* Q. What were your duties as superintendent of that factory from January 29, 1903 on, continuously?

A. The general supervision of the factory.

239*a* Q. Now, tell someone who does not know anything about what those duties are?

A. Well, hiring the foreman and generally managing the factory, aside from buying the leather and such important matters as might come up from time to time, that I would take up with the manufacturing head of our business?

240*a* Q. Did you supervise the daily output?

A. Yes, sir.

241*a* Q. And have control of the employes and force that produced it?

A. Yes, sir.

242*a* Q. And the method of recording and preserving the evidences of what was produced?

374 A. Not altogether, no, for the reason that we have three factories there together and we try to keep our records for each factory in one central place for those three factories. We have a young man who attends to that part of the business for us.

243*a* Q. Would you have knowledge, generally, of what was done

in that regard, so far as regards your factory, the "American Lady" factory?

A. Yes, sir.

244*a* Q. What are the three factories that are kept in that method?

A. "American Lady"; "American Gentleman" and the "Security."

245*a* Q. Are those separate buildings, Mr. Johnston?

A. Yes, sir.

246*a* Q. Where is the place that they are centralized, as you stated a few moments ago?

A. In the office of the "American Gentleman" factory.

247*a* Q. And that adjoins the "American Lady"?

A. Just across the street from it.

248*a* Q. Do you know the name of the party who has had charge of this centralization, or records of centralization?

A. That has been under the direct charge of Mr. McElroy. That is, he has been the head of it as he is the manufacturing head of our business, but the man who has looked after that, or is looking after it at this time, is Mr. Hauchan.

249*a* Q. How long has he had charge of it?

A. I should say for the last year or 18 months.

250*a* Q. Prior to that time who had charge?

A. Prior to that time there was a Mr. Lincoln.

251*a* Q. How long had he charge of it?

A. I don't know just how long. He was there when I came there.

252*a* Q. It has been since 1905?

A. Yes, sir.

253*a* Q. What is Mr. Lincoln's first name?

A. Norman.

254*a* Q. Is he still with the Company?

A. No, he has not been for 18 months or two years.

255*a* Q. Where is he located?

A. In St. Louis.

256*a* Q. Do you know his business?

A. Yes, he is in the leather business.

257*a* Q. We had brought here yesterday, Mr. Johnston, a stock book of the "American Lady" factory, which contained entries as early as January 29, 1906:

Now, pursuant to our request you have brought here a book which is backed "Stock Book, American Lady Factory, H. B. S. Co.," and on the cover appears the words "Stock Book, American Lady Factory, H. B. S. Co."; from whence was this book obtained, Mr. Johnston?

A. You mean where did I get it?

375 258*a* Q. Yes.

A. We have it in our office.

259*a* Q. In the office of the "American Lady" factory?

A. Yes, we had it sent over there a few days ago. We formerly kept it at the other place.

260*a* Q. This last book that was produced yesterday ended some

time in June; This book begins June 18, 1906; that is either the same day or the next, in the consecutive numbering of the days?

A. It might not be the same day or the next, but it would be the consecutive order that we received for shoes.

261*a* Q. The pages do not seem to be numbered, do they?

A. No, they have a serial number.

262*a* Q. It starts with 95,600 in number and has 14 columns, that is correct, is it?

A. I think so; I have not counted them. There is a column for each.

Mr. HART: Count them to be sure.

A. (Witness examining book.) Yes.

Mr. JOHNSON:

263*a* Q. The first column has at the top the words "shipped"?

A. Yes, sir.

264*a* Q. The next has "case number"?

A. Yes, sir.

265*a* Q. The next column "pairs"?

A. Yes, sir.

266*a* Q. And the next column "Sizes"?

A. Yes, sir.

267*a* Q. The next "lasts"?

A. Yes, sir.

268*a* Q. And the next "Price"?

A. Yes, sir.

269*a* Q. The next "description"?

A. Yes, sir.

270*a* Q. And the next, "cut"?

A. Yes, sir.

271*a* Q. Then a general heading of two columns of "F. M. D.," the earlier sub-head being "uppers"; the next "stock"; a column having the heading "last"; a column having the heading "bottom"; another with the heading "finish" and the last with the word "packed"?

A. Yes, sir.

272*a* Q. The column having "pairs" seems to have on the first page of it a succession of 36's?

A. Yes, sir.

273*a* Q. That would represent a rack?

A. 36 pairs to a case, we call it.

274*a* Q. That is what is put on this rack, is it, that goes from workman to workman to be manufactured?

A. Yes, sir.

275*a* Q. Then the size is self-explanatory, is it?

A. That is the size that the case runs.

276*a* Q. And this "last"?

A. That is Arc. an abbreviation for Arcadia.

277*a* Q. At the bottom appears the word "Elba" and the change from time to time as the lasts change?

376 A. Yes, sir.

278*a* Q. Are the lasts what determine the styles?

A. Those are the names of the lasts.

279*a* Q. Does the shape of the last determine the style of the shoe?

A. Yes, sir.

280*a* Q. Then you have the prices, the invoice prices to the jobbing department?

A. Yes, sir.

281*a* Q. Then a description: for instance, the first is "Dong."; is that Dongola?

A. Yes, sir.

282*a* Q. And "Blu."; is that Blucher?

A. Blucher, yes.

283*a* Q. And "pat. Tip. Fox., yellow stitch, Id. Welt"; and so it goes on from page to page of this long record in the same manner?

A. Yes, sir.

284*a* Q. Now, as we are after the period of time covered by this book, I find that it runs over on the last page to March 5, 1908: is that correct?

A. Yes, sir.

285*a* Q. And the last number in the book is 50499 G: that is correct, is it?

A. Yes, sir.

286*a* Q. As I gather from you, this record is a complete record of the product of the "American Lady" factory of all kinds, during the period of time from June 18, 1906 up to and including March 5, 1908, shipped by the "American Lady factory" to the jobbing department of the Hamilton-Brown Shoe Company?

A. Yes, sir.

287*a* Q. Some of these columns toward the end, on the right, which are left vacant on the first page of this book, Mr. Johnston, appear to be filled in on the last: is there any reason for that?

A. Yes; formerly when he were using that book we checked our shoes through the factory by a boy, on a sheet of paper, or by a man; and afterwards, as you will see there, we had our reports sent to the office by the foreman when the shoes left the different departments, as far as they were made, and it was then checked in the office by the girl—checked in the book. You will notice over there they were checked packed, and here there is a different process of checking. The stock was not checked at that time.

288*a* Q. This book will show the date on which you started that method of differentiating?

A. I think you will find that, yes, sir.

289*a* Q. Was it somewhere about August 29, 1906, when that different method of filing out the columns which were before left vacant, first started, pursuant to the reasons you have just given us?

A. Yes, sir.

290*a* Q. We started with a "D" yesterday: the number we had was somewhere in the eighty thousands, D, and you say that the last number here is "G"?

A. Yes, sir.

377 291*a* Q. What became of the serial numbers with the letters "E" and "F"; were those pursued at all?

A. No, they were not for the reason that——

292*a* Q. As I take it from this book, when you got to 99,999 you stopped with "D"—five 9's, that is 99,999: now, then, I assume you started arbitrarily with 20,000 for the "G"?

A. Yes, that is correct.

293*a* Q. Skipping all numbers and all letters from D, between 99,999 D, up to 20,000 G, which was the starting point of the next serial number of the shoe?

A. Yes, that is right.

294*a* Q. Was there any reason for that?

A. Yes, Mr. Wolf will understand. A great many of our shoes are numbered "E" and the orders are written up "E" for width, and "F" for width, as well as "D" for the width and at the time we were through with "D" we decided it would be best to begin numbering with "G" so as not to confuse the width with the serial number.

295*a* Q. What was the reason for starting with 20,000, Mr. Johnston, if any?

A. I don't know.

296*a* Q. Were there not special order numbers that did not have any serial letter at all?

A. Yes, sir.

297*a* Q. And would they not run up from one to——

A. Not always from one. I don't remember just where those order numbers began or where they stopped.

298*a* Q. From whatever arbitrary number they started they would run up to a number possibly not to exceed 20,000?

A. To keep them from getting mixed up with the other goods they would be of a lower number.

299*a* Q. In other words, in order to avoid reduplication of special orders?

A. Yes, sir.

300*a* Q. The special orders were made the subject of [*an*] a notation which had earlier numbers?

A. Yes, sir.

301*a* Q. Was a separate record kept of them?

A. Yes, but I haven't that book here.

302*a* Q. Where is that kept, Mr. Johnston?

A. In the "American Gentleman" factory, in the general office.

303*a* Q. What is it called.

A. A special order book.

304*a* Q. That, of course, would disclose when it started—your impression is it would not start with one?

A. I don't know just where that did start.

305*a* Q. Is there any trade advantage got by starting with 20,000, that is, that it looks better or anything of that kind?

A. No, I would not say there was.

378 306*a* Q. Then, as I get it, from 20,000 on it runs through to "G" to the end of this book?

A. Yes.

307*a* Q. No skipping whatever in any serial number?

A. No skipping, no.

308*a* Q. This is labelled the "stock book" but is that what you understand as the order book, Mr. Johnston?

A. That is the book in which we enter our orders when we receive them from the store.

309*a* Q. This is the initial book?

A. Yes, sir.

310*a* Q. How do you keep track of the time and work of your employes? Do you pay by the piece plan or by the week?

A. We use both; probably 75% of our factory is on the piece plan and 25%, I should say, that is just an estimate—on week work.

311*a* Q. That means, of course, that each man is paid for what work he does according to the piece plan?

A. Yes.

312*a* Q. Were any records kept (my inquiries relate only from January 29, 1906, on) of the piece plan work of each employe?

A. Oh, yes; we have that.

313*a* Q. How do you do that, do you number the employes?

A. We number them, yes; we also keep their names on the payroll.

314*a* Q. The employes in the different departments of the business?

A. Yes, sir.

315*a* Q. There would be employes in the stamping department, would there?

A. Yes, sir.

316*a* Q. Is that a separate department, Mr. Johnston?

A. No, it is in our finishing department.

317*a* Q. What book would show the employes of the finishing department during the period of time I am inquiring about?

A. Our time book would show that.

318*a* Q. Is there a man that does that work alone?

A. Yes, sir.

319*a* Q. Just stamping?

A. Yes, sir.

320*a* Q. Would it show who was employed by you during this period of time doing the stamping, by the number, you say?

A. Yes, or by name. We have always used the number but we have the name.

321*a* Q. Was the stamper during this period of time paid for piece work?

A. No, I think week work. I am not positive on that, however, without looking it up.

322*a* Q. Mr. McElroy seemed to think yesterday that a stamp would not be put on twice because that might call for double pay, and I simply call your attention to it so you may investigate for us and let us know whether he was a piece man or a week man. If he was a week man would the record still show that he

379 stamped—that is, if he was paid by time or by piece?

A. Would the record show he stamped a shoe twice?

323*a* Q. That he did any stamping to the shoe?

A. No, sir.

324*a* Q. What is that record called that contains the permanent

evidence of the work done by the employes; you say the time book?

A. Yes.

325*a* Q. You keep those and preserve them and have them for all the period of time I am inquiring about?

A. I don't know that we have. We probably would not keep a record as long as that.

326*a* Q. Would there be any record preserved of what was done with each lot of shoes?

A. Only this record (indicating).

327*a* Q. Suppose a shoe went into manufacture: it would go from workman to workman, would it not?

A. Yes, sir.

328*a* Q. And he would have to have something to tell him what he had to do with the shoes?

A. Yes, sir.

329*a* Q. What would that something be?

A. That would be what we call a coupon or the factory ticket. We have what we call a factory ticket.

330*a* Q. Would it be something like the style we have here now, or anything different? I am handing you the red ticket?

A. Yes, this is what we call a factory ticket.

331*a* Q. Or coupon?

A. No, a coupon has the separate portions either printed or written on, that is torn off by the employe when he does the particular work.

332*a* Q. Would it be originally attached to the ticket?

A. The two would be tied together on a shoe.

333*a* Q. What would that tell him, if anything, that was not on this ticket? Suppose it came to the stamper, what would it tell the stamper?

A. It would not tell the stamper anything. I don't think that "stamper" is on those coupons. I think we have done that by week work and if we have that would not be on.

334*a* Q. How would the stamper know what to do unless he had some direction?

A. This ticket shows the stamp sole "American Lady."

335*a* Q. What would he put on the sole?

A. He would stamp it with the "American Lady" bottom stamp.

336*a* Q. What words would be on the sole? I want all of them?

A. At this time?

337*a* Q. Yes.

380 A. That would be "Hamilton-Brown Shoe Company, Makers" and Hamilton-Brown Shoe Company" would be in the belt, which is the firm's trade mark, with "Makers" on the inside of the belt.

338*a* Q. I do not mean at this time now; I mean the time we refer to, January 29, 1906.

A. Oh, well, I cannot tell you just what it did have on at that time.

339*a* Q. As I understand your former answer is that you are now universally stamping your shoes. I am not asking you that—did

not mean to ask that—but my reference was as to January 29, 1906, and you do not think you are able to tell me that?

A. No, I cannot answer that just now. I don't remember.

340*a* Q. How could you ascertain that, Mr. Johnston?

A. I don't know of any way that I could get at it exactly. We do not keep our factory tickets as long as that; that has been four years.

341*a* Q. You have one in your hands; tell me what that reads?

A. This is Nov. 17, 1908.

342*a* Q. What does that say?

A. This says to stamp sole "American Lady Special."

343*a* Q. What would be put on, "American Lady Special"?

A. He would have done it at that time if he had that stamp, but since that our tickets are made "American Lady Special" which designates the grade and it is put in this place (indicating).

Now, he may have stamped the bottom whatever this particular shoe called for; it may have been what we call a special grade of an "A. D. B." grade, or some other grade. This designates the grade of the shoe.

344*a* Q. How would it be indicated to him from what that reads, he following the literal language of that, would stamp the bottom of the shoe "American Lady Special"? How would he know whether something else had to go on, from what was stamped on that ticket?

A. He would know for this reason, that we would give the foreman certain instructions to stamp certain shoes a certain way and he would give those instructions to the stamper, often taking a list and tacking it upon a post by the stamper, as to how those shoes were to be stamped.

345*a* Q. Well, a great many styles were produced during the year we inquire about, beginning January 29, 1906, and the workman would not go to the foreman for each particular case of shoes to inquire about the stamping?

381 A. No, he would stamp a certain style of shoe as he was instructed to stamp that particular style, until such time as he was instructed to change.

346*a* Q. There might come into your factory for getting up by the workmen any particular day as many as—your production was about 2,000 pairs a day?

A. No, more.

347*a* Q. Well, at least that?

A. Yes.

348*a* Q. That would be very nearly 60 cases of shoes and might cover all sorts of styles, might it not?

A. Yes, sir.

349*a* Q. Your foreman would have to have some definite instructions as to each style as to how that was to be stamped?

A. Yes, sir.

350*a* Q. Some of your styles were permanent?

A. Yes, sir.

351*a* Q. And are still kept; he would not be able to keep in his

head how all of your many designs of styles were to be stamped, without some orders?

A. I don't know just what it is that you are trying to get at, but I believe I can explain it to cover the ground.

Twice a year we make samples that our salesmen take out and in making our samples we always retain one of each style at the factory. My foremen stamp their shoes or bottom them or make them, or whatever there is to do to them, by that sample, which is kept in the sample room in the office and they have access to the sample.

352*a* Q. Is any record kept of the sample, too, Mr. Johnston?

A. No more than a factory ticket like this (indicating).

353*a* Q. I mean when you manufacture a sample shoe you keep it during all the period of time you are manufacturing that style or sample?

A. I don't understand the question.

354*a* Q. Do you keep that sample all the time?

A. Yes, during that particular season.

355*a* Q. How long is the sample itself preserved?

A. As a rule we keep them from six to eight months; from the time that we make one set of samples until the next set of samples is completed.

365*a* Q. And you would have at the factory now samples of the shoes that were current back past six or eight months?

A. Not quite so long as that because the sample season has just changed. We sent new samples out about the first of March.

382 357*a* Q. Are there any permanent records kept of these various samples so they could be reproduced?

A. We have what we call a sample book that we issue to our salesman. The description of the shoe is printed in that book.

358*a* Q. You do that every season?

A. Yes, sir.

359*a* Q. Are there two seasons a year?

A. Yes, sir.

360*a* Q. Is it a printed book?

A. Yes, it is printed by the store; that is, it is furnished by the store.

361*a* Q. And those are issued and have been issued since your connection with the business, to these salesmen, during the period about which I now inquire, and those are preserved, are they?

A. Well, they are not always preserved. I don't know that every salesman preserves them. I have preserved mine.

362*a* Q. In other words, we could get those books from some one, from you, so as to tell what were the samples?

A. Yes, I think I have them.

363*a* Q. Those that were issued during 1906, 1907, 1908, 1909 and on? Those are accurate descriptions in the book of the samples, are they not?

A. As a rule, yes. There may be some discrepancies that the printer would make.

364*a* Q. Give me an illustration now; I am testing your recollection as to what would be in a book as to a sample.

A. The description of the book that goes to the salesmen?

365*a* Q. Yes.

A. The sample number and description which would cover the kind of upper leather that was in the shoe; the last on which it was made; the sizes and widths that it was carried in stock, and the prices. I think that is all.

366*a* Q. Anything else?

A. I cannot recall anything else right now, not having the book.

367*a* Q. Any picture of the shoe?

A. No, not in the sample books. Sometimes they have pictures of the factories and have had pictures of Mr. McElroy, Mr. Brown, and the different factory superintendents, in connection with the factory building.

368*a* Q. Would the name of the shoe appear on it?

A. I don't believe it does, aside from the grades. We grade them by name. An abbreviation of that may appear. I don't remember.

369*a* Q. You will let us have one of those sometime during this inquiry, so we can see it?

A. You can get one any time you want.

383 370*a* Q. How do these duplication of orders come in, Mr. Johnston; you get them from the jobbing department?

A. Yes, we get our orders from the jobbing department.

371*a* Q. Suppose a man wanted to have a style reproduced for him: how would you do that, say it was No. 6102?

A. We would get that order from the store if they needed No. 6102; for instance, if they wanted to re-order style 6102, they would write up an order for so many cases and send it out to us.

372*a* Q. What would you have to do when you got that order?

A. I would take it up to my girl that makes out these factory tickets. She would make that out and after having made them out she would put the serial number at the different points on the order, if there were several items on the order, she would put the beginning case number and then take it—or, another girl would enter it on this book.

373*a* Q. Where would she find out what ought to be in the description of 6102? How would she indicate the description or how it should be made or manufactured, on any paper or card or document?

A. That description is taken from the sample and the description of it is put in the book. This girl is not competent to do that, but it is put in the book. At this time I have a man who does that, and this girl has this book that describes the shoe: it calls for a certain style heel, a certain style lace stay and top; and she makes her factory ticket from that description.

374*a* Q. Is that a permanent record that is preserved, that book?

A. I don't know that we have it for the period that you speak of, but we probably have it for a year; we keep it for a year or eighteen months or longer.

375*a* Q. Then those books, contemporaneously or currently, would show exactly what had to go on that shoe, all through the works, in-

cluding branding, stamping, finishing, edging—or whatever that term is, etc.; is that correct?

A. With one exception and that exception is that from time to time we have changed the bottom finish, for instance. I might see a bottom finish or think of one that I thought was a little nicer than the one we were getting; or some one of our directors, or some one at the store, and after talking the matter over they would instruct me to change the bottom finish, or the top band, or a lace stay, or something of that kind, and I would give instructions to the man whose duty it was to make that change to make it.

376*a* Q. This book that this man enters into would be ruled in columns?

384 A. I don't think it is; I think it is only a small day book.

377*a* Q. How many processes are there in the making of a shoe?

A. Six or eight or more; probably fifteen all told.

378*a* Q. All of those that were essential to the manufacture of the shoe would be in this original book?

A. Yes, or on this sheet; sometimes we have that on loose sheets.

379*a* Q. It would have——

Mr. HART: I object to this line of inquiry because counsel have stated it is their intention to call for this book.

Mr. JOHNSON: He says some are not here.

Mr. HART: The witness says he has the books back possibly 18 months, and I do not see what is the use of letting the witness speculate on this matter when it is possible to produce the books.

The MASTER: The witness is simply describing it. The objection is overruled.

A. It is not always on a book; sometimes on a sheet.

By Mr. JOHNSON

380*a* Q. These sheets would have these different columns——

A. I don't think they have columns.

381*a* Q. I used the wrong term: the divisions would have places for noting and would contain the notations of the different processes of——

A. It has no specified place for making notations in that particular space at all times, but the description is written out.

382*a* Q. Would it run across a line or two lines, Mr. Johnston?

A. Do you mean that way (indicating a vertical line)?

383*a* Q. Or would it run across?

A. As well as I remember I have had them write it straight across.

384*a* Q. Or would stamping be here (indicating) that being the last process?

A. It has no specified place.

385*a* Q. But somewhere it would be shown how it was to be stamped and from that these tickets would be made out?

A. Yes, sir.

386*a* Q. Then it would go to the various departments at the factory to be worked up?

A. Yes; but I don't know that we always put stamping on there, because it is a minor thing. We depend upon getting that from our samples.

385 Mr. HART: I object to the testimony unless the witness has positive knowledge, and move that that be stricken out.

The MASTER: The objection is overruled.

To which ruling of the Master, the defendant by its counsel, then and there, duly excepted.

Mr. JOHNSON:

387*a* Q. Why do you say the stamping is a minor thing?

A. It would be a minor thing to have it on this list where the tickets are made out, because it is an easy matter for the foreman of the finishing department under whose jurisdiction the stamping is done, to see just how that is to be stamped, by the sample; provided there has been no change made and if there has been a change made he has been told of that change by me.

388*a* Q. Has he a permanent record kept from day to day of what changes are being made as pertaining to each particular style?

A. I should not think he would keep that record. I don't think he has.

Mr. HART: I object to that and move it be stricken out, the witness is merely giving his opinion.

The MASTER: The objection will be overruled.

To which ruling of the Master, the defendant by its counsel, then and there, duly excepted.

Mr. JOHNSON:

389*a* Q. Would he have any record as he proceeded to supervise his work from day to day or any period, from month to month, or semi-monthly, of the method that the shoe should be stamped?

A. I don't think he would keep that record. If you will permit me, I believe I can explain.

390*a* Q. Please do that.

A. When we make up these samples I tell them as a rule how to finish the bottom and how to stamp the bottom, and they stamp the samples as I tell them. Then all shoes that are made like that particular sample or under that sample number—which is supposed to be the same—are stamped as this sample is stamped until such time as we decide to make a change.

I am liable to go to him at any time and say, you are stamping such a shoe in such a way and we have decided we want it stamped differently; I am going to order a different bottom stamp and when you get it stamp the shoe in that way, and he does it.

386 391*a* Q. Then during the period of time that your stamp is in vogue in any particular way, it is uniformly according to the sample?

A. Yes, sir.

392*a* Q. That sample would not be produced one way one time and one way another, as far as the stamping was concerned?

A. Not unless it is done by error; that sometimes occurs.

393*a* Q. You have a man furnish dies to you?

A. A man to make our dies?

394*a* Q. Yes.

A. We have had the most of them made by a home firm.

395*a* Q. Who is that?

A. The Steiner Engraving Company, I think they have made them, but I am not positive of that because I don't order those. I simply O. K. the orders and they are ordered by the purchasing agent.

396*a* Q. Who was that during the period of time regarding which I inquire?

A. Mr. Lincoln first, and Mr. Heuchan afterwards. That is, it is done by a girl in the office; whoever handles the orders at that time.

397*a* Q. I want to clear up if I can, the confusion in my mind; you know about this and I do not: Say you have in your catalogue 54 styles; what I want to understand is how would the foreman be able to carry in his head, without some permanent record, how those styles should be marked?

A. If he was in doubt as to whether or not he was stamping a shoe correctly or there had been a change, he would come to me and ask me about it.

398*a* Q. Would there be as many as 54 different methods of stamping a shoe?

A. No, sir.

399*a* Q. How many would you say? Your 1906 or 1907 catalogue—I may be wrong in the date—contains 54 styles, I think, of low cut shoes?

A. In the 1906 or 1907 catalogue I should say that there was—as near as I can remember, there were three or possibly four styles of bottom stamps; I cannot tell; I don't remember whether three or four.

400*a* Q. In other words, there would not be 54 bottom stamps for marking 54 styles of shoes?

A. Oh, no.

401*a* Q. And that would be true during the period of time about which we inquire, 1906, 1907, 1908 and on to the date of the decree; that is, you would not have as many stamps as there were styles?

A. No, we never have.

402*a* Q. What is your impression as to how many you had during 1906? I am only asking approximately?

A. It would only be a guess on my part to answer it.

387 Mr. HART: Then I object to the testimony unless he is able to refresh his memory.

The MASTER: The objection will be sustained.

Mr. JOHNSON:

403*a* Q. Who can tell us?

A. I don't know, because I don't remember.

404*a* Q. Will you be able to tell us within the limits certainly how many you had up to a certain number?

A. I should think within one or two, probably.

405*a* Q. Give us that, then.

Mr. HART: That is objected to for the same reason.

The MASTER: The objection is overruled.

To which ruling of the Master, the Defendant by its counsel, then and there, duly excepted.

A. As well as I remember it was either three or four.

Mr. JOHNSON:

406*a* Q. Was that so during the succeeding years 1907, 1908, and 1909?

A. No, it has sometimes been less than that. Sometimes we have only had—I don't believe we ever had less than three until within the last year.

407*a* Q. What has been the maximum in number?

Mr. HART: If you remember.

A. I don't remember.

Mr. JOHNSON:

408*a* Q. Would it be as high as 10?

A. No, never.

409*a* Q. As high as five?

A. Possibly.

410*a* Q. You think that would be the limit?

A. I am only guessing at it being five; I don't remember of their having used five bottom stamps at one time.

411*a* Q. You do remember using three or four?

A. I do remember using three.

412*a* Q. But not in excess of three?

A. No, sir.

413*a* Q. Can you describe from memory the three that were used in 1906, Mr. Johnston?

A. No, I cannot.

414*a* Q. The stamps are still at the department?

A. I don't think that we have a stamp now that we used then. We change those stamps from time to time.

415*a* Q. Would these stamps be ordered by letter, would you think?

A. No; it would be on an order sheet for ordering material.

416*a* Q. Are those preserved?

388 A. No, not after the goods come in and the invoice is checked by this order. We do not keep them after that.

417*a* Q. Is it a fact, Mr. Johnston, to your knowledge that an impression of the stamp is put on the bill furnished by the stamp manufacturer to the purchaser?

A. I don't know that that is always done.

418*a* Q. Where are the bills sent for the purchase of stamps, to the factory proper?

A. Yes, sir.

419*a* Q. And you preserve your bills?

A. Yes, sir.

420*a* Q. You would have the bills from 1903 on?

A. Yes, I should say so.

421*a* Q. You would preserve them, of course, for the length of time that the statute of limitation would run, so you would not have to pay them again?

A. Yes, sir.

422*a* Q. So you would have the bills for each stamp purchased during this period?

A. Our purchasing agent would have them. I am not familiar with these points that you are asking me because it is left with him.

423*a* Q. And his office is with the "American Gentleman factory"?

A. Yes, sir.

424*a* Q. Do you recall ever having seen impressions of the stamps attached to any of the bills?

A. No, sir.

425*a* Q. When we speak of so many stamps during a season, is it or not a fact that you reproduce some of the dies for the next season that you used the preceding season?

A. Yes, sir.

426*a* Q. Could you not use the old stamps?

A. Bottom stamps sometimes get blurred and we have to sharpen them up or get new ones.

427*a* Q. Do you know the life of a stamp at all?

A. It depends largely upon how often they are used.

428*a* Q. Yours is a very busy factory and they are often used?

A. Yes.

429*a* Q. Your product, as we have shown—Mr. McElroy testified—I think, he said your product goes up in 1906, to 489,000: that would be a very considerable use, would it not, for either three or four stamps?

A. Yes, sir.

430*a* Q. Would there be any way of your telling to what extent the stamps were used, any one of the three or four; I mean in number?

A. About in what proportion we used one particular stamp to the other stamps.

431*a* Q. Yes.

A. Yes, sir.

432*a* Q. How would you be able to tell that?

389 A. Because of a certain grade of shoes we would probably make more pairs than we would of some other particular grade. I would be able to tell that by the price of the shoe.

433*a* Q. You have brought some catalogues here, Mr. Johnston, which you will produce, will you?

A. Yes, sir.

The MASTER:

434*a* Q. I don't quite understand what you mean by the statement made a few moments ago when you said the stamping is a "minor affair": what do you mean by that? Do you mean that it is unimportant whether the shoe is stamped, or do you mean that it is unimportant whether the order for the stamping goes to the stamper?

A. I meant that it was a minor affair to write this description, as to how this would be described in this particular book that Mr. Johnson was asking about, because if they were undecided they would ask me.

The MASTER:

435*a* Q. Your meaning of that was that it was a minor matter whether it was included in the order or not?

A. Yes, or whether a record was made of it.

Mr. JOHNSON:

436*a* Q. Can you tell us, Mr. Johnston, what catalogue was in use during the period I inquire ab ut, first from January 29, 1906, on until you issued a new catalogue?

A. No, sir, I am not familiar enough with it.

437*a* Q. Who would be able to tell us that? Some of them are number four, five and six; would the numbers indicate the order of issuance?

A. Yes, I should say they would. I don't know who issued the catalogue at that time. This is a department that I have nothing whatever to do with.

438*a* Q. In order that they should properly represent to customers the product of your "American Lady factory," you would have to indicate to whoever got up the catalogue what styles you wanted to go in?

A. No, they don't always consult us in regard to that.

439*a* Q. You would know a best seller better than anybody else would, would you not?

A. No, the man who received the orders at the store would know better than I.

440*a* Q. Would you have anything at all to do with advertising what styles of shoes should be made for any particular period of time?

A. No, I take my orders from the folks at the store.

441*a* Q. Then, after the catalogue is issued you would have the catalogue in order to determine how to make the orders, would you not?

390 A. How to make the shoes?

442*a* Q. Yes.

A. No, we would not. I get one of those catalogues and look it over and see whether I think it is a pretty nice looking catalogue or not, and probably won't look at it again in the season, because I have nothing to do with it.

443*a* Q. Would you carry styles in your mind? For instance, if I were to take a catalogue and take out your most popular shoe and give you the number, would you know what that meant?

A. I would know what the sample number was.

444*a* Q. These catalogues are sample numbers?

A. The number is in the catalogue. If you should ask me for a certain number in our factory that we were making, unless it happened to be a new number in the line just gone out, I would know what that shoe was because we handle those samples and those samples are numbered continually in the factory.

445*a* Q. If you had a style of shoe or a sample number—is "style" and "sample" number the same?

A. Yes.

446*a* Q. That appeared in catalogue No. 4, 5, 6 and 7, that would indicate what?

A. That appear in these catalogues?

447*a* Q. Yes, as to its popularity or selling qualities.

A. I would consider that a pretty good selling shoe, or I would consider it what we call a staple shoe. Sometimes we will make a shoe, for instance, like "Old Ladies' Eze" shoe; that is not a particularly good seller, but a shoe that we have made for sometime and we continue making it.

448*a* Q. I am doing this for a memory test; could you give me from memory a style number that has appeared in 1906, 1907, 1908 and in 1909?

A. I don't think I can in 1906, as far back as that.

449*a* Q. Well, say 1907, 1908, or 1909?

A. No. 6003.

450*a* Q. I am testing your memory and I am doing it frankly with you: what does 6003 indicate to you?

A. A certain style shoe we make.

451*a* Q. What style?

A. Do you want me to describe the shoe?

452*a* Q. Yes, I am trying to see if I can get from you——

A. I will describe the shoe as it is today, because although it has carried the same number and has been made on the same last at all times, the style has changed. The style of the upper has changed slightly. Shall I describe it as it is made today?

453*a* Q. Yes.

391 A. It is a Dongala Blucher, patent tip; welt sole; do you want a minute description——

454*a* Q. Yes, I am really testing your memory.

A. 6½ iron sole; long heel foxing; black shank and heel; straw forepart. It also has a number eight heel and is stamped, the top band, "American Lady Special" and "Hamilton-Brown Shoe Company, Makers;" the bottom stamp, "Hamilton-Brown Shoe Company, Makers."

455*a* Q. That is as definite as you can give it?

A. I can give you the color of the top band if you care for it?

456*a* Q. No, I don't care for colors. Of course, that might change or not, but these are the general characteristics?

A. Yes, sir.

457*a* Q. Do you recall any shoes that did not have the words "Hamilton-Brown Shoe Company" on the bottom of the shoe, Mr.

Johnston, "American Lady" shoes (of course, this is all "American Lady"); I am not asking for any other shoes, during the period of time about which I inquire, January 29, 1906, on?

A. Up to date?

458*a* Q. Yes.

Mr. HART: I do not understand that this inquiry covers the period since Nov. 15, 1909.

Mr. JOHNSON: I have no objection to Nov. 15, 1909.

A. I do.

459*a* Q. Could you tell how many thousand pairs of shoes were so stamped without that name?

A. No.

460*a* Q. Could you suggest any way we could ascertain that?

A. Not exactly. I could only take it for a certain period of time on certain priced shoes.

461*a* Q. Do it in your own way.

A. I would have to figure that out.

462*a* Q. Explain fully what you mean by that answer?

A. There was a time that Mr McElroy, I think, was in Europe at the time—I believe it was in 1908—that we received instructions in our factory to stamp some shoes—I don't know whether we received instructions or not, but anyhow for some reason or other we made a stamp, a stamp "American Lady:" I think some of the salesmen suggested our doing it and we did it, stamped them "American Lady" without "Hamilton-Brown Shoe Company" on it. I think that was in the fall sometime of 1908; I am not sure about that.

463*a* Q. You were going to tell us how you would be able to get at the extent to which that was done.

392 A. I couldn't tell you just when we began it. I would have to take certain styles of shoes, made at a certain price, which was the cheaper grade we were making of this "American Lady" and see how many of them we made.

464*a* Q. You could do it from that, could you?

A. We could get pretty close to it.

465*a* Q. Can you take this book and tell me the starting point?

A. No, sir.

466*a* Q. What book would you have to refer to?

A. I probably would have to take the next book. Let me see—this is 1907. To the best of my recollection it was after this. I think this was done in August, 1908.

467*a* Q. For instance, suppose you were not there, how could I tell from the book?

A. I don't know any way in the world that you could tell from the book, except to take—what you are after now is the beginning when we began?

468*a* Q. Yes.

A. I cannot think just now how we would tell.

469*a* Q. Would the ordering of the dies from the engraving company enable you to tell?

A. That possibly would help us, yes.

470*a* Q. That would be the common sense way of getting at it?
A. Yes, sir.

471*a* Q. Then how would you tell from any record or memoranda how long it continued?

A. I believe it was in November or December of that year that we received instructions to put the Hamilton-Brown Shoe Company's trade mark on the bottom of our shoes and we ordered a new die at the time and began stamping them that way. That is my recollection of the dates; however I am not clear on that.

472*a* Q. I understand that you want to refresh your memory as to that in order to be fair to yourself and to us, as to when that was?
A. Yes, sir.

473*a* Q. This new die that you ordered you have been using ever since, have you?

Mr. HART:

474*a* Q. Up to Nov. 15, 1909?

Mr. JOHNSON:

475*a* Q. I do not want to repeat that each time: I want you to understand that my inquiry when it begins at one end, starts with January 29, 1906, and when I am trying to end it, for the present purpose, it goes only up to Nov. 15, 1909.

A. Well, it did not and I will explain to you the change. I ordered a small stamp at that time (if you had a shoe I could
393 show you just where we put it), but we put it on the ball of the sole.

I ordered a small stamp, a little smaller than would fit into the shank in front of the breast of the heel and put the stamp there, "Hamilton-Brown Shoe Company, Makers," so it would fit into this shank which is narrower than the breast of the sole, but it did not please us. I think I objected to it more than anyone else on account of the additional cost of two operations. We had two operations just putting that bottom stamp on, so I then went ahead and ordered this other *sat*mp to get the full trade mark with the "American Lady" in the center.

476*a* Q. Can you recall what was on the full trade mark stamp?
A. "Hamilton-Brown Shoe Company" in the belt, just the same as on the small one. It would fit the ball of the foot.

Mr. HART: Give him the shoe you offered in evidence.

A. I am only giving this as I can remember, because on these days I did not try to test my memory.

Mr. HART: I do not think it is fair and I object to it.

Mr. JOHNSON:

477*a* Q. Have you any objection to my testing your memory?

The MASTER: The objection will be overruled.

To which ruling of the Master, the defendant, by its counsel then and there, at the time, duly excepted.

A. No, except that the evidence I am giving I cannot depend upon it myself altogether; it is only my memory.

Mr. JOHNSON:

478*a* Q. You are giving the best you can remember?

A. Yes, sir.

479*a* Q. Are you not mistaken about any of these dies having the word "Makers" on the bottom of the shoe?

Mr. HART: I object to their cross-examining their own witness.

Objection overruled.

To which ruling of the Master, the defendant by its counsel, then and there, duly excepted.

A. I did not say that that had "Makers" on this last bottom stamp. Don't misunderstand me; that it had the trade mark
394 "Hamilton-Brown Shoe Company" in the belt and inside of that was the stamp "American Lady" as well as I remember it.

480*a* Q. Now, I show you a pair of shoes that have been offered in evidence.

Mr. HART: Let him have the pair Mr. Werner's stenographer introduced.

Mr. JOHNSON: I am asking a question now and then we will get through with this.

481*a* Q. Will you examine the pair of shoes [labeled] "Complainant's Exhibit A, January 31, 1910, Henry H. Denison, Master" and look at the stamp on the bottom of that exhibit is that the stamping that you have described in your last answer?

Mr. HART: Let me see them before we proceed with this inquiry. I object and demand to see the pair of shoes that were introduced here and identified by Mr. Werner's stenographer. They were introduced as a matter of court record and I have the right to see them. They are deliberately withholding them——

Mr. JOHNSON: That is a remarkable statement.

Mr. HART: It is not a remarkable statement; it is a bald statement of fact.

The MASTER: The witness has not been examined with regard to that pair of shoes. The objection is overruled.

Mr. HART: Do you rule that I have no right to see them?

The MASTER: No, but you have not the right to interrupt the examination of the witness to see them now.

Mr. HART: I demand of the Master to extend me that privilege.

The MASTER: The privilege will be extended. Proceed with the examination.

Mr. HART: I demand the privilege at this time.

The MASTER: The demand is overruled.

To which ruling of the master, the defendant by its counsel, then and there, duly excepted.

(Previous question read.)

Mr. HART: I object to the witness answering before I see these shoes. I have a right to see them before this answer is given.

395 (Shoes produced and exhibited to Mr. Hart and the witness.)

The MASTER: Proceed with your answer.

(Previous question read)

A. (Witness examining shoes) It looks to me [—] one of the style of stamps.

Mr. JOHNSON:

482*a* Q. Now, what is the other stamp on the shoe you are looking at now?

A. Do you want me to read the whole stamp?

483*a* Q. Yes.

A. It says "Security Welt, Hamilton-Brown Shoe Co., American Lady", "Hamilton-Brown Shoe Company" is in the belt trade mark.

484*a* Q. Is that one stamp or two stamps, Mr. Johnston?

A. I don't remember whether that "Security welt" is a separate stamp or not. It ought not to be but sometimes we have had to order—where we had a stamp like this—we have had to order some part of it like "Security Welt" or "Ideal", rather than ordering a whole stamp, to save expenses.

485*a* Q. Ignoring the "Security welt" is that the stamp you had in mind in your description given to me?

A. No, it is not altogether; it is very similar, but it is not just the stamp.

486*a* Q. Then the correct description would be as it appears on these shoes?

A. On this particular shoe?

487*a* Q. Yes.

A. The stamp I had reference to when I gave that was a stamp that has not "Security Welt" on it at all. Simply "Hamilton-Brown Shoe Company" with "American Lady" in the center.

488*a* Q. That is what I said: ignoring "Security Welt" then it would be as you described it?

A. Practically the same thing, omitting the "Security Welt".

489*a* Q. Do you want to look at the other shoe; I don't know what is on it.

A. This shoe (referring to Complainant's Exhibit No. 2) reads: "Hamilton-Brown Shoe Company, American Lady"; "Hamilton-Brown Shoe Company" in the belt.

490*a* Q. Are you reading the belt strap, too?

A. "Hamilton-Brown Shoe Company" is in the belt.

491*a* Q. What is inside?

A. "American Lady" in the center.

492*a* Q. What is on the other one?

396 A. "Hamilton-Brown Shoe Company" in the belt and "American Lady" in the center.

493*a* Q. There is no difference, is there?

A. Only in the style of type.

494*a* Q. I mean, in the words that the two contain?

A. No, not any difference only the style of type.

495*a* Q. Now, to my mind (I want you to correct me if I am wrong), that would indicate that the "Security Welt" would be a separate stamp; that would be a stamp having "Security Welt" in connection with the belt and "American Lady" and a separate stamp without the "Security Welt"?

A. Yes, if I understand you right. This shoe is a stamp that reads "Security Welt, Hamilton-Brown Shoe Company, American Lady" as appears on the shoe. While this stamp (if you want to make a distinction, the exhibit is "Complainant's Exhibit No. 2") is a separate stamp because it has not the "Security Welt" on it. It is entirely a different stamp on that account.

496*a* Q. In other respects they are the same?

A. Except for the style of type.

497*a* Q. I am only asking about the wording?

A. Yes, sir.

498*a* Q. You have brought here Nos. 3, 4, 5, and 6 of what is termed "Shoelight": is that correct?

A. Yes.

499*a* Q. What are those, Mr. Johnston?

A. These are catalogues issued by the Hamilton-Brown Shoe Company.

500*a* Q. Do you know or not whether they cover the period from January 29, 1906, on to and including Nov. 15, 1909?

A. I only know that I telephoned our folks at the store this morning to send those catalogues over here and these are the ones they sent.

Mr. HART: I object unless the witness knows these are the catalogues covering this period. If he does know, all right; if not, the person who does know should be produced.

The MASTER: You can ask a preliminary question to test the knowledge of the witness.

Mr. JOHNSON:

501*a* Q. We requested you this morning early to bring catalogues covering the period of time about which I am now inquiring, did we not?

A. You did.

502*a* Q. And as superintendent of the factory you endeavored to comply with that request, did you not?

A. To the extent of telephoning to the store to have those catalogues sent over here to Mr. Werner's office.

397 503*a* Q. Covering that period of time?

A. November, 1906, 1907, 1908 and 1909.

504*a* Q. And these are the catalogues you have produced?

A. Yes, sir.

505*a* Q. We want to formally offer, Mr. Denison, these four catalogues, the first to be known as "Shoelight No. 3" having on the cover the words "For merchants, Shoelight, Hamilton-Brown Shoe Company" and ask that it be marked "Complainant's Exhibit No. 5."

We also offer as "Complainant's Exhibit No. 6" "Shoelight No.

4," marked on the cover "For merchants, Shoelight No. 4, Hamilton-Brown Shoe Company, St. Louis, U. S. A."

We also offer "Complainant's Exhibit No. 7" marked on the cover "Hamilton-Brown Shoe Company, St. Louis, U. S. A. Shoelight No. 5, revised edition, a handy book for merchants."

We further offer "Complainant's Exhibit No. 8" marked on the cover "A handy book for merchants, Shoelight No. 6, Hamilton-Brown Shoe Company, Quality, St. Louis, U. S. A."

The catalogues referred to are marked by the Master as requested, which exhibits are in the words and figures as follows, to-wit:

Mr. JOHNSON:

506*a* Q. Are you able to tell us, Mr. Johnston, anything about the method of marking style 6001, appearing at page 91 of "Shoelight No. 3" "Complainant's Exhibit No. 5"; of course, this inquiry relates only to "American Lady" shoes of which this is one?

A. No. 6001?

507*a* Q. Yes.

A. No, that is a shoe we were not making at that time and I don't remember.

508*a* Q. It is in catalogue No. 3; you would not be able to tell us anything?

A. I don't remember how that was marked. I don't remember the style top band or bottom stamp.

509*a* Q. Could you refer in any of these exhibits to any of the styles that were made during this period, not containing the words "Hamilton-Brown Shoe Company" that were only stamped "American Lady"?

A. Could I find a sample number in one of those catalogues? Is that what you have reference to?

510*a* Q. Yes.

A. I don't think that I could. I could find the sample number, but I don't know, at the period the catalogue calls for, that
398 is, that particular year, it was stamped without the "Hamilton-Brown Shoe Company". I could get the——

511*a* Q. What was your most popular selling shoe during the period that you tell us was the time that these shoes were branded "American Lady" without the words "Hamilton-Brown Shoe Company"?

Mr. HART: That is objected to for the reason that the witness had nothing to do with the sales, as is already shown on this record, and for the reason that he has testified that he does not know what would be the most popular seller.

Mr. JOHNSON:

512*a* Q. What was the most numerously produced shoe at the factory, if you know, during the period of time in which you say the shoes were stamped "American Lady" without "Hamilton-Brown Shoe Company"?

A. I don't know that; I couldn't answer that.

513*a* Q. Is there any way that you could refresh your memory?

A. I would have to take certain sample numbers and go through the books to see how many we had made of each one of those particular sample numbers.

514*a* Q. To your knowledge, did you prior to Nov. 15, 1909, ever stamp on the ball of any "American Lady" shoe produced at the "American Lady Factory" the words "Hamilton-Brown Shoe Company, Makers"?

A. I don't remember, Mr. Johnson whether we have or not. We have had that for a long time on our cartons and have had a bottom stamp of that kind, but whether we have used it prior to that time or not, I cannot answer.

515*a* Q. You would have the die, of course?

A. We would not have the die if it has not been in use for some time because we don't retain those dies after we discontinue using them.

516*a* Q. I understood you to say that you were doing that now, Mr. Johnston; am I wrong in that impression?

Mr. HART. That is objected to. The period of this inquiry is limited, as I understand it, to the period prior to Nov. 15, 1909, and it is immaterial what they are doing now.

The MASTER: The objection is overruled. It is simply for the purpose of refreshing the memory of the witness.

To which ruling of the Master, the defendant, by its counsel, then and there, duly excepted.

(Previous question read.)

399 A. By that you mean that we are stamping the bottoms of some of our shoes "Hamilton-Brown Shoe Company, Makers" on the ball?

Mr. JOHNSON:

517*a* Q. Yes.

A. We are today stamping some of them that way.

518*a* Q. For the purpose of leading to another question, I will ask you, did you do that prior to Nov. 15, 1909?

A. I cannot answer you as to just when we began doing that; I don't remember.

519*a* Q. Then, tracing it further: you would have the stamp you are using now?

A. The one we are using today, yes.

520*a* Q. And you would have the order or invoice from the die maker for that stamp?

A. We could find that.

521*a* Q. You could find that out for me so as to tell when you began using that stamp, whether before or after Nov. 15, 1909?

A. Yes.

522*a* Q. Will you do that for us?

A. Yes, sir.

523*a* Q. This is the ball of the shoe, is it not, that I am pointing to on "Complainant's Exhibit No. 4" and the stamp that you

refer to would be on the ball of the shoe, and that is what I am asking you to find out?

A. Yes, sir.

524*a* Q. And that is where "American Lady" appears on "Complainant's Exhibit No. 4", the ball of the shoe?

A. Yes.

525*a* Q. Now, Mr. Johnston, here is style No. 6232 and the serial number is 62798 G: won't you look at those, please? It has been offered in evidence as "Complainant's Exhibit No. 4."

Mr. HART: I object to the question and the statement of counsel that the style number is 6232. It is entirely volunteered by counsel——

Mr. JOHNSON: I have not asked my question.

The MASTER: That is overruled; it is simply preliminary to a question to be asked.

Mr. JOHNSON:

526*a* Q. Have you looked at the shoes referred to in my last question?

A. I have.

527*a* Q. Are you able to tell by that what we claim to be the catalogue number?

Mr. HART: I object to the voluntary statement on the part of counsel. Let them introduce some evidence.

Mr. JOHNSON:

528*a* Q. Whether that same catalogue number appears in any of these catalogues, with reference to this same class of shoe?

400 A. Let me see if I understand: whether this 6232 appears in any of these catalogues?

529*a* Q. Yes.

A. 6232 appears in these catalogues.

530*a* Q. Won't you find it for me? You now have before you, Mr. Johnston, "Shoelight No. 5" referring to "Complainant's Exhibit No. 7": what do you find there?

A. Do you want me to read the description as I have it here?

531*a* Q. Yes.

A. (Referring to Page 145) "No. 6232, Vamp tip and Blucher cut quarter of grown glaze kid, modelled on our stylish Knob Last, the toe of which, though quite narrow provides plenty of room for the foot, the light flexible sole has a square edge and is small wheeled, neatly trimmed Cuban heel. No. 6232 American Lady, brown glaze kid, M. S. Knob Last, Gibson tie; 1-8 D; $1.85."

532*a* Q. You have read enough to give a description of what appears under No. 6232 in that catalogue, have you?

A. Yes, sir.

533*a* Q. I will ask you if the shoes which I now hand you, marked "Complainant's Exhibit 4, April 8, 1910" answer that description?

Mr. HART: That is objected to because it is absolutely immaterial

whether they do or not, unless it is shown that those shoes were sold by the Hamilton-Brown Shoe Company; that they were sold during the period of time of this inquiry and that they were sold "as and for" the shoes of the complainant.

The MASTER: The objection is overruled. It is impossible to put in a whole case all at once.

To which ruling of the Master, the defendant, by its counsel, then and there, duly excepted.

A. If I understand your question, you want to know if this description that I have read describes this pair of shoes?

534*a* Q. Yes.

A. It does, yes, in a general way.

Mr. JOHNSON:

535*a* Q. Now, Mr. Johnston, I want you to look at "Complainant's Exhibit No. 8" known as "Shoelight No. 6" looking at the bottom of the page and read what appears on the bottom of that page.

A. (Witness referring to page 141) No. 6232 Chocolate kid, M. S. wheeled edge sole, high Cuban heel, straight tip. American Lady, Chocolate kid, M. S. Blucher Oxford, Knob Last, 1-8 D.

536*a* Q. Have you given enough of it to describe it?

A. Yes, sir.

401 537*a* Q. Did you say "1-A"?

A. 1-8 D.

538*a* Q. What does that indicate.

A. The sizes in which they are carried in stock. The "D" indicates the width.

539*a* Q. Look at "Complainant's Exhibit 4" April 8, 1910, and tell his Honor whether those shoes answer the description you have just read?

Mr. HART: I make the same objection to that.

The MASTER: The objection is overruled.

To which ruling of the Master, the defendant by its counsel, then and there, duly excepted.

A. They do, with one exception.

540*a* Q. What is the exception?

A. The bottom stamp.

541*a* Q. Do you mean that they do not answer this description you have just read, with reference to the bottom stamp?

A. No bottom stamp is mentioned in either one of these descriptions. But on account of my manufacturing those shoes I know that the bottom stamp we are putting on these shoes now, or at the time that this catalogue was issued, is different to the bottom stamp that is on that shoe.

542*a* Q. I understand you to mean by that answer that the bottom stamp you were putting on the shoes when "Shoelight No. 6"—"Complainant's Exhibit No. 8"—was issued, was different from what appears on "Complainant's Exhibit No. 4"?

A. Yes, sir.

543*a* Q. Now, having reference to those two catalogues and to

any independent knowledge you may have, are you able to tell us, this being serial No. 62798 G, when these shoes were so stamped?

Mr. HART: That is objected to for the reason that it is not shown in this record that those shoes were stamped, made or sold by the Hamilton-Brown Shoe Company, and until such evidence is produced and such a showing is made on the record, such a question is absolutely improper. You have not laid a foundation for such a question.

The MASTER: The objection is overruled.

To which ruling of the Master, the defendant by its counsel then and there, duly excepted.

Mr. HART:

544*a* Q. Have you stated that that pair of shoes was manufactured by the Hamilton-Brown Shoe Company? Have you stated on the record, that that pair of shoes was manufactured by the Hamilton-Brown Shoe Company?

(Previous question read.)

402 A. Referring to the description of the shoe described in the catalogue——

Mr. HART:

545*a* Q. You refer to the shoe described in the catalogue and not to the shoe shown you?

A. Other manufacturers could have made a shoe just like this description, or could have made those shoes, and we are making a shoe just like that which is described here.

Mr. JOHNSON:

546*a* Q. You do not mean to tell Mr. Denison that that is not a product of your factory?

Mr. HART: That is objected to. If you expect to prove that that shoe is manufactured by the Hamilton-Brown Shoe Company before the question which has been put to the witness is answered it should be shown that the shoe is manufactured and sold by the Hamilton-Brown Shoe Company. Such a showing ought to be made preliminary to the question which is put to the witness.

The MASTER: The objection is overruled.

Mr. HART: Is your Honor going to take it for granted that those shoes were manufactured by the Hamilton-Brown Shoe Company?

The MASTER: I am taking nothing for granted.

Mr. HART: I want to get the position of the Master as we go along and I want to know if the Master is assuming at this time that that shoe is manufactured by the Hamilton-Brown Shoe Company.

The MASTER: I am assuming nothing. I am listening to the testimony of the witness.

To which ruling of the Master, the defendant, by its counsel, then and there, duly excepted.

Mr. JOHNSON:

547*a* Q. You do not mean to tell Mr. Denison that that is not a

product of your factory, referring to "Complainant's Exhibit No. 4"?

A. I do not mean to say that it is not a product of our factory. Does that cover the ground, your Honor?

The MASTER: That is a complete answer to the question, Mr. Johnston.

Mr. JOHNSON:

548*a* Q. Mr. Johnston, we have this book up to 50499 G, which would be March 1908; you did have a serial number as it
403 appears on these shoes (Referring to Complainant's Exhibit No. 4) did you not, and that serial number is 62798 G?

Mr. HART: You mean similar to the number on the shoes?

Mr. JOHNSON: I am asking the question.

Mr. HART: It is objected to because it is not plain. If he means the serial number shown on these shoes the qustion ought to say so.

The MASTER: The objection is overruled.

To which ruling of the Master, the defendant by its counsel, then and there, duly excepted.

(Previous question read.)

A. We had a serial number 62798 G.

Mr. JOHNSON:

549*a* Q. Are you familiar with shoes of the description that we have read into this record relative to "Complainant's Exhibit No. 4"?

A. I am.

550*a* Q. Do you know the extent to which shoes of that character were produced at the "American Lady" factory, during the period of our inquiry?

A. The quantity?

551*a* Q. Yes.

A. I cannot answer that right off-hand.

552*a* Q. Are you able to tell as to whether that was or not a good seller?

A. As well as I remember that was a fairly good selling shoe, but, of course, the selling end of it is with the store and I would not know except what we have made of them.

Mr. HART: I object to the question and answer and move that they be stricken out. It appears the witness does not know.

(Answer read.)

Mr. JOHNSON:

553*a* Q. My inquiry relates as to what you manufactured as relating to selling shoes?

A. Yes.

554*a* Q. Could you tell how many thousands of that shoe, as Complainant's Exhibit No. 4 is described, were manufactured by the Hamilton-Brown Shoe Company during the period of this suit?

Mr. HART: The question is objected to because it does not appear from the record at this time, to the best of my recollection, that the

Hamilton-Brown Shoe Company has manufactured any shoes marked as Complainant's Exhibit 4 are marked. The witness has identified certain styles of shoes appearing in catalogues which have
404 been offered in evidence as "Complainant's Exhibit 7 and Exhibit 8", but the witness has not identified this particular pair of shoes, or the particular branding of these shoes as the product of the Hamilton-Brown Shoe Company, and for that reason the question is objected to.

The MASTER: The objection is overruled. The question is not directed to this question. The question is for the purpose of ascertaining, if possible, how many shoes were made of that description.

(Previous question read.)

A. Only by checking up the book, the sample number and description on the book, and getting at it that way.

Mr. JOHNSON:

555*a* Q. Were any shoes of the same character and description as "Complainant's Exhibit 4" manufactured by the Hamilton-Brown Shoe Company during the period of time that you have stated Mr. McElroy was absent in Europe and that shoes were produced by the Hamilton-Brown Shoe Company having "American Lady" on the soles of the shoe, without the words "Hamilton-Brown Shoe Company"?

A. Yes, shoes of that description were manufactured during some part of that period.

556*a* Q. You say you would have to ascertain the number by the method you indicated in your answer to the previous questions?

A. Yes, sir.

557*a* Q. That could be ascertained?

A. I think it could by procuring the invoices for the different bottom stamps and seeing the time that that particular bottom stamp was ordered and when another one was ordered in its place.

558*a* Q. The invoice also would follow to your jobbing department, if it were in existence, of the exact serial number of this exact pair of shoes, would it not, of that lot?

Mr. HART: That is objected to as a conclusion which the books or records will best show.

Mr. JOHNSON:

559*a* Q. In other words, you have invoiced to your jobbing department every serial number of cases of shoes appearing on this "stock book", as well as all other stock books of the "American Lady factory" during the period about which I am inquiring, that actually went from your factory to that jobbing department?
405 A. We put that serial case number on our invoices, yes, sir.

560*a* Q. And on the shoes?

A. It is on the lining of the shoes.

561*a* Q. And your invoices would show the date that it was made

out and sent to the jobbing department of the Hamilton-Brown Shoe Company?

A. It would.

562*a* Q. And those invoices, as I understood Mr. McElroy yesterday, are preserved at the office during this period of time?

A. I think they are.

563*a* Q. Mr. Johnson, there is some method or some manner known to you, is there not, whereby the exact number of shoes produced by the "American Lady factory" can be ascertained, on which shoes there did not appear upon the soles thereof the name "Hamilton-Brown Shoe Company"—this is as to "American Lady" shoes?

A. The only way that I can think of now that I can get at that, is, as I have explained, by going through the invoices for the bottom stamps. Then I can find a period during which shoes were stamped in that way and figure how many there were of those particular sample numbers.

564*a* Q. With that explanation it can be done?

A. I think it can.

565*a* Q. Did you make the calculation for Mr. McElroy as to the top facing ribbon lining?

A. I made some calculations for him, yes.

566*a* Q. What calculations did you make for him relative to ribbon lining of the "American Lady" shoes?

A. How many we had made of "American Lady Special"; "American Lady"; "A. D. B." grade, and the "Vassar" grade. We used to make a "Picnic"; that, however, does not relate to "American Lady Picnic" or "Vassar."

567*a* Q. Did you include in that calculation the "Hamilton-Brown Shoe Company, Makers" woven ribbon lining?

A. I made a calculation of the ones that had Hamilton-Brown Shoe Company" on the top band and the ones that had not.

568*a* Q. How did you get that, what was the method of arriving at that, Mr. Johnston?

A. It takes so many woven top bands for a dozen or a case of shoes. There are so many woven top bands to a yard, four to a yard, and we took the number of yards of this particular style top band that we have bought.

569*a* Q. How did you figure out each shoe? You put how many inches of this top lining in the shoe?

406 A. There are four to the yard; 9 inches.

570*a* Q. There are nine inches to a shoe and 36 inches in four shoes, that is two pairs, is it, or four?

A. No, that would be four pair.

571*a* Q. Would that vary as to button shoes?

A. Vary as to button shoes?

572*a* Q. Yes.

A. At that time we did not always put woven top bands in our button shoes and made very few button shoes. It is only recently we began making button shoes.

573*a* Q. Your calculation does not include any reduction for button shoes?

A. No.

574*a* Q. And the reason is that you did not make any button shoes until recently?

A. Only a very few.

575. Q. There are two kinds of satin ribbon made for you?

A. Yes, one lettered and the other plain.

576*a* Q. And in one of each pair of shoes you put the lettered ribbon, 9 inches to the shoe?

A. Yes, sir.

577*a* Q. And in the other you put nine inches in the shoe, unlettered?

A. Yes, sir.

578*a* Q. Except in button shoes: are you able to tell whether it would not take 12 inches to the shoe or do you know?

A. No, it would not take 12 inches to the average shoe.

579*a* Q. Would it take over nine inches?

A. Some shoes, yes.

580*a* Q. Did you keep the yardage of the lettered ribbon distinct and separate from the unlettered ribbon?

A. We do.

581*a* Q. Do you keep each separate style of lettering separate from others?

A. We do in a way. We keep it separated ourselves as best we can and then from time to time we would check up the manufacturer on it to find out what he had made.

582*a* Q. Have you a separate record of the yardage of silk ribbon lining having thereon "Hamilton-Brown Shoe Company, Makers"?

A. Yes, that is the yardage we have bought.

583*a* Q. Have you a separate yardage of silk ribbon lining that had nothing on it?

A. I don't believe we have, because we have not always bought the plain ribbon that had nothing on it, from the same source. There have been instances where we would need very little and we bought it elsewhere, but as a rule it comes from the same source and we can get pretty close to it.

584*a* Q. Have you a separate record of silk ribbon lining that would have on it neither "Hamilton-Brown Shoe Company" nor "Makers"?

A. Yes, sir.

407 585*a* Q. Then there would be three separate yardages, would there not?

A. Name them and let me see if I understand.

586*a* Q. First those that had "Hamilton-Brown Shoe Company Makers"?

A. Yes, sir.

587*a* Q. Then those that had lettering on that did not contain either of those words, but might have "American Lady Special" or something of that kind?

A. Yes, sir.

588*a* Q. Then those that had ribbon lining with nothing whatever on?

A. Yes, sir.

589*a* Q. That would be three kinds; that is intelligible and you understand it?

A. Yes, sir.

590*a* Q. Are you able to tell the number of "American Lady" shoes that were produced that had the ribbon lining "Makers" with "Hamilton-Brown Shoe Company"?

A. I have that record, but not with me.

591*a* Q. You will give that to Mr. Werner, will you?

A. Yes, sir.

592*a* Q. You have the same record with reference to the shoes that had the silk ribbon lining with nothing, absolutely plain?

A. That would only be the mate to the one that had something on it, don't you understand?

593*a* Q. Yes. Then you had the record of those that had some other lettering, but did not have "Hamilton-Brown Shoe Company," nor "Makers" on that same label?

A. Yes, the yardage we have bought of that ribbon.

594*a* Q. Then each of these calculations is made separately by you?

A. They are made separately in this way: that we figure the amount of the different kinds of ribbon that we have bought and used and by that we arrive at the number of pairs of shoes we have made of each style.

595*a* Q. It does not depend upon one alone of them to arrive at the calculation of all three?

A. No, sir.

596*a* Q. It is not done by a process of subtraction or elimination?

A. No, that is not necessary.

597*a* Q. Were there not some "American Lady" shoes, during the period of this suit, manufactured that had this ribbon lining in both shoes, absolutely plain, with no lettering? I ask you that question because you say one of the lettered ribbon lining shoes would have a plain facing to the mate?

A. If there was it should have had a small label sewed into the shoe. That has sometimes been the case when we have sewed a small label in it that designated the grade that we call our "A. D. B." grade.

408 598*a* Q. What was on that label, Mr. Johnston?

A. "Hamilton-Brown Shoe Company" in the belt and "A. D. B. American Lady" on the inside. That was the label, I think, as well as I remember now.

599*a* Q. Were there some of those labels, to your knowledge, without "Hamilton-Brown Shoe Company" on it?

A. I don't remember any. We may have had some sometime ago, but I don't remember.

600*a* Q. Were those labels sewed on the silk ribbon lining?

A. As a rule.

601*a* Q. Before the lining was put in?

A. No, but just at the time that the shoe was put together, you know.

602*a* Q. Were they sewed on the silk ribbon lining or on the white lining?

A. We did it both ways, both on the white and on the silk ribbon lining.

603*a* Q. I want to know if you perhaps really did by inadvertence, omit from calculating us the number of shoes that had nothing on those shoes, that were not mates or another shoe that did have the ribbon lining in?

A. I don't remember an instance of that kind. If it occurred it should not have occurred.

604*a* Q. You have not taken it into the calculation?

A. No, I have not.

605*a* Q. These books are all up at the factory, as you say, these books we had been referring to, invoices and records?

A. Invoices and stockbooks, yes.

606*a* Q. And special order book, too?

A. Yes.

607*a* Q. Mr. McElroy suggested yesterday that we agree with you to send some one up at some time that would be convenient to you, to verify with reference to the data on these books and make the calculations—and I refer particularly to calculations picking out "American Lady" shoes as contradistinguished from your "American Lady" product, with reference to stock books and order books, these products being given as a whole in these books; is there any particular time that you can indicate to us and the Master that will meet your convenience?

A. We will give you the time and give you access to our books at any time to suit your convenience.

608*a* Q. When does your current book that you are now using start, in point of date—I refer to stock book's serial number?

A. I don't remember now just when it did. There is one other book that comes in between the one that we are now working on, the serial number we are now working on, and this one.

409 609*a* Q. Would it go back as far as Nov. 15, 1909?

A. The one we are working on today?

610*a* Q. Yes.

A. I believe it does.

611*a* Q. We could begin at the other end and not inconvenience you with something you are using now, either as to stock book or your invoices?

A. Yes.

612*a* Q. Of course there is some other information I wish you to give us that we have asked for in this inquiry and I want to resume your examination at some future period that will be agreeable to all of us, when we get that data; You haven't any idea how long it is going to take you to work to get that?

A. To get up these figures that you have asked for?

613*a* Q. Yes.

A. No, I have not, because it is a pretty big job, and running a shoe factory in connection with it, it is not so easy.

614*a* Q. Do you think our expert could help you?

A. Most likely.

At this point adjournment was taken to April 21, 1910, at 9:30 o'clock A. M.

ST. LOUIS, April 21, 1910.

Met pursuant to adjournment as above on April 21, 1910, at 9:30 o'clock A. M.

No proceedings were had and by consent a further adjournment was taken until Thursday, April 28, 1910, at 10:30 A. M.

Met pursuant to adjournment as above on Thursday, April 28, 1910, at 10:30 o'clock A. M.

No proceedings were had and by consent a further adjournment was taken until Monday, May 9, 1910, at 10:30 A. M.

Met pursuant to adjournment as above on Monday May 9, 1910, at 10:30 o'clock A. M.

No proceedings being had a further adjournment was taken until Thursday, May 12, 1910, at 10:30 o'clock A. M.

Met pursuant to adjournment on Thursday, May 12, 1910, at 10:30 o'clock A. M.

No proceedings were had and by consent a further adjournment was taken until Tuesday, May 31, 1910, at 10:30 o'clock A. M.

410 10:30 A. M., TUESDAY, May 31, 1910.

Pursuant to adjournment as above stated the hearing of said cause was resumed as follows:

Present:

Simeon M. Johnson and Percy Werner for Complainant.
Luke E. Hart for Defendant.

By consent an adjournment is now taken until two P. M. of this day, at which time the following proceedings were had:

J. T. JOHNSTON, being recalled by the complainant, further testified as follows:

Mr. WERNER: Before proceeding with the examination of Mr. Johnston, counsel for complainant desire to say that at the last session, as shown on page 193 of the record, Mr. Bakewell for defendant tendered counsel for complainant five typewritten sheets, said to have been prepared through Mr. McElroy, concerning data, with a view, as stated by Mr. Bakewell, if possible to reach a stipulation as suggested by complainant's counsel, a copy of this data was at the same time handed his Honor, the Master in this case.

Counsel for complainant desire to say that since the last adjournment we have given careful consideration to said memoranda and

data, and are willing, in order to save time and expense, to agree to so much of the said data as shows the number of pairs of American Lady shoes, the price per pair, the total product of the American Lady Factory, the total factory profits, and the percentage of such profits on American Lady shoes as contained in said memoranda tendered by counsel for defendant, and as shown in the stipulation, which we herewith tender to counsel for defendant. This stipulation has been duly signed by counsel for complainant.

As will be noted in the propo-ed stipulation, we have adopted the precise language and figures of defendant's counsel covering the data, so far as agreed upon; a copy of this I hand to His Honor, the Master.

Mr. JOHNSON:

615*a* [—.] Now, what do you call this book?

A. Just a memorandum book.

616*a* Q. And what would it contain?

A. It will contain the date of the order, the number of cases, and the serial number attached. It starts on these main order books.

617*a* Q. What would it show with reference to styles of American Lady's shoes, if anything?

411 A. It only shows the sample number.

618*a* Q. Is the sample number the style number?

A. Yes.

619*a* Q. Now then would we be able to get from that the number of pairs of each style that had been manufactured from the date the book started on?

A. From the date this book started on, yes. It is not a complete book. We have not been doing that all the time.

620*a* Q. As I understand you, it is a sort of an index, a memoranda by having reference to this we have here the data could be compiled?

A. As far as books go, yes.

Mr. WERNER:

621*a* [—.] It is an index to your stock book?

A. Yes, sir.

Mr. JOHNSON:

622*a* [—.] Now would that save Mr. Wolf this process of going through each bill or invoice?

A. You mean would it simplify it?

623*a* Q. Yes, would it simplify it?

A. I would say it would, as far as it goes.

624*a* Q. What is your judgment about how long it would take to get the data up?

A. I don't know exactly the data you want.

625*a* Q. The data we are trying to get at is the number of each style, the number of pairs of each style of American Lady shoes produced between any given period?

A. In this book I think we could do that in a day, probably

less than a day. As I understand it, you have certain shoes—you want to take a certain shoe, look in this book and see how many cases were ordered.

The MASTER: Suppose you ask what period it embraced in this memoranda.

A. Several years probably.

Mr. JOHNSON:

626*a* [—.] Probably a couple of years?

A. Yes, sir.

627*a* Q. Is catalogue number and style number the same?

A. Yes.

628*a* Q. And what else do you use beside catalogue number and style number?

A. Sample number.

629*a* Q. Now those are really convertible terms that mean the same thing?

A. Yes, sir.

630*a* Q. And what is the book called, if there is any designation on the outside of it at all?

A. No*t*, it is just a plain little day-book.

631*a* Q. Is it a bound book?

A. It is a paper bound book.

632*a* Q. Kept in permanent form?

A. Yes, sir.

412 633*a* Q. And how many would you keep a season?

A. Oh, I think we have had this same book for probably three, or possibly four seasons.

634*a* Q. Three or four seasons?

A. Yes, sir.

635*a* Q. How many seasons are there a year?

A. Two.

636*a* Q. Would it cover both of those seasons?

A. I don't remember just how far back it runs, but I think about that, maybe further.

637*a* Q. Now, Mr. Johnson, will you see if you have the factory book that shows when serial number 21319-G was manufactured; if so, refer to it and tell us when it was so manufactured?

A. You mean now when it was cut, when it left the factory?

638*a* Q. All the data you have in reference to it?

A. Well, we find here it was 12/15—that is December 15, 1906.

639*a* Q. What does that mean?

A. That means that it left our factory for the store—jobbing house.

Mr. HART:

640*a* [—] Isn't this the date of manufacture up here and this the shipping date (indicating to witness on book)?

A. Yes, sir.

Mr. JOHNSON:

641*a* [—] 12/15/06 is the date it was shipped from the factory to the jobbing house?

A. Yes, sir.

642*a* Q. That top date Mr. Hart draws your attention to, what is that?

A. That is the date that the order was entered into the cutting room.

643*a* Q. Now what date was that, Mr. Johnston?

A. October 6, 1906.

644*a* Q. Now, Mr. Johnston, with reference to a stamp on the shoe, what would be the course prior to its leaving your house, would it be stamped?

A. Yes, sir.

645*a* Q. And the shipping date you have given me as December 15, 1906; would the shoe be stamped in the method prescribed by your factory before it was shipped?

A. Yes, sir.

646*a* Q. Now, Mr. Johnston, we exhibit you a pair of shoes having attached to them a tag, having thereon in ink "catalogue No. 6125 and serial No. 21619-G" and which we shall ask Mr. Dennison to mark for convenience, on label pasted on the bottom of one of the shoes of the pair, Complainant's Exhibit 300, May 31, 1910, and will ask you to state if those are the shoes referred to in your record just given us under serial number 21619-G?

413 Mr. HART: We object to any reference to those shoes upon this record as made, for the reason that it does not appear that those shoes were the product of the Hamilton-Brown Shoe Company, that they were sold by the Hamilton-Brown Shoe Company as and for the American Girl shoes of the Wolf Brothers and Company, and that it does not appear in what condition those shoes were with respect to accompanying matter at the time they were sold by the Hamilton-Brown Shoe Company, if they were ever sold by the Hamilton-Brown Shoe Company.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel duly excepted then and there at the time.

A. As near as I can tell from this description it partially describes that shoe.

Mr. JOHNSON:

647*a* [—] To what extent does it describe the shoe, Mr. Johnston?

Mr. HART: Same objection.

The MASTER: Same ruling.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. Above the number there it says thirty-six pair, three to seven sizes, RF last, price $2.25, patent leather, Christy tie, turn D.

648*a* Q. Now my idea is to have you institute a comparison. Does that pair of shoes (Exhibit 300) answer that description?
A. Yes, sir.
649*a* Q. Now, what is the serial number in the lining there of that pair of shoes (Exhibit 300)?
A. 21619G.
650*a* Q. And what size?
A. Size three.
651*a* Q. Any figures?
A. 6.
652*a* Q. In the French figures?
A. 430.
653*a* Q. Is it a pearl color, leather heel pin?
A. Yes, sir, kindo' gray.
654*a* Q. How many eyelets has it?
A. Do you refer to the eyelets on each side or all the eyelets?
655*a* Q. No, on each side?
A. Two on each side.
656*a* Q. Is it a ribbon tie?
A. Yes.
414 657*a* Q. Plain toe?
A. Yes.
658*a* Q. Turn?
A. Yes.
659*a* Q. Now, Mr. Johnston, how are the soles of each of those [shoes] branded?
A. "American Lady Special".
660*a* Q. Anything else appear on the sole of either of the shoes?
A. No, excepting the label that the Master put on.
661*a* Q. Does the name "Hamilton-Brown Shoe Company," anywhere appear thereon?
A. I don't see it.
662*a* Q. Either on the sole or inside?

Mr. HART: Same objection.
The MASTER: Same ruling.
To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. I don't see any.

Mr. JOHNSON:

663*a* [—] Well, you would see it if it was there, would you?
A. Yes.
664*a* Q. Then it isn't there, is it?
A. No.
665*a* Q. It isn't there?
A. No.
666*a* Q. What Shoelight did you bring with you, if any, today?
A. I didn't bring one. I just had it sent down.
667*a* Q. Is that No. 2?
A. Yes, sir.

668*a* Q. Does that style number of this Exhibit just referred to (300) appear in catalogue Shoelight No. 2?

A. I am just looking now.

669*a* Q. 6125 catalogue or stvie number?

A. We don't find that number in this catalogue.

670*a* Q. Will you look, Mr. Johnston, at page 121, of Catalogue, Shoelight No. 3 and tell us whether that style 6125 appears in that catalogue at that page?

A. It does.

671*a* Q. Now will you also look at Shoelight No. 4, page 131, and tell us whether that catalogue number 6125 appears there?

A. It does.

672*a* Q. Now will you also look at Shoelight No. 5, page 139, and tell us whether that catalogue number 6125 appears at that page?

A. Yes, it does.

673*a* Q. You have produced another Shoelight catalogue, have you not, Mr. Johnston?

415 A. Yes, sir.

674*a* Q. What catalogue exhibit and how do you identify it?

A. Call this Shoelight No. 2.

Mr. JOHNSON: We formally offer in evidence Shoelight No. 2, and I will ask His Honor to mark it Exhibit No. 301 Shoelight.

Mr. JOHNSON:

675*a* —. Can you tell us, Mr. Johnston, what period of time Shoelight No. 2 covers?

A. No, sir, I cannot; I am not familiar with the Shoelights.

676*a* Q. Can you tell us what year it covers?

A. No; I was just looking for a year marked in it, but I don't see it.

677*a* Q. What was the next one in point of time that succeeded that, if any, Mr. Johnston?

A. Well, if I answer that question it will just be a guess, because I don't know at all about the catalogue, because they are issued at the store.

678*a* Q. I believe you have told us who is able to answer, I have forgotten his name?

A. Mr. McLaughlin, the advertising man.

679*a* Q. Mr. McLaughlin?

A. Yes, sir.

680*a* Q. Were you familiar with the contents of the catalogue during the period of time it was issued?

A. Only as I picked it up and casually looked through it.

681*a* Q. You recognize it as being a catalogue issued by the Hamilton-Brown Shoe Company?

A. Yes.

682*a* Q. And used by you for reference after it was issued?

A. Well, we don't use the catalogues very much. It is very seldom we have occasion to refer to them.

683*a* Q. What use, if any, would you make of it? What attention if any, would you pay to it?

A. I don't know. I cannot remember where we have ever used one in the factory. We have them there, usually hang them up and don't refer to them.

684*a* Q. You have it in the factory?

A. Yes.

685*a* Q. And is the purpose of referring to it to get the number of the styles?

A. No.

686*a* Q. Where you familiar with the styles referred to in that catalogue?

A. Why, yes, if we were making a certain style shoe, why, the chances are it would be in the catalogue; it would be catalogued.

687*a* Q. And if you looked at the catalogue you recognized the style?

A. Yes, sir.

416 688*a* Q. Now with reference to this first exhibit, because it covers different numbers and refers really to the same exhibit almost by description; I call your attention, Mr. Johnston, to serial number 15004, catalogue or style number 6125; this has no serial number you will have to look at your special order book in order to tell us about that; and I want you to tell His Honor when that was cut and shipped, and any other data you have relative thereto within your personal knowledge?

A. I have it here: This shoe was 15004, twelve pair, sizes two and a half to seven, Redf last, price $2.25, patent colt, Christy tie, turn D; cut 1/16/07; fitted 1/21/07; lasted 1/23/07; bottomed 1/26/07; finished 1/29/07; packed 2/1/07; shipped 2/22/07.

689*a* Q. Can you tell to whom they were shipped, or for whom they were manufactured?

A. All I can tell is the name that appears at the top of the order as we have it, as we don't ship direct to anyone ourselves. We only would ship to the store.

690*a* Q. What name is there at the bottom of the order?

A. The Sweeney Company, Buffalo, New York.

691*a* Q. What was the purpose and object of putting the name at the place designated?

A. That name comes out on the order from the store and we put it on there special order.

692*a* Q. What kind of an order would you term that, if any?

A. Special order.

693*a* Q. And how does that differ, if at all, from the orders in the book that we have referred to containing numbers and serial letters;

A. Well, it is an order that we presume is made up special, that the salesmen takes to be made up special for the customer.

694*a* Q. I will ask you to look at a pair of low cut shoes, having attached to them a tag having the words thereon "catalogue 6125, serial No. 15004", having on the bottom of each shoe in script-type the words "American Lady", and in block type "special", and noth-

ing else on the soles, having a pearl colored heel pin in each shoe on which the words "American Lady" in script type and "special" in block type appear, having in the lining of each shoe the number 15004 and size 4 70, Hamilton-Brown Shoe Company's name nowhere appearing in the sole or anywhere upon the shoe, and state if you can identify those shoes, which will be referred to and marked in our offer as Exhibit 362, as one of the pair of shoes referred to in the special order book which you have just read from as No. 15004.

Mr. HART: Objection to the question is made upon the ground it contains a mass of matter amounting to nothing other
417 than remarks and conclusions of counsel, and therefore they should not be in the record in this case as testimony; and for the further reason that this pair of shoes referred to, like the pair of shoes referred to a few moments ago, contains a tag, which is also referred to in the question, and from the statements made by counsel with reference to that tag it might be inferred that that tag had something to do with the pair of shoes to which it refers, or that it was attached to those shoes at the time that the shoes left the factory of the manufacturer; furthermore, that it does not appear from any competent evidence in this case that the shoes are the product of the Hamolton-Brown Shoe Company, and the shoes sold by the Hamilton-Brown Shoe Company as and for the American Girl shoes of the complainant D. Wolf Brothers and Company; and for the further reason that it does not appear in what condition those shoes were with respect to accompanying matter at the time they were sold by the Hamilton-Brown Shoe Company, if they were ever sold by it.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

Mr. JOHNSON: For the purpose of removing any doubt in the record, we want to say that as far as the tag is referred to there is no claim made—there is an admission now made of record that that tag was simply put by complainant on the shoe for identification and not by the respondent.

Mr. HART: For your own identification?

Mr. JOHNSON: For our own identification and convenience.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

It is stipulated by and between counsel, for the purposes of this cause, the objection just spread of record by counsel for defendant may stand and be considered as having been made to each question and answer put to this witness, and to any exhibit offered in evidence on behalf of the complainant, with the same force and effect as if repeated following each question or answer and at the time of the introduction of any such exhibit in evidence in this case, and that an exception will be considered as allowed in each case in which this objection is overruled.

A. The description written out here in the special order book corresponds with the description of this shoe.

418 Mr. JOHNSON: We now offer in evidence this Exhibit 302.

695*a* Q. Can you tell us when the serial number 404346 of the shoes of the American Lady Factory were manufactured and give us what data, if any, you can relative thereto within your own knowledge and information?

A. I will read the description to you from the order book: 404346, 36 pair—(this is all blank, but taken as 36 pair; it is 36 pair at the top of the page)—sizes 2½ to 6; Redf last; price $2.25; Pl—which is an abbreviation for patent leather; Christy tie; plain toe; turn D; cut 12/5/06; fitted 12/11/06; bottomed 2/26/07; finished 2/28/07; packed 3/7/07; shipped 3/19/07.

696*a* Q. I hand you a pair of low cut shoes, which I will ask His Honor to mark Exhibit 303 for identification, and ask you to describe those shoes and the marks thereon?

A. This is a pair of patent leather two eyelet tie, turn sole, ribbon lace, it has a straw fore-part, black shank and heel, with a bottom stamp that reads: "American Lady Special" on each shoe, with a [blank] heel pin that reads "American Lady Special" in each shoe, with the size stamped inside of the shoe 425, serial number 404346.

697*a* Q. Does the name Hamilton-Brown Shoe Company anywhere appear on either of those shoes?

A. It does not.

698*a* Q. Are those shoes manufactured by the Hamilton-Brown Shoe Company?

Mr. HART: Objected to for the reason that it does not appear that there is any mark on that shoe which will enable the witness to identify the shoe as being the product of the Hamilton-Brown Shoe Company, it appearing now—although not upon the record—that the shoes have been in the possession of the complainant and their counsel and have just now been handed to the witness by the complainant's counsel, and therefore it will be utterly impossible for the witness to say and speak with any knowledge whatever of the fact as to whether or not that pair of shoes is the product of the Hamilton-Brown Shoe Company; such proof, if it exists, lies within the power of the complainant; the shoes have been produced here by them, and they have not only failed to produce it, but it has been suggested during this hearing at different times that the complainant do produce this proof, and they have not produced it.

The MASTER: The objection is overruled. It is for the witness himself to state whether he is able to identify the shoes as the manufacture of the Hamilton-Brown Shoe Company.

419 To which ruling of the Master, the defendant, by counsel duly excepted then and there at the time.

A. The shoes answer to the description which is written up here in the stock book as I read it, but as to saying positively that they were or were not made by the Hamilton-Brown Shoe Company, I couldn't say.

Mr. JOHNSON:

699*a* [—]. What is your best impression?

Mr. HART: I object to that as clearly not testimony.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. You want my impression of it?

Mr. JOHNSON:

700*a* [—]. Yes.

A. My impression would be that they were manufactured by the Hamilton-Brown Shoe Company.

Mr. HART:

701*a* [—]. Have you any knowledge on the subject, whatever?

A. None whatever. That is only an impression.

Mr. WERNER:

702*a* [—]. You reached that conclusion by the fact——

A. That the description——

703*a* Q. In your order book——

A. The description in the order book.

704*a* Q. And the serial numbers are the same?

A. Yes, sir.

Mr. JOHNSON:

705*a* [—]. Can you tell us, Mr. Johnston, how many pair of shoes were manufactured by the Hamilton-Brown Shoe Company on this particular order as that serial number by reference to any book that may be necessary, or otherwise—How many pairs do you know, or can you tell us of the particular order—or any particular order of which that was a part, if you know, were manufactured?

A. The only way I can tell is to count the cases of this particular description in the order book. There are one hundred cases that meet that description.

706*a* Q. How many pairs of shoes would that be?

A. Thirty-six pair to the case would be thirty-six hundred pair of shoes.

Mr. HART: I object to this testimony for the further reason that it is not clear whether or not the witness is referring to the
420 particular pair of shoes which he is holding in his hand, and which counsel has referred to as [Complainant's] Exhibit 303, or whether or not he is referring to the description appearing in the stock book of the American Lady Factory which appears before him, and which follows the serial number in that stock book 404346; it not appearing from that stock book with the description contained therein just how the shoes referred to that serial number were marked.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

Mr. JOHNSON:

707*a* [—]. What do the one hundred cases cover so far as relates to the fact you refer to?

A. You have reference not to the shipping?

708*a* Q. Well, yes.

A. The first number I find on that description is 40382G—it is blurred so I cannot tell for sure what that number is, I think it is 2/4/07, and the last serial number 40481G, shipped 1/3/08; and the shipping dates run in December, January—the last shipping date that I find here in this one hundred serial numbers is 40477G, which is 5/13/08.

709*a* Q. By that you mean May 13, 1908.

A. Yes.

710*a* Q. What would you say as to the method of stamping those shoes, how was it done? What name appeared upon the sole of the shoes?

Mr. HART:

711- [—]. If you remember.

A. Well, I don't remember what name appeared on the sole of all the shoes, can't tell that without seeing them.

Mr. JOHNSON:

712*a* [—]. As I get your testimony at the last sitting there was only one stamp in use, was there not, with reference to American Lady shoes at any one time?

A. Yes.

713*a* Q. So that if at this time any one pair of those shoes appear stamped "American Lady Special" with the words "Hamilton-Brown Shoe Company" appearing nowhere thereon, all other "American Lady" shoes would be stamped the same way?

A. At the same time that particular pair of shoes were stamped, yes.

714*a* Q. Now you have given us one hundred cases, and that would be true as to them, wouldn't it?

A. No, for the reason that the bottom stamp might be changed after the shoes have started through the works, and at a later
421 date even the same described shoes might have a different bottom stamp.

715*a* Q. What would enable you to tell whether or not the bottom stamp had been changed?

A. I couldn't tell now.

716*a* Q. Would a reference to one of the numbers late in date of these serials you have given us of one hundred cases enable you to tell us?

A. Well, it would enable me to tell on that date, because the bottom stamp would show on the bottom.

717*a* Q. Would you alternate every day or two?

A. Oh, no.

718*a* Q. How long a period did the stamp cover used in 1907 beginning with the very first that I gave you, if you remember?

A. I cannot remember, I don't remember; we never keep a record of those things nor tax our memory to remember them.

719*a* Q. I call your attention in this one hundred cases to serial number 40459G. You find that there?

A. Yes.

720*a* Q. And what were the dates the shipments were made, if at all, under that serial number by the American Lady Factory?

A. January 30th, 1908, according to this record.

721*a* Q. Now that you may refresh my memory, what was the earliest date of shipment of those one hundred cases?

A. 11/30 was the earliest number I find.

722*a* Q. 1907?

A. Yes—well, the one I thought was 11/30 *a* think must have been 1/30/08, for the reason it was packed on 1/28/08, for the reason it could not have been shipped before it was packed. 40455G was shipped 12/2/07. That is the earliest shipping date that I can find here now.

723*a* Q. Then, Mr. Johnston, in order to get you straight on the record—because you have made a correction—the earliest shipment you find for the shipment of ony of these one hundred cases of shoes is December 2, 1907. And then a later date of shipment, including 40459G was January 30, 1908?

A. January 30, 1908.

724*a* Q. Now is that the very latest of the one hundred cases shipped?

A. No, we found one later awhile ago; we found one *one* as late as May 13th, 1908.

725*a* Q. And what number is that?

A. 40477G.

726*a* Q. Now I am going to show you a pair of shoes which I will ask Mr. Denison to mark Exhibit 304, and which the complainant for its own convenience and identification has marked
422 on the tag "catalogue 6125, serial 40459G," and I am going to ask you if I correctly describe that shoe: It is a patent colt, two eyelet ribbon tie, plain toe, turn, straw forepart, black shank, having only on each shoe branded on the sole "American Lady" in script and "Special" in block type, and having on the black heel pin the same words in the same type, having in the lining of each shoe stamped the serial number 40459G, size 455, the name Hamilton-Brown Shoe Company nowhere appearing on the shoes in any way?

A. That meets the description of the shoe as near as I can tell.

727*a* Q. Does that meet the description as you have referred to it in 40459G of the factory book of the Hamilton-Brown Shoe Company?

A. Practically the same.

Mr. JOHNSON: We formally offer Exhibit 304.

728*a* Q. Now I will ask you having reference to the stamp on the soles of 40459G, whether or not you are able to tell us as to how the balance of that one hundred case lot was stamped?

A. I am not.

729*a* Q. Are you able to tell us how the shoes between 40459G and 40434G were stamped on the sole?

A. 40434G was a shoe that we just had exhibited, isn't it? That date shows that we shipped on March 19th——

730*a* Q. No, I asked you how it was stamped?

A. —1908; and the other one was shipped January 30th, 1908; we would naturally conclude that the shoes between those dates were stamped the same way.

731*a* Q. In the same way?

A. Yes, sir.

732*a* Q. That is your knowledge as superintendent of this factory, isn't it, Mr. Johnston?

A. Yes.

733*a* Q. Now, there is still another pair, Mr. Johnston, in this same style number 6125, having the serial number several thousands ahead of the one I have given you—47682G, being its serial number—the style number being 6125—what information have you with reference to that serial number as to its production, cutting, shipping and so forth?

A. Well, I can only read you the description as it is outlined here in the description:

47682G, 36 pair 2½ to 6, R. D. F., price $2.25; Pl., Christy tie, plain toe, turn D; cut 2/24/08; shipped 4/10/08.

734*a* Q. Are you able to tell from memory how that shoe was marked, being the same style?

A. How it was marked, no.

735*a* Q. How those were—the American Lady shoe?

A. No, not from memory.

423 736*a* Q. I now show you a pair of shoes and ask you if these shoes which I now show you, and which we will ask Mr. Dennison to mark 305 for identification, and which we have for our own convenience and identification put on a tag "catalogue Number 6125, serial 47682G," and ask you if they do not comport in all respects to shoes Exhibit 304?

A. The description is the same as it is in the stock book.

737*a* Q. Is the stamp the same?

A. Yes, the stamping is the same, as near as I can see. There is no stamping mentioned in the stock book.

738*a* Q. Well, I mean from an exhibit of the shoe when you are looking at it?

Mr. Hart: I object to the question as made for the reason the witness has stated he has no recollection as to how those shoes were stamped, and the record which he has in front of him and which he has been and is referring to, does not contain any information upon this point, inasmuch as it has no reference whatever to the stamp upon the shoes. The witness, therefore, cannot state either from his

own knowledge or from the information contained in that record how those shoes were stamped.

The MASTER: The objection is overruled. The witness is the best judge of whether he can state of his own knowledge or information.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. This pair of shoes No. 47682G are stamped as the pair marked Exhibit 304 by the Master.

Mr. JOHNSON:

739*a* [—]. Now, is it not a fact, according to your knowledge as superintendent of the factory, that the ad interim numbers up to the number I have last read of the last exhibit, 305, were stamped in the same way?

Mr. HART: I object to the question as made for the reason that the witness has said time and again on the record that he has no knowledge or information how the shoes were stamped during that period; and the witness has stated he cannot identify those shoes to which reference is made as being the product of the Hamilton-Brown Shoe Company.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

424 A. The only way that I could answer that would be the supposition that a shoe of a certain number was shipped on a certain date, and another shoe of a certain number, as you gave me, shipped on a later date, both of the same style, that the shoes shipped between those two dates would be stamped with the same kind of a bottom stamp.

740*a* Q. The same heel pin stamp, would it?

A. Yes, between those dates.

Mr. HART: Objection to the answer as made and move to strike it out on the ground it is obviously nothing but a conclusion and opinion of the witness, not based upon any information or knowledge which he has or is able to get.

The MASTER: Motion overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

Mr. JOHNSON:

741*a* [—]. In other words, as I understand you, Mr. Johnston, that was the course of your conduct as superintendent of the respondent's American Lady Factory with reference to conducting its business and stamping its shoes?

Mr. HART: What conduct do you refer to?

Mr. JOHNSON: In reference to stamping.

A. Well, now, let's see if I understand what you mean; that we stamp a shoe a certain way on a certain date?

742*a* Q. Yes.

A. And we stamp the same shoe the same way on a later date?

743*a* Q. Yes.

A. And we stamp the same shoe the same way on a later date?

744*a* Q. *Yes.*

A. That the supposition is that all shoes of that particular kind have the same kind of a bottom stamp on during that period?

745*a* Q. Yes.

A. Yes.

Mr. HART: Same objection.

The MASTER: Same ruling.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

Mr. JOHNSON:

746*a* [—]. And that would be true, no matter what the interval of time would be, wouldn't it, Mr. Johnston?

425 A. On those particular shoes?

747*a* Q. Yes.

A. I should judge so.

Mr. HART: Same objection to the question and motion to strike out.

The MASTER: Same ruling.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

Mr. JOHNSON:

748*a* [—]. Isn't it a fact that of this same style and description—47682G—fifty cases were ordered at the same time, amounting to eighteen hundred pair?

A. Fifty cases.

749*a* Q. And that amounts to how many pair?

A. Eighteen hundred.

750*a* Q. Now I am going to give you the last number we have, Mr. Johnston, so far, and ask you to turn to 64126G of the factory records of the respondent and tell us what you know in reference to the date of manufacture, cutting, shipping and other data with reference to that material?

A. 64126G. Now I will read you the description as it appears in this stock book: 64126G; 36 pairs, 3 to 7; Vass last; sole 6, price $2.25; Choc.—is an abbreviation for chocolate; blu.—abbreviation for blucher—tip GW, D, sample No. 6214; cut 11/5/08; shipped 12/15/08;

751*a* Q. I am going to exhibit you a shoe which I will ask His Honor to identify as Complainant's Exhibit 306, and will ask you if I correctly describe the shoe;

Chocolate kid, 3 evelet ribbon ties, blutcher, cut with tip, the sole of each shoe stamped, "American Lady," in script type and "Special" in block type, no other stamp appearing, and the leather heel nin in each shoe stamped "American Lady" in script and "Special" in block type, no other stamp appearing,—stamped in the lining of each shoe serial number 64123G; and size 435; Hamilton-Brown Shoe Company no where appearing on the shoe, and which have

been marked on the tag for our own convenience and identification: "Catalogue number 6214, Serial 64126G?"

A. That practically describes this shoe.

752*a* Q. Do those shoes, Mr. Johnston, answer the description that you have given us in the record of that serial number 64126G?

A. They do.

753*a* Q. Can you tell us how many of that style number were manufactured by the Hamilton-Brown Shoe Company from that particular order?

426 A. I can only count them here on the stock book—fifty cases.

754*a* Q. Or eighteen hundred pair.

A. Eighteen hundred pair.

755*a* Q. Can you tell us if that style 6214, Mr. Johnston, is included in catalogue No. 2 of the Shoelight of the respondent?

A. No, I don't find it.

756*a* Q. How about Shoelight No. 3 of the Hamilton-Brown Shoe Company?

A. No, sir, I don't find it.

757*a* Q. I can help you on the balance. Take No. 4, look at Shoelight No. 4 issued by the Hamilton-Brown Shoe Company, on page 132, see if that same description of 64126G and style 6214 does not appear thereon?

A. Yes.

758*a* Q. Now, isn't the same true of Shoelight No. 5, page 140, issued by the Hamilton-Brown Shoe Company?

A. Page 140?

759*a* Q. Yes, sir.

A. Yes, 6214 appears there.

760*a* Q. And Shoelight No. 6, page 138?

A. 6214 appears in Shoelight No. 6.

761*a* Q. At page 138?

A. Yes.

762*a* Q. Now, I made an incorrect statement, because the list they gave me made 64126G the last number, but it isn't. The last number I find is 64239G. Tell us what your knowledge is as to when that shoe was manufactured, shipped and cut by the respondent—64239G?

A. The description of 64239G in the stock book reads: 36 pair, 3 to 7 Vassar SW, 185, Pl. FX, Blu, OX, tip, McK, E, 6137.

763*a* Q. What does that mean (6137), style number?

A. Yes. Those were cut—now that is blurred so I cannot tell for sure—it is the 11th month and looks like 16th day—11/16, I am pretty sure, 1908, and shipped 12/10/08.

764*a* Q. Now I am going to exhibit you a pair of shoes which I am going to ask his Honor to mark Complainant's Exhibit 307 for identification, of this serial number 64239G, and ask you if I correctly describe the shoe:

Patent leather, mat top, four eyelets, Butcher cut, Oxford, black bottom, tip, sole of each shoe stamped "American Lady" in script and the words "Security welt" in block type, no other stamps appearing on the sole, and Hamilton-Brown Shoe Company nowhere

appearing on or in the shoe, stamped in the lining of each shoe serial number 64239G and size 550, having thereon placed by the complainant for its own convenience and identification a tag with the catalogue number 6137, serial 64239G thereon?

A. Yes, that answers the description of this shoe.

765*a* Q. Does that description answer the data you have given with reference to that serial number?

A. It is approximately the same.

427 Mr. JOHNSON: We formally offer as Exhibit 307 the shoe referred to in the witness' last answer.

776*a* Q. I will ask you if from your knowledge as superintendent of the American Lady Factory of the Hamilton-Brown Shoe Company during those years is it not a fact that they had a stamp or stamps which they used continuously from December, 1906, to and including December 10th, 1908, (which is the date of the last serial number) on which either the words "American Lady" alone or "American Lady Special" or "American Lady Shu Eze," or "American Lady Security Welt" or "American Lady ADB" only appeared and without the name in anyway "Hamilton-Brown Shoe Company" appearing in the said stamp?

A. Why, from these shoes that we see here and the dates that we see on the record I should say that we did have such a stamp or stamps in the factory that we used on certain shoes during that period.

Mr. HART: Object to the question and the answer as made on the ground that the witness is merely stating an opinion, giving his conclusion; for the further reason that the witness has assumed what he had no right to assume from the record that those shoes are product of the Hamilton-Brown Shoe Company, it not appearing in any testimony in this record that that is a fact, and the complainant has not produced testimony to prove that that is a a fact, when if such is the fact such testimony must be within its control inasmuch as all of the shoes referred to are produced here and exhibited to the witness by the complainant's counsel or its vice-president, James J. Wolf, who is here present.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

Mr. JOHNSON:

767*a* [—]. Mr. Johnston, don't you know of your own personal knowledge that between the periods of time aforesaid thousands of pairs of shoes of the American Lady were so manufactured and stamped?

A. What number did you say, thousands?

768*a* Q. Thousands?

A. No, I would not know that, I couldn't say that there was that many, or that there was more or less, it would be a guess on my part.

769*a* Q. Do I understand you as telling us that this little book

you have reference to will enable us to tell how many thousands were so produced and stamped—how many?

428 A. Why, it will tell approximately how many of the different shoes of these particular sample numbers that have been manufactured during the period.

770*a* Q. That the book covers?

A. Yes. It is an index to these books, and these books tell you.

771*a* Q. Do you think that will extend back as far as this date I have given you—1907?

A. I cannot tell. I have never looked at that book. It is a book we never pay much attention to. We simply let the girl keep it as index to these.

772*a* Q. But as I gather from your testimony, not more than one stamp is used on the same style at the same time?

A. For the same style number?

773*a* Q. Yes, at the same time.

A. Yes.

774*a* Q. So, therefore, if we should produce you forty-one styles of shoes of American Lady pattern, all stamped in the same manner, you would state that all styles of the same kind, of the same dates of production, were stamped the same way?

A. As to the sample numbers, yes, sir.

775*a* Q. No matter how long a period that extends over?

A. I should judge that to be the fact.

776*a* Q. Now, Mr. Wolf with reference to the next to the last sample has produced 54001G serial number of this same style 6214. Tell us your knowledge as to the date of cutting, manufacture and shipment of that serial number, and as to the number of pairs of which that was a part?

A. 54001G. Now this stock book reads:

54001G, 36 pair, 2½ to 6, Vass., sole 6, price $2.25, Chocolate Vici, blu., Ox., tip, Gw., D., 6214; cut 4/25/08; shipped 5/23/08.

777*a* Q. I exhibit to you a pair of shoes, serial number 54001G as stamped, and which we will offer as complainant's Exhibit 308, and ask does this pair of shoes answer the same description as Exhibit 306 in all respects except the serial number?

A. It does save the serial number and size.

778*a* Q. How does that comport with the description you have given us of that same serial number 54001G?

A. It is practically the same. It answers the description given in the stock book.

779*a* Q. How many pairs of shoes did you make of that order of that description?

A. Well, I will just have to count them on the stock book, is the only way I can get at it.

Mr. WERNER:

780*a* [—]. That means in that one order on that one date?

429 Mr. JOHNSON: That one order on that date.

A. A hundred and fifty cases.

781*a* Q. That would be fifty-four hundred pair?

Mr. JOHNSON: I want to formally offer exhibits 303, 305, 306 and 309 heretofore identified.

Mr. BAKEWELL: I object to each and all of these exhibits as irrelevant and immaterial to any issue in this case.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at that time.

Mr. HART: We want to save our objection, of course, that the origin of those shoes is not shown, and the objection heretofore spread of record by counsel for the defendant with respect to questions and answers referring to those exhibits is made as to those same exhibits at this time.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

Mr. PRIEST: May I inquire, so I may understand the ruling of the master, whether these exhibits are admitted without any qualifications; that is to say, without identifying by whom they were made, and the manner in which they were uttered or placed upon the market by the defendant, or does the Master rule that these are admitted now subject to such qualifying proof later?

The MASTER: They are admitted now, having already been identified heretofore. They are admitted as exhibits for the pur-
431 pose, as I understand, of identifying the various styles of shoes that have been issued and sold with the particular markings which these shoes have. There has been heretofore no testimony introduced absolutely establishing these exhibits as the manufacture of the Hamilton-Brown Shoe Company. That, I understand, will be furnished—is to be furnished, if counsel see fit.

Mr. PRIEST: I then, I believe, comprehend the ruling of the Master that the value of these exhibits ultimately will depend upon the further proof of the fact of whether they were made and issued by the defendant, and the manner in which they were made and issued by the defendant. That is to say, if I read the decree properly, it authorizes an accounting only as to shoes made and sold by the defendant upon which, or in connection with which, there was no matter indicating the authorship or manufacture of the shoes. Do I make myself understood?

The MASTER: Yes, sir.

Mr. JOHNSON: Gentlemen, is there any denial on your part that these exhibits we have introduced are your shoes?

Mr. HART: You have to introduce your proof.

Mr. PRIEST: We don't know.

Mr. WERNER: Can't you tell?

Mr. PRIEST: We simply say we don't know.

Mr. WERNER: I want to know whether you find that the shoes themselves bear insufficient markings to enable you to say whether they are of your manufacture?

Mr. PRIEST: We will answer your question by asking you where you got them?

Mr. WERNER: Oh that we expect to show. Have you any diffi-

A. Fifty-four hundred pair.

782*a* Q. Is that one order?

A. Yes.

783*a* Q. Of what date?

A. The book is dated here April 17, 1908.

Mr. JOHNSON: We offer Exhibit 308.

784*a* Q. I call your attention to the same style 6214, and which we will ask his Honor to mark for identification as complainant's Exhibit 309, and tagged by complainant for its own convenience and identification with a card on which appears "catalogue No. 6214, serial No. 61590G, and ask you, save as to serial number and size, if it isn't the same as the pair of shoes Exhibit 306?

A. Yes, the description is practically the same as these shoes.

785*a* Q. Is it not the same practically as the description of the same serial number 61590G as shown by your record?

A. Yes, the description is practically the same as it is here in the stock book.

786*a* Q. Now how many cases and pairs of that particular order as of that date and of that style were manufactured by the Hamilton-Brown Shoe Company?

A. According to the stock book here there are one hundred cases, thirty-six hundred pair.

An adjournment is now taken until 10:30 A. M., June 1st, 1910.

10:30 A. M., WEDNESDAY, June 1, 1910.

Pursuant to the adiournment, as above stated, the hearing of said cause resumed as follows:

By consent of the parties hereto an adiournment was had until tomorrow morning (June 2, 1910) at 10:30.

10:30 A. M., THURSDAY, June 2, 1910.

Pursuant to the adiournment, as above stated, the hearing of said cause was resumed as follows:

Present:

Simeon M. Johnson and Percy Werner for Complainant.
Luke E. Hart for Defendant.

430 Judge Henry S. Priest enters his appearance for the defendant.

By consent of the parties hereto an adiournment was had until tomorrow afternoon (Friday, June 3, 1910) at 2:30 o'clock.

2:30 P. M., FRIDAY, June 3rd, 1910.

Pursuant to the adiournment as above stated, the hearing of said cause was resumed as follows:

Present:

Simeon M. Johnson and Percy Werner for Complainant.
Paul Bakewell, Luke E. Hart and Henry S. Priest for Defendant.

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culty in arriving at or determining whether or not they are your shoes?

Mr. PRIEST: I will simply answer your question by asking you another. We want to know where they came from and the form in which they were originally acquired.

Mr. WERNER: I may have misunderstood, Your Honor, but I think I did not misunderstand the witness, Mr. Johnston, to testify as to the exhibits heretofore introduced, that he identified those as of the manufacture of the Hamilton-Brown Shoe Company from the markings and serial numbers of the shoes corresponding with serial numbers in the book.

432 The MASTER: My impression is that Mr. Johnston did not state that, Mr. Werner.

Mr. WERNER: I may be wrong. However, the record speaks for itself.

The MASTER: Yes, the record will show.

J. T. JOHNSTON, being recalled by the complainant, further testified as follows:

Direct examination.

By Mr. JOHNSON:

787*a* Q. Mr. Johnston, have you produced the factory book showing the date of the manufacture, cutting and shipping of any shoes on the day preceding November 15th, 1909, the date of the entry of this decree?

A. I don't know. We had some books sent down that you phoned out for. (Witness examines books.)

788*a* Q. And I refer to American Lady shoes?

A. November 15, 1909?

789*a* Q. Yes.

A. Why, yes, sir.

790*a* Q. You say you have?

A. Yes.

791*a* Q. Will you turn to such book and give us the last serial number of American Lady shoes ordered or cut at the factory of the American Lady at that date, or if not on that date at the next previous date?

Mr. BAKEWELL: I object to this question on the ground that it does not appear that it relates to anything relevant or material to the period of time covered by the inquiry in this account, and it does not appear that it relates to any American Lady shoes sold by the Hamilton-Brown Shoe Company within the time covered by this inquiry, as we are confined here simply to the number of shoes sold.

Mr. JOHNSON: We submit it is simply a preliminary question.

The MASTER: The objection is overruled. I do not see the purport of it exactly myself now, but I suppose counsel will make it clear.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. I have phoned out to the factory and they tell me over the phone that an order of October 28th is the nearest back of November 14th, 1909, and that last serial number is 929796.

433 Mr. JOHNSON:

792- [—.] Will you tell us on what date 442926 of American Lady Factory shoes were manufactured?

A. I will look in the stock book.

Mr. BAKEWELL: I object to this as immaterial. We are not dealing here with the date of manufactured shoes, under this decree; we are dealing here with the question of sale.

The MASTER: Would it not be well to wait until a question is formulated and then lodge an objection against it?

Mr. BAKEWELL: There is a question.

A. 442926, according to this stock book, was cut February 12, 1908; fitted February 18, 1908; lasted February 21, 1908; bottomed March 2, 1908; finished March 3, 1908; packed March 5, 1908; sent to the store March 6.

Mr. JOHNSON:

793*a* Q. 1908?

A. 1908.

794*a* Q. Now, Mr. Johnston, will you furnish exact information of the last number of shoes and serial number of American Lady shipped from the American Lady factory on November 14, 1909? We will leave that open for you to do so.

Mr. BAKEWELL: I object to that because on the record in this case it clearly appears that the shoes may have been shipped from the American Lady Factory and not necessarily sold by the Hamilton-Brown Shoe Company; and that this inquiry is confined by the terms of the decree to shoes marked "American Lady" sold by the Hamilton-Brown Shoe Company and not accompanied in any manner with anything to indicate that the shoes emanated from the Hamilton-Brown Shoe Company.

It clearly appears from the record that the American Lady shoes were made at the American Lady Factory of the Hamilton-Brown Shoe Company and shipped by the factory to the wholesale department of the Hamilton-Brown Shoe Company. It does not follow, therefore, that the American Lady shoes shipped from the factory were necessarily shoes sold by the Hamilton-Brown Shoe Company within the time of this inquiry.

The MASTER: The objection will be overruled. It is true that the order is limited to shoes that are sold by the Hamilton-Brown Shoe Company. It does not necessarily appear that shoes shipped from the American Lady Factory on that day were sold on that day at the jobbing house. It is not clear to me whether the question of the counsel is directed to the sale of specific shoes or not. Without more this objection will have to be sustained, but if the counsel proposes to follow this up by showing either that shoes were sold that were shipped on November 14, or after that

434

date, and probably may be desired for some other purpose in the course of the examination, I think the counsel will have the right to pursue it.

Mr. JOHNSON: We hope to do that and want to limit the inquiry with reference to the order.

Mr. PRIEST: May I submit this to the Master for his consideration. Where testimony is offered which upon its face does not appear to be material, the Master should ask an expression of counsel offering the testimony as to what he proposes to prove and how he proposes to connect it with something that is material.

The MASTER: Well, I think in answer to that, Judge Priest, it would have been in a little better order seriatim if I had asked that question of the counsel first, but I assumed that the counsel expected to follow it up with something else.

Mr. PRIEST: But we may be disappointed in our expectations unless we know what is in the mind of counsel, and take a great deal of immaterial testimony. So, I think it is the usual custom, with all due deference to the Master, to require counsel to state that first.

The MASTER: You are correct.

Mr. JOHNSON:

795*a* Q. Mr. Johnston, will you also supply the information what serial number was shipped of American Lady shoes from the American Lady Factory to the jobbing department filling orders for shoes actually sold on the date last prior to November 14, 1909?

Mr. PRIEST: I do not think that question upon its face is material or relevant. I think counsel should state how he expects to connect it and the purpose of making the inquiry.

Mr. JOHNSON: My purpose and object in asking the question is simply preliminary to showing that within the number that the answer will elicit the information will be given that will disclose shipments of these infringing shoes, as we term them, on orders for shoes actually sold prior to the date of the decree. Of course, I cannot show it all at once. I have got to get the number first and introduce our shoes with reference to the number.

Mr. PRIEST: I submit that that does not meet the issue referred to the Master. The order, it seems to me, is quite explicit
435 and narrows very much the investigation before the Master: Shoes made and not bearing certain insignia or any marks that would indicate the origin of their manufacture.

Now I want to be briefly heard upon that question. The interlocutory decree in this case is very short and is very specific, and follows very closely the language of the opinion directing the entering of the decree in this case, and that was made upon a review of all the testimony taken in the case, and which the Court considered at the time it ordered this decree.

That testimony shows that American Lady shoes were made at the American Lady Shoe Factory of the Hamilton-Brown Shoe Company in a variety of styles, and were put up as manufacturers usually pack their goods for shipment, in boxes, and with a label,

each of which indicated the origin of their make, and some, it is contended, did not bear any such indicia.

Now in view of that condition of the testimony, the Court of Appeals reversed this case and ordered an accounting between the date of the institution of the suit and the entry of the decree, which expressly limits the scope of the accounting.

The said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case which were marked with the name of American Lady and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company. So, that the issue plainly before the Master, under this reference, pursuant to that decree, is confined to such shoes as were Marked American Lady and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company.

Within the limits of the reference the defendant has by its conduct, under the adjudication of the Court, submitted itself and its business to the inspection of the complainant in this case. Out-side of that limit the rest of the business of the defendant is just as secure from inquisition as is Your Honor's private property, and Your Honor has no right to widen the scope of this investigation so as to compel either methods, series, or any other form in which this defendant does its business in nowise connected with the special issue before you. And I submit that this inquiry must be confined to that specific issue and the testimony must upon its face be relevant to that issue before it can be admitted as competent
436 evidence.

The MASTER: It is perfectly clear, of course, that this examination is limited to shoes which have been sold by the Hamilton-Brown Shoe Company which were not accompanied with such matter as indicated by the decree. Perhaps, if Judge Priest would read my opinion which I dictated into the record early in the case he would find that everything that he has covered by this present suggestion was met. I do not intend that the business of the Hamilton-Brown Shoe Company shall be investigated here. I do not intend to widen the examination beyond the matters which the Court has directed me to find. But I do not think that the question and answer as given by the witness and in the explanation given by the counsel, in any way tends to go beyond the scope of the examination or beyond the authority given to me by the Court. I cannot see until the case is all in exactly how this may bear upon the ultimate finding. It may be made clear, it may not. If it is made clear I shall accept it as such, if it [—] not made clear I shall reject it. In the present condition of the question and answer I will not have to determine whether it becomes material or not. Counsel has assured me that he proposes to make it material, and he will have an opportunity to do so.

To which ruling of the Master, the defendant by counsel, duly excepted then and there at the time.

Mr. JOHNSON:

796*a* [—.] Mr. Johnston, having reference to the same factory book, *in* the style number of 44292G disclosed?

A. I will have to look in the book and see that. (Looks in book). It is not. I do not find it here.

797*a* Q. I will ask you to look at ten calf, three eye-let ribbon tie, low cut shoes, having on each sole thereof the words "Flexible Oak Soles" and having on the brown heel pin of each shoe in script type the words "American Lady" and underneath in block type the word "Special", having in each shoe the size number 435 and serial number 44292G in the lining, which I ask his Honor to mark Complainant's Exhibit 310 for identification, and ask you if I have correctly described those shoes?

Mr. BAKEWELL: Counsel for the defendant objects to this question on the following ground:

That in respect to this pair of shoes now inquired about, as is true in regard to all the pairs of shoes offered in evidence by the complainant, they have carefully refrained from producing (in the event it should turn out that this particular pair of shoes,
437 or any of the other pair of shoes offered by the complainant in evidence were sold by the Hamilton-Brown Shoe Company during the time covered by this inquiry), the carton of the Hamilton-Brown Shoe Company encasing every pair of shoes; it having already appeared from the testimony of Mr. McElroy and from the exhibit introduced by the defendant in cross-examination of Mr. McElroy that during the time covered by this accounting every pair of American Lady shoes sold by the Hamilton-Brown Shoe Company was accompanied with other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company, to-wit, a carton, on the lid of which appeared prominently the name "Hamilton-Brown Shoe Company" and on the end of which appeared prominently the name "Hamilton-Brown Shoe Company" in association with the word "Makers" on a red background in the center of the belt trade mark.

Therefore, this is only an exhibition of another attempt on the part of the complainant's counsel to go outside of the issue involved in this inquiry and to misrepresent the actual situation; for this reason, it must be manifest to the Master, and to anyone who uses his eyes or ears at this examination, this question is but one of a series of questions asking for utterly irrelevant and immaterial matter, and not only irrelevant and immaterial matter, but matter which will improperly, unjustly and untruly represent the situation, not only to the Master, but to the Circuit Court and United States Circuit Court of Appeals when the record and exhibits in this case are presented to those tribunals. For these reasons I insist upon this objection and ask the ruling of the Master thereon.

Furthermore, there is no foundation for this question, because it does not appear that the shoes in question were sold by the Hamilton-Brown Shoe Company at all, much less within the pe-

riod of this inquiry; or that the said shoes, if made and sold by the Hamilton-Brown Shoe Company were sold as and for the American Girl shoes of the Wolf Bros. & Company of Cincinnati.

It must be remembered that in view of this decree, which must be interpreted in the light of the opinion of the Court of Appeals, that the majority of the Court of Appeals has expressly decided—and it is the law of this case—that the complainant has no trade name or trade mark in the name "American Girl", and that this accounting is limited simply and solely to the alleged good will feature of the case, which involved many things besides the use, and indeed was based on things other than the use by the de-

438 fendant of the name "American Lady," and it must therefore be perfectly apparent to the Master that this inquiry as to the sales of shoes by the defendant marked with the name "American Lady" is precisely the inquiry that might have been relevant and material had the majority of the Court of Appeals decided that the complainant had a trade mark in "American Girl". This the Court of Appeals did not decide. The majority opinion of the Court of Appeals did not sustain the complainant's contention that it had a trade mark in the American Girl. The complainant dissatisfied with that decision sought to have the matter reviewed by the Supreme Court of the United States by certiorari, which petition was denied, and which petition is one of the exhibits before the Court. Not only to have the ruling of the Master on this question, but that our position in the matter may be clear, so that it may be before the Circuit Court and Court of Appeals on the review of the action of the Master in the premises, we submit and urge this objection, which objection, with the permission of the Master, we ask to be considered as applicable to any further questions on this line that may be asked by the complainant's counsel, without the necessity of repeating the same objection to each of said questions.

Mr. PRIEST: You simply asked whether the description you recited there was a correct one?

Mr. JOHNSON: Yes.

Mr PRIEST: I don't understand the purpose of that question. Is it simply to confirm the accuracy of your description?

Mr. JOHNSON: I want to get into the record the description of this shoe, and it is easier for me to describe it than to ask him to describe it. We have pursued both ways. I will follow, that, of course, by the offering of the exhibit and with the question to the witness whether that is their shoe.

The MASTER: The suggestion of counsel that that objection may be held to apply to any further examination, of this same character, in order to avoid repeating the objection, which, of course, is reasonable, and will be allowed.

This matter has been gone over several times heretofore. The objection is overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

439 A. You want to know if you have described this shoe (Exhibit 310). You have practically described it, you have described the principal points.

Mr. JOHNSON:

798*a* [—.] I will ask you to state, Mr. Johnston, whether the name Hamilton-Brown Shoe Company anywhere appears on or in that shoe——

Mr. BAKEWELL: Objected to as immaterial.

Mr. JOHNSON: —or either of them.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. I don't see it.

Mr. JOHNSON:

799*a* Q. You don't see it, Mr. Johnston?

A. I don't see it.

809*a* Q. Well, is it there?

Mr. HART: I object to that for the reason the shoe itself is the best evidence of what is or is not contained on it.

The MASTER: Objection overruled

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

Mr. PRIEST: I take it, Mr. Johnson, that you have meant to describe simply the shoe without any tag or covering or box attached to them?

Mr. JOHNSON: We mean to describe this exhibit (310) in the form we have presented it.

Mr. PRIEST: You are putting it down there without any reference to the exhibit. You have a tag on there.

Mr. JOHNSON: We have some question whether I ought to refer to the tag. I haven't offered it yet.

Mr. PRIEST: You are asking him to describe the shoe with the markings on it.

Mr. JOHNSON: I will be fair about the tag.

Mr. PRIEST: I want a full description of them, how they are presented to the witness.

Mr. JOHNSON:

801*a* [—.] Mr. Johnson, out of deference——

440 Mr. PRIEST: It is not a criticism, simply a suggestion.

Mr. JOHNSON: I understand that. I think it is a good cri-icism. I refer to a tag attached to these shoes, which we want the record to show was attached by complainant for its own convenience and identification, and not with any claim on our part that it is attached by the respondent in any way.

Mr. PRIEST: Now will you further make a contention that those shoes are taken from the carton?

Mr. JOHNSON: Why, no, sir, we will not, because it isn't true.

Mr. BAKEWELL: What isn't true?

Mr. JOHNSON: It isn't true that these were taken from any carton as far as we know.

Mr. BAKEWELL: You don't know when the Hamilton-Brown Shoe Company sold those shoes they sold them in any carton?

Mr. JOHNSON: No, we certainly don't know anything about it.

Mr. PRIEST: You understand, Mr. Johnson, that my position is this—that we want to show that those shoes are presented there without any wrapping. They are without any wrapping whatever?

Mr. JOHNSON: Why, certainly.

Mr. PRIEST: We don't know whether you got them from any retailer or from the Hamilton-Brown Shoe Company, or whether you purchased them after they were retailed, or what condition they are in. The point we are making is this, that we do not want the description of those shoes to appear to be now in the form in which they emanated from the factory, or in which they were sold by Hamilton-Brown Shoe Company, if they were sold by Hamilton-Brown Shoe Company.

Mr. JOHNSON: Well, if you will admit they were sold by the Hamilton-Brown Shoe Company, I am willing to accommodate you?

Mr. PRIEST: We cannot admit, because we don't know.

Mr. JOHNSON: I don't think it is worth while to pursue this any farther.

Mr. PRIEST: I want the description of the shoes to be as they are at present—separated from any package in which they may have been heretofore.

441 Mr. JOHNSON: I don't know what package they may have had. The tag I have referred to has on it "Catalogue No. 6207, Serial No. 442926——

Mr. PRIEST: That is a temporary tag attached by the complainant?

Mr. JOHNSON: For our own convenience and identification.

Mr. JOHNSON:

802*a* [—]. Now having reference to that, is there any other description that you want to add with reference to those shoes?

A. No, sir.

803*a* Q. I will ask you to state whether the Hamilton-Brown Shoe Company, the respondent in this case, cut an American Lady shoe on or about the date that you have identified, serial number 442926, answering the description of the shoes to which I have just directed your attention as Exhibit 310?

A. Well, according to the stock book we have here they cut a pair of shoes similar to the pair that you have described.

804*a* Q. How many?

Mr. HART: In that connection I think the record ought to show, in fairness to the witness that the description does not indicate with reference to how the shoes described in that stock book were marked and identified. The description does not correspond to that pair of shoes, although the pair of shoes corresponds to that description.

Mr. JOHNSON: I think that is cross-examination.

Mr. PRIEST: My objection to your question is this: that it asks for an opinion of the witness. The witness may state what the stock books contain, but he cannot express an opinion by compari-

son between the description in the stock book and the exhibit produced.

Mr. JOHNSON: The witness has already stated he is superintendent of that factory, and this is under his knowledge and authority, and I asked——

Mr. PRIEST: The question was directed to the book itself. That is a matter of opinion what it contains. The witness may read what the book contains.

Mr. JOHNSON: Now I formally offer as Exhibit 310 these shoes.

Mr. BAKEWELL: I object to the same for the reason stated in my full objection heretofore made, and because the shoes are not proven to be a pair of shoes sold by the Hamilton-Brown Shoe Company within the period of this inquiry, and because those shoes
442 are not accompanied with the other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company, if such shoes were made by the Hamilton-Brown Shoe Company and sold within the period of this inquiry; because of what already appears on the record in connection with the testimony of the witness McElroy, produced by the complainant, it is distinctly stated that not a pair of American Lady shoes were sold by the Hamilton-Brown Shoe Company within the time covered by this inquiry which were not accompanied by other matter clearly indicating that such shoes were the manufacture of the Hamilton-Brown Shoe Company, namely, a carton marked in the manner hereinbefore described in connection with my former objections spread upon the record.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

Mr. JOHNSON:

805*a* [—]. Have you already given us the dates when this serial number appearing on that book was cut and shipped?

A. Yes.

806*a* Q. You remember giving us that, do you?

A. Yes, we looked that number up awhile ago.

807*a* Q. Suppose you give it again, my mind is in doubt about it, Mr. Johnston. I think you gave it.

A. According to this stock book 44292G was cut on February 12, 1908, and sent to the store March 6th, 1908.

Mr. BAKEWELL:

808*a* [—]. Does it show when it was sold?

A. I don't have any record of that.

Mr. JOHNSON:

809*a* [—]. Can you tell what style number this exhibit 310 is by reference to your catalogue?

Mr. PRIEST: We don't want you to imply by your question that the witness recognizes the identity of the exhibit offered here as the

product of the Hamilton-Brown Shoe Company. The witness has not so stated.

A. The style number is not recorded in this book.

Mr. JOHNSON:

810*a* [—]. Will you have reference to exhibits heretofore offered in evidence, Shoelight No. 4, page 129, and tell us whether
443 the Hamilton-Brown Shoe Company manufactured at any time between the scope of this inquiry which you understand without my repeating in each question, January 29, 1906, and November 15, 1909, a style number 6207?

A. We have a 6207 number in our catalogue No. 4. This catalogue is not dated.

811*a* Q. Well, we have it in the other part of the testimony when it was issued. Can you tell us whether the shoes marked complainant's Exhibit 310 answer in any respect to style number 6207 contained in that catalogue for the page I have drawn your attention to?

Mr. PRIEST: That is a matter of opinion which the Master is entitled to form for himself; not a matter of expert knowledge.

The MASTER: Is that intended as an objection?

Mr. PRIEST: Yes, sir.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. You have partially described this 6207 in our catalogue.

Mr. JOHNSON:

812*a* [—]. What is missing in the description, if anything?

A. The minor details connected with the shoe.

813*a* Q. Does the shoe itself fit the description—Exhibit 310 fit the style number appearing, 6207, catalogue 4, page 129?

Mr. HART: Same objection.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. Wait until I read the description. The description in the catalogue is practically the same as the description of the shoe.

Mr. JOHNSON:

814*a* [—]. Have you your index book here that you refer to in your——

Mr. PRIEST: I think it would be perfectly proper for the witness to read the description in connection with his answer there.

The MASTER: Description in the catalogue? The witness may read the description in the catalogue if counsel so desires.

444 A. (Reading:) 6207. American Lady Special, tan Russian calf, flexible welt, Cuban heel, Worth last, Gibson tie, 6207 is also made with that flexible oak sole mentioned above. All

tan Russian calf. Quarter ribbon lace, same shade, and a high Cuban heel and large perforated tip.

Mr. JOHNSON:

815*a* [—]. Have you read it all?

A. I have read it all.

816*a* Q. Did you bring with you, Mr. Johnston, the memorandum book that you referred to in your testimony of yesterday?

A. Yes, I have had it sent [it] down.

817*a* Q. Will you produce it?

A. I will.

818a Q. Now the book that you produce, how is it [labelled,] if any way?

A. It isn't [labelled.]

819*a* Q. How will you describe it? It has what sort of a cover?

A. I would call that a red paper back book.

820*a* Q. Are there any markings on the inside fly-leaf or cover?

A. No.

821*a* Q. Where did you produce that book from?

A. The office of our American Lady Factory.

822*a* Q. And what do you term it at the factory?

A. An index to the stock book.

823*a* Q. What paging did you start with, if any?

A. Three.

824*a* Q. Page three. What was the purpose and object of keeping it?

A. To have a quick handy reference to our stock book to enable us to find a certain style shoe without having to look all through the stock books for it.

825*a* Q. Can you find in that book which you produce a reference to style number 6207 of the American Lady shoe manufactured by the Hamilton-Brown Shoe Company within the period of our inquiry, January 29, 1906, and November 15, 1909?

Mr. BAKEWELL: It is understood by the Master that the same objection applies to all these questions?

The MASTER: Certainly.

Mr. BAKEWELL: It is also understood, without the necessity of repeating it, the record shows that defendant excepts to all rulings of the Master overruling any objection it may make?

The MASTER: Certainly.

A. They have a record here of 6207.

445 Mr. JOHNSON:

826a Q. [—]. When was style 6207 with reference to the scope of this inquiry first manufactured by the Hamilton-Brown Shoe Company?

A. This book does not give the year.

827*a* Q. Is there anything by which you could tell the year, or independent recollection?

A. It gives the date per month and day, but not the year.

828*a* Q. Do you know of your own knowledge within what period of time the book has been kept?

A. This book has been kept for the last eighteen months or two years.

829*a* Q. That is within your personal recollection? Now having reference to that two years, it would be in 1908?

A. Yes, sir.

830*a* Q. What does this book show with reference to 6207 American Lady shoes, and that style produced and manufactured?

A. You want me to read the memorandum as we have it on the book just verbatim?

831*a* Q. Any way. I am just getting a starting point.

A. Sample number 6207, August 19. 50. 61083. D.

832*a* Q. Now what does 61083 D refer to?

A. That refers to the number in the stock book.

833*a* Q. What does the 50 refer to?

A. 50 refers to cases.

834*a* Q. Now having reference to 61083 D, by reference to your larger factory book, couldn't you give us the date that really refers to?

A. I suppose so.

835*a* Q. Suppose you do that and tell us. What date is 61083 D? What serial letter should have followed that, do you know?

A. No, I do not.

836a Q. The D is the width and not the serial number?

A. Yes.

837*a* Q. Well, within eighteen months refers to 61083G?

Mr. BAKEWELL: I object to the reference eighteen months, unless you bring that within the time of the accounting, and if it is subsequent to the time of the accounting I deny your right to inquiry.

Mr. JOHNSON:

838*a* [—]. It is within the time of the accounting. What does 61083G refer to, what date?

A. You are asking for sending shoes to the store?

839*a* Q. Well, we will say cut.

446 Mr. BAKEWELL: I object to that, as sending those shoes to the store has nothing to do with the inquiry.

I object to the inquiry when the shoe was cut. It has nothing to do with this case when the shoe was cut. The shoe might have been cut, and non constat that shoe was sold within the time of the inquiry, and that is the objection I make and ask a ruling on that from the master. It does seem that the defendant has some right in regard to the privacy of the business.

The MASTER: I do not think the date when the shoe was cut has any bearing upon this inquiry unless it has some relevancy to a date of sale or date of shipment.

Mr. BAKEWELL: You mean shipment not from the factory to the store?

Mr. WERNER: It is a preliminary question. We can get the date of shipment to the factory.

Mr. BAKEWELL: I object to the date of the shipment to the factory. We are only concerned here by the actual sale of the goods by the Hamilton-Brown Shoe Company. It is a most importune inquiry, and I object to this being conducted in this way. There is a right and wrong way of doing this thing, and I do not propose to allow the question asked without protecting my client's right by interposing what I conceive to be a perfectly right and proper objection. The question is only when the shoes were sold, if they were ever sold.

The MASTER: If the question was directed to the purpose of finding what was the date on which that book was kept, the objection will be overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. According to our stock book here, 61083 G was cut September 8, 1908.

Mr. JOHNSON:

840*a* [—]. Now, having given us as near as you can, what was that reference in that book in point of year? I refer to the memorandum book I have just had handed you.

A. I should say that it referred to the first item in this book.

841*a* Q. What page?

A. Well, it isn't the first item. On page 154. It is the first item that appears under the sample number that you asked about, 6207, is 61083.

447 842*a* Q. And that is on what page of the book?

A. On the index book?

843*a* Q. Yes.

A. 154.

Mr. BAKEWELL:

844*a* [—.]Does that refer to the date of sale.

A. No, indeed. None of this refers to the date of sale. I have no knowledge of knowing when any of these shoes were sold.

Mr. JOHNSON: I submit Mr. Bakewell has no right to interject these questions when I am asking the witness.

Mr. BAKEWELL: It shows how pertinent my question was. You are not dealing here with anything relevant before the Master on this inquiry, you are not dealing with anything that has to prove that any of these shoes were sold within the time of this accounting.

Mr. JOHNSON: You have made that statement a great many times.

Mr. BAKEWELL: That is my apology for bringing out what you failed to bring out, that the Master may see what you are undertaking, and your question does not bring out anything relevant to this inquiry.

Mr. JOHNSON: I submit I should be able to show these shoes were sold within the period of this inquiry.

The MASTER: The objection will be overruled. It does not fol-

low that this may not lead up to the date of the sale. I cannot say whether it will or not.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

Mr. JOHNSON:

845 [—.] Was an index kept prior to this time, Mr. Johnston?

A. No, sir.

846*a* Q. Was there any method of collating the number of pairs of shoes made under any style prior to the keeping of this book?

A. Nothing whatever but our stock books that you have previously examined.

847*a* Q. That is the factory books?

A. Yes, sir, factory stock books.

848*a* Q. Now, having reference to the first page of this book, we have the first number 47999 under sample number 6173. Will you turn to this book, factory stock book, and tell us when 47999 was either cut or shipped?

448 Mr. BAKEWELL: I object to that question, and Your Honor may see from this objection enough of what has already transpired that it has nothing to do with anything relevant to this inquiry: towit, it has nothing to do with the question of shoes sold during this inquiry.

Mr. HART: Furthermore it does not appear that that number relates to American Lady shoes, it appearing that every pair of shoes manufactured by the American Lady Factory is listed under that serial number in this stock book, and there are a great many shoes manufactured in that factory other than American Lady shoes, and if it is not an American Lady shoe it certainly cannot have any relevancy to the issue before this Master.

Mr. JOHNSON: We have already stated we have forty-one of these styles, and one page of this book is given a certain date. Now we have the book here. The purpose of our inquiry with reference to the book is to show the precise date when it was kept, and the numbering will enable us to do so. The book, as far as it goes, is a complete record of all the style numbers. As we will have to begin at a period earlier than this early one, we will have to show when the book was kept in actual point of time.

Mr. HART: We have nothing but the statement of counsel that there are forty-one styles of shoes that have any bearing on this accounting, and there is not a particle of evidence in this case that the Hamilton-Brown Shoe Company manufactured any shoe that is not marked in accordance with the ruling of the Court of Appeals, and evidence of that character ought to precede this inquiry.

The MASTER: As far as his question is concerned the objection will be overruled; and I suggest that it would simplify matters very much if but one counsel would make an objection at a time. Of course, I do not intend to adhere to strict ruling that would prevail in court, and I am not restricting counsel if they choose severally to make their objection, but I merely suggest if one counsel would con-

duct that part of the examination it would simplify and perhaps hasten matters.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. The number you ask for isn't in this book.

Mr. JOHNSON:

849*a* [—.] 47999G?

A. It isn't in this book.

449 850*a* Q. Will you get the book and tell the date of that—either shipped from the factory or cut before being shipped to the factory?

Mr. BAKEWELL: Your Honor, will note counsel is continually asking of shipping to the factory and cutting of the shoe and careful to abstain from asking as to when the shoes were sold by the Hamilton-Brown Shoe Company. Therefore, I will again repeat my objection.

The MASTER: The objection will again be overruled. The witness is distinctly stating that the date of the sale of the shoe is not within his knowledge. This, as I understood, is preliminary of something to follow.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. 47999G in this stock book is blurred so you cannot tell when it was cut.

Mr. JOHNSON:

851*a* [—.] Well, when was it shipped to the factory, if at all.

A. You mean when sent to the store?

852*a* Q. Sent to the jobbing department of the Hamilton-Brown Shoe Company?

A. May 27, 1908.

853*a* Q. Are there any figures from which you can decipher the date when it was first put in to work—cutting?

A. No, the only one that is legible is lasting.

The MASTER: What is the materiality of that?

Mr. JOHNSON: To show the date when this book was first started to be kept.

Mr. JOHNSON:

854*a* Q. When was the lasting?

A. May 13, 1908.

855*a* Q. Now having reference to that, Mr. Johnston, are you able to tell us when this book was first started to be kept, this memorandum book?

A. I think that it was prior to May 13, 1908.

856*a* Q. Now I will ask you if you can tell us in any way with reference to the period of this inquiry whether this book covers up to and including November 15, 1909?

A. From May 13, 1908?

857*a* Q. Yes.

A. It does.

858*a* Q. Now, will you tell us, having reference to this page, and I have forgotten the number it was——

A. 154.

859*a* Q. —how many shoes of the style 6207 of the American Lady shoes of the description and style as appears in the catalogue 4, to which you have referred, were manufactured by the
450 American Lady Factory between the date of this inquiry, which I won't repeat, for I have given it to you several times?

Mr. BAKEWELL: Within the date of that record?

Mr. JOHNSON: Not going back any further than from May 13, 1908, and going from them on up to and including whatever date it is.

Mr. BAKEWELL: I object to that question because the question has nothing to do with this inquiry, because it does not relate to any shoes sold by the Hamilton-Brown Shoe Company, and non constat, that particular shoe was marked precisely as the exhibit referred to.

The MASTER: Objection overruled.

To which ruling of the Master, the defendant, by counsel, duly excepted then and there at the time.

A. I can only add them up.

Mr. JOHNSON:

860*a* Q. Well, do that and tell us what it is. I mean of that style number.

A. One hundred and forty-two cases.

Mr. WERNER:

861*a* [—.] That is between August 19, 1908, and the following May 4, 1909?

A. Yes, sir.

Mr. JOHNSON:

862*a* [—.] How many shoes does that indicate?

A. Thirty-six pairs of shoes to the case.

863*a* Q. How many cases?

A. A hundred and forty-two.

864*a* Q. I make that 5112 pair of shoes, is that correct?

A. 5112.

865*a* Q. Is there any way of telling, Mr. Johnson, how long that particular style was on the market between the scope of this inquiry——

Mr. PRIEST: I think that question is objectionable, because this witness has said he knows nothing about the marketing of the shoes at all.

Mr. JOHNSON: Let me withdraw that question.

The MASTER: If you withdraw the question all right. Otherwise it will be overruled.

451 Mr. JOHNSON:

866*a* [—]. As superintendent of the American Lady Factory are you able to tell as to when this style 6207 was first adopted, and I only refer to the period between January 29, 1905, and November 15, 1909?

A. Why, I have no way to tell aside from this index book, the date I gave you there.

867*a* Q. Would the catalogue enable you to tell or refresh your memory in any way?

A. When the store adopted the shoe?

868*a* Q. When the factory produced that style?

A. The first shoe that the factory produced, I should judge, would be indicated in this book.

869*a* Q. With reference to the period of time, and going back prior to May, 1908, what is your information as to whether it was or was not manufactured under your supervision at that factory?

A. I don't remember.

870*a* Q. Is there any way of telling?

A. Well, the only way we could tell to get at that would be to go back to the stock book and look and see if [—] a shoe of that description.

871*a* Q. What would be the method of doing that? You say go back through your——

A. Just go back to the stock book and see if we could find the shoe describing the shoe as it is described here.

872*a* Q. And that is the only way that you could suggest that would give us this information?

A. Yes.

873*a* Q. Did you compile any information with reference to this, Mr. Johnston—for use of this inquiry so that you could testify to it?

A. No. I didn't compile it myself altogether. I gave certain data to your accountant that you sent out, and to our accountant.

874*a* Q. I mean with reference to this style?

A. That particular style?

875*a* Q. Yes.

A. No.

876*a* Q. My purpose is to ask you and leave it now, if you can tell us the exact number of shoes of style 6207 of the American Lady produced at your factory between January 29, 1906, and November 14, 1909, inclusive?

A. No more than I have already given you, 5112 pair.

877*a* Q. What, if anything, do you know about serial number 58692 of the manufacture of the American Lady shoe?

The MASTER: I think before giving another number, which may prove as long as the last one, we will continue the examination until tomorrow morning at 10:30.

452 An adjournment was had until tomorrow morning (Saturday, June 4th, 1910), at 10:30.

ST. LOUIS, June 4, 1910.

Met pursuant to adjournment as above, on Saturday, June 4, 1910, at 10.30 o'clock A. M.

Present:

Mr. Henry H. Denison, Special Master.
Messrs. Simeon M. Johnson and Percy Werner, for Complainants.
Messrs. Paul Bakewell, Luke E. Hart and Judge Henry S. Priest, for Defendants.

The following proceedings were had:
A long discussion was had with reference to the stipulation which would be entered into between the parties.
By consent an adjournment was taken until three o'clock P. M. (June 4, 1910), at which time stipulation should be in readiness to submit.

ST. LOUIS, June 4, 1910.

Met pursuant to adjournment as above, on Saturday, June 4, 1910, at 3:00 o'clock P. M.

Present: Same parties as heretofore with the exception of Messrs. Bakewell and Priest.

At said meeting the following stipulation was entered into by the parties complainant and defendant and it was [stipulaged] and agreed that same should be entered as the proceedings of this session:

Stipulation Made Between Complainant and Defendant on the Accounting Before Henry H. Denison, Master.

For the purpose of shortening the taking of proofs before the Master, and subject to the terms and conditions herein stated, it is stipulated as follows:
That the Hamilton, Brown Shoe Company, the defendant in this cause, was at all the dates hereinafter mentioned engaged in the manufacture and sale of shoes at St. Louis, Missouri, exclusively at wholesale.
That the said defendant, among other factories, owns a factory building located at 21st and Locust Streets, St. Louis, Missouri,
453 known as the American Lady Factory, at which factory, during said period, it manufactured all the shoes marked with the name American Lady which it has sold during said period, said period covering the time between January 29, 1906, (the date of the filing of the bill) and November 15, 1909, (the date of the interlocutory decree in this case);
That at said American Lady Factory the defendant corporation also manufactured shoes other than the shoes marked with the name American Lady;
That the wholesale house or department of the Hamilton, Brown Shoe Company, the defendant herein, during said period and now is located at 12th Street and Washington Avenue, St. Louis, Missouri;

That the shoes sold by Hamilton, Brown Shoe Company during the said period, which were marked with the name American Lady, were all manufactured at the said American Lady Factory of the Hamilton, Brown Shoe Company and billed by that factory to the said wholesale department of the Hamilton, Brown Shoe Company at 12th Street and Washington Avenue, St. Louis, Missouri;

That every pair of shoes marked with the name American Lady manufactured and sold by Hamilton, Brown Shoe Company between January 29, 1906, and November 15, 1909, as said shoes were sold and shipped by said Hamilton, Brown Shoe Company, was sold and delivered to its customers in a carton, each of which cartons bore prominently on the lid thereof in white letters on a black background, at the head of said lid, the words "Hamilton, Brown Shoe Co's." and at the foot of said lid, in equally prominent letters, the name "American Lady," while at the front end of each of said cartons appeared the name "American Lady" and the belt trade mark of the Hamilton, Brown Shoe Company, which belt trade mark consisted of a black strap in the center of which was a red background, the words "Hamilton, Brown Shoe Company" appearing in white letters on the black strap and the word "Makers" appearing in white letters on the red background; said particular way of marking each of said cartons being exemplified by "Defendant's Exhibit, American Lady Shoe Carton, January 31, 1910, Henry H. Denison, Master";

That attached hereto, and marked "Exhibit A" is a duplicate of the label and markings thereon appearing on the lid of each carton containing American Lady Shoes sold by defendant since the filing of the bill in this case;

454 That attached hereto and marked "Exhibit B" is a duplicate of the end label appearing on the end of each of said cartons except as to the word "Special" on said label, the word "Special" appearing on the cartons of defendant's American Lady shoes known as Special but not appearing on the cartons of defe-dant's American Lady shoes which are not known as Special.

This stipul*t*aion does not cover Complainant's Exhibit 104 put in evidence before the original hearing in the Circuit Court, concerning which no agreement is made.

That the following schedules are correct; and all the American Lady shoes named in these schedules may be, for the purpo-es of this accounting, treated as having been sold by the defendant during such respective periods.

1906.

January 29, 1906, to December 10, 1906.

1. During the above named period said American Lady Factory of Hamilton, Brown Shoe Company made and billed to said wholesale department of Hamilton, Brown Shoe Co., 491,849 pairs of American Lady shoes at a gross price of $2.00 per pair, making a gross total of..... $983,698.00

From the above amount there was deducted an arbitrary store discount of 12½% or..... 122,962.00

Making the net price on said American Lady shoes for which said American Lady Factory was credited by the wholesale department of... 860,735.00

2. During the above named period said American Lady Factory shipped to Hamilton, Brown Shoe Company's said store, of all kinds of shoes made, including American Lady shoes..... 1,204,357.00

3. The total so-called factory profit of said American Lady Factory for the above named ten months on all shoes made at said American Lady Factory, shipped to said wholesale department of Hamilton, Brown Shoe Co. and sold by Hamilton, Brown Shoe Co., including American Lady shoes, and without allowing for cost of advertising or selling or interest on capital invested, was 91,025.50

71.5% of said total factory profit, being the proportion of the product of said factory represented by shoes marked American Lady and made and sold during said period, amounts to..... 65,083.23

1907.

December 10, 1906, to December 12, 1907.

1. During the above named period said American Lady Factory of Hamilton, Brown Shoe Co. made and billed to said wholesale department of Hamilton, Brown Shoe Co. 514,829 pairs of American Lady shoes at a gross price of $2.05 per pair, making a gross total of..... $1,055,399.45

455 From the above amount there was deducted an arbitrary store discount of 12½% or... $131,924.93

Making the net price on said American Lady shoes for which said American Lady Factory was credited by the wholesale department of..... $923,474.52

2. During the above named period said American Lady Factory shipped to Hamilton, Brown Shoe company's said store, of all kinds of shoes made, including American Lady shoes..... $1,362,108.29

3. The total so-called factory profit of said American Lady Factory for the above named period on all shoes made at said American Lady Factory, shipped to the said wholesale department of Hamilton, Brown Shoe Co., and sold by Hamilton, Brown Shoe Co., Including American Lady shoes, and without allowing for cost of advertising or selling or interest on capital invested was $113,067.02

68% of said total factory profit, being the proportion of the product of said factory represented by shoes marked American Lady and made and sold during said period, amounts to..... $76,885.57

1908.

December 12, 1907, to December 11, 1908.

1. During the above named period said American Lady Factory of Hamilton, Brown Shoe Co. made and billed to said whole-sale department of Hamilton, Brown Shoe Co. 579,187 pairs of American Lady Shoes at a gross price of $2.10 per pair, making a gross total of.....	$1,216,292.70
From the above amount there was deducted an arbitrary store discount of 12½% or.....	$152,036.60
Making the net price on said American Lady shoes for which said American Lady Factory was credited by the wholesale department of.....	$1,064,256.10
2. During the above named period said American Lady Factory shipped to Hamilton, Brown Shoe Company's said store, of all kinds of shoes made, including American Lady shoes.....	$1,655,834.21
3. The total so-called factory profit of said American Lady Factory for the above named period on all shoes made at said American Lady Factory, shipped to the said wholesale department of Hamilton, Brown Shoe Co. and sold by Hamilton, Brown Shoe Co., including American Lady shoes, and without allowing for cost of advertising or selling or interest on capital invested, was	$213,301.20
64% of said total factory profit, being the proportion of the product of said factory represented by shoes marked American Lady and made and sold during said period, amounts to.....	$136,512.76

1909.

December 11, 1908, to November 15, 1909.

1. During the above named period said American Lady Factory of Hamilton, Brown Shoe Co. made and billed to said wholesale department of Hamilton, Brown Shoe Co. 724,178 pairs of American Lady shoes at a gross price of $2.10 per pair, making a gross total of.....	$1,520,773.80
456 From the above amount there was deducted an arbitrary store discount of 12½% or..	$190,096.73
Making the net price on said American Lady shoes for which said American Lady Factory was credited by the wholesale department of....	$1,330,677.07
2. During the above named period said American Lady Factory shipped to Hamilton, Brown Shoe Company's said store, of all kinds of shoes made, including American Lady shoes.....	$1,721,654.26

3. The total so-called factory profit of said American Lady Factory for the above named period on all shoes made at said American Lady Factory, shipped to the said wholesale department of Hamilton, Brown Shoe Co. and sold by Hamilton, Brown Shoe Co., including American Lady shoes, and without allowing for cost of advertising or selling or interest on capital invested, was	$185,072.18
77% of said total factory profit, being the proportion of the product of said factory represented by shoes marked American Lady and made and sold during said period, amounts to.....	$142,505.58

The above schedules and statements therein contained are made with the distinct understanding that none of the same is to be considered in any way as an admission by the defendant that "the total factory profits made" on American Lady shoes, for each of the four periods of time hereinbefore mentioned, actually represents the net profits made by Hamilton, Brown Shoe Co., during each of said periods, on shoes marked with the name American Lady and sold by Hamilton, Brown Shoe Co. during said periods, defendant contending that its actual net profits on said shoes sold during said periods marked with the name American Lady were much less than the so-called "total factory profits" made on American Lady shoes, because the expense of advertising and selling said shoes and the interest on the capital invested has not been deducted in arriving at said so-called "factory profits."

It is also stipulated that from December 11, 1908, up to and including November 15, 1909, every shoe sold by defendant and marked with the name American Lady was also plainly marked on the sole of each shoe with the belt trade mark of Hamilton, Brown Shoe Co. bearing upon said belt trade mark the name Hamilton, Brown Shoe Co. and in the center of said belt trade mark the name American Lady; and as to 212,000 pairs of said shoes sold by Hamilton, Brown Shoe Co. between December 11, 1908, and November 15, 1909, one shoe of each pair bore on the inside top facing of said shoe the name American Lady in association with said belt trade mark of Hamilton, Brown Shoe Co., on which belt trade mark appeared the name Hamilton, Brown Shoe Co. and the word "makers" in the center of said belt trade mark.

457 It is further stipulated that all American Lady shoes sold by Hamilton, Brown Shoe Co. between December 10, 1906, and December 11, 1908, to-wit, 1,094,016 pairs, (except 120,000 pair of the same) nowhere bore anywhere on or in the shoes themselves the name Hamilton, Brown Shoe Co., although every pair of said shoes was sold and shipped by Hamilton, Brown Shoe Co. in a carton marked as hereinbefore stated and as illustrated by said label exhibits A and B. As to said 120,000 pairs of shoes, one shoe of each pair had attached to the inside lining thereof a silk top facing hereinafter referred to and attached to this stipulation, which silk

top facing bore upon it the name American Lady and the belt trade mark of Hamilton, Brown Shoe Co. bearing the name Hamilton, Brown Shoe Co. with the word "Makers" in the center.

It is further stipulated and agreed that nothing in this stipulation is to be construed as waiving, on defendant's part, any objection or exception heretofore made on the record on behalf of defendant, and that defendant makes this stipulation subject to the following objections here and now made by defendant:

1. That in view of the majority opinion of the Court of Appeals in this case and in view of the interlocutory decree entered in this case on Nov. 15, 1909, complainant is not entitled to recover any damages or profits in respect to any shoes sold by defendant since Jan. 29, 1906, in cartons marked as hereinbefore described and marked with the name American Lady, unless complainant also show-, as to each pair of said shoes, that in the sale of said shoes the same were sold as and for the complainant's American Girl shoes, or that the purchaser in each case was actually deceived into buying defendant's American Lady shoes believing the same to be complainant's American Girl shoes.

2. Also, it being admitted and conceded that the defendant does simply a wholesale business, that even if it were shown in any given instance that a retailer *is* selling defendant's American Lady shoes sold the same as and for the complainant's American Girl shoes, to the deception of the consumer, then and in such case the fraud, if it be one, is a fraud, for which defendant is not responsible under the circumstances, but is simply the fraud of the retailer, in the event any such instance can be established; and that the existence of any such case is denied by the defendant.

3. Also, that defendant takes the position that the complainant cannot recover any damages or profits in respect to any shoes sold by defendant since the filing of the bill, which shoes are
458 marked with the name American Lady, but which shoes were also marked either on the soles thereof or on the lining or facing of one shoe of each pair with the name Hamilton, Brown Shoe Co.

4. Also, that the defendant objects and takes the position that complainant cannot recover in this action, either as to damages or profits, in respect to any shoes sold by defendant since January 29, 1906, which shoes were marked in the manner stated in the last preceding paragraph, and which shoes were also marked, either on the soles thereof or on the lining or inner facing of one shoe of each pair, with the name Hamilton, Brown Shoe Co. and the word "Makers."

5. Also, that defendant objects and takes the position that the complainant cannot recover in this action, as to damages or profi's, in respect to any American Lady shoes sold by defendant since January 29, 1906, which shoes were sold by defendant packed in cartons, said cartons plainly bearing on the lid thereof the name Hamilton, Brown Shoe Co. and on the end thereof the name Hamilton, Brown Shoe Co. in association with the word "Makers."

As this stipulation is made for the purpose of saving the taking

of proofs and of shortening the accounting before the Master, it is stipulated that in the taking of further testimony neither party shall question or dispute anything contained in the schedules set forth in this stipulation or any of the matters stipulated herein.

It is further stipulated and agreed that as to all the American Lady shoes sold by defendant between Jan. 29, 1903, and December 10, 1906, each and every one of said shoes was plainly marked on the sole thereof with the name Hamilton, Brown Shoe Co. and the name American Lady, the name Hamilton, Brown Shoe Co. appearing on the sole of each of said shoes in letters forming the arc of a circle, and the name American Lady appearing on the sole of each of said shoes immediately below the name Hamilton, Brown Shoe Co.; and that as to 244,000 pairs of said American Lady shoes sold during said last named period one shoe of each pair had attached to the inside lining thereof a silk top facing, a sample of which is attached to this stipulation and hereinafter referred to, which said silk top facing bore upon it the name American Lady and the belt trade mark of Hamilton, Brown Shoe Co., upon which belt trade mark appeared the name Hamilton, Brown Shoe Co. with the word "Makers" in the center of said belt trade mark.

It is further stipulated and agreed that between the dates of January 29, 1903, and November 15, 1909, of the total number of American Lady shoes sold by Hamilton, Brown Shoe Company, and mentioned in the schedules referred to herein 576,-
459 & 460 000 pairs of said American Lady shoes (of which 244,000 pairs were sold between Jan. 29, 1906, and Dec. 10, 1906, and 120,000 pairs were sold between the dates of Dec. 10, 1906, and Dec. 11, 1908, and 212,000 sold between Dec. 11, 1908, and Nov. 15, 1909) had on the inside top lining of one shoe of each pair a woven top facing substantially identical with the silk ribbon hereto attached in which were woven the name American Lady and the belt trade mark of Hamilton, Brown Shoe Co., said belt trade mark bearing thereon, as illustrated by said top facing hereto attached, the name Hamilton, Brown Shoe Co. and the word "Makers" in the center of said belt trade mark.

It is further stipulated and agreed that Complainant's Exhibits 300 to 320, inclusive, are pairs of shoes manufactured and sold by the defendant between Dec. 10, 1906, and Dec. 10, 1908, and said exhibits may be considered in evidence subject to all objections heretofore interposed to such exhibits by defendant's counsel.

Executed in triplicate, at St. Louis, Missouri, June 4, 1910.

LAWRENCE MAXWELL,
By SIMEON M. JOHNSON,
SIMEON M. JOHNSON,
PERCY WERNER,
Solicitors for Complainant.
H. S. PRIEST.
By PAUL BAKEWELL,
PAUL BAKEWELL,
LUKE E. HART,
Solicitors for Defendant.

(Here follow Exhibits A, B, and C, marked page 461.)

462 ST. LOUIS, June 20, 1910.

Henry H. Denison, Esq., Special Master, 1913 S. Compton Av., City.

DEAR SIR: As the record in this case shows, a stipulation was made between the parties dated June 4, 1910. The matter of making this stipulation was under consideration between complainant's counsel and defendant's counsel before the stipulation was made, that is to say, several days before June 4, 1910. An inducement in the matter of making this stipulation was the fact that it would shorten complainant's proofs-in-chief, and Mr. Luke E. Hart, who signs this communication to you with me, here and now corroborates my statement to the effect that Messrs. Percy Werner and Simeon M. Johnson represented to us at the time they first suggested this stipulation and afterwards, while the matter of the stipulation was pending, that if we made this stipulation practically the only remaining proofs to be taken in chief by the complainant on this accounting would be the testimony of B. D. Kribben, the special accountant employed by the complainant. Afterwards when we asked them to put that statement on the record, as you will probably remember, they refused to do so, but repeated that they were still of the opinion that it only remained for them to take the testimony of their accountant. Indeed, this was one of the inducements which led us to make the further stipulation as to the shoes presented by the complainant at the last session and which have not been identified by any witness.

We mention these matters to you here and now because the record shows that since these stipulations were made, that is to say, since June 4, 1910, complainant has done nothing further in the way of taking proofs, and that all this delay up to the present time is due to the complainant and complainant's counsel and not to defendant's counsel. On the contrary, we, representing the defendant, have been ready and anxious to proceed and have the complainant's proofs-in-chief closed promptly. Indeed, I have been waiting from day to day since June 4th to have the testimony proceeded with and complainant's proofs-in-chief concluded.

After the stipulation of June 4th was made Mr. Werner called at my office to say that he intended to go to Europe, but the distinct understanding of Mr. Hart and myself in the matter was that Mr. Simeon M. Johnson would proceed on behalf of complainant at such reasonable date as could be fixed after June 4th, to
463 the end that complainant's proofs-in-chief might be speedily completed.

As I told you repeatedly at various interviews which I have had with you since June 4th, defendant is anxious to proceed with the cross-examination of the witnesses McElroy and Johnston and to have complainant's proofs-in-chief closed promptly before the summer vacations. When you spoke to me several days ago about your leaving St. Louis for Europe on July 1st I stated that I had no objection to your doing so except that I was anxious that the cross-examination of the said witnesses and the complainant's proofs-in-chief be closed before July 1st.

This morning you informed me that you had received a letter from Mr. Simeon M. Johnson stating that neither he nor Mr. Maxwell of Cincinnati could attend on this accounting before July 1st, and therefore the matter would have to go over until the Fall. Under the circumstances, as solicitors for the defendant, we can only protest against complainant's proofs-in-chief not being closed and the cross-examination of the said witnesses McElroy and Johnston not completed before July 1, 1910; and we appeal to the record and to the facts which must be known to you that, except for the fact that Mr. Hart and I were actively engaged in attendance on the U. S. Circuit Court of Appeals at St. Paul between the 15th and 31st of May, we have been prompt in attendance at every session before you and have urged no continuance. As it is, if this accounting is to be laid over until Fall, we wish to make this record to show that the delay has not been caused by us, and call your attention now to the fact that when the Fall comes the Courts will be busy and it will not be so easy for us to attend the sessions before you, although we shall do everything in our power consistent with our other engagements to have this reference proceeded with as promptly as possible.

Under the circumstances, and because of accidents which may befall any of us or both or either of the witnesses McElroy or Johnston, I hope you will have the record show that except for a partial cross-examination of Mr. McElroy on one specific point, complainant's witness Mr. McElroy has not been cross-examined by defendant's counsel, and that Mr. Johnston has not been cross-examined at all by defendant's counsel. I ask that this statement of mine be read into the record and form part thereof, and that you show the circumstances under which this matter is adjourned until Fall and confirm my statements that the cross-examination of the witnesses McElroy and Johnston is still open.

464 I am sending you an original as well as a carbon copy of this statement.

Yours very truly,

PAUL BAKEWELL.
LUKE E. HART.
Solicitors for Defendants.

At this point adjournment was taken until Wednesday, June 8, 1910, at 10:30 o'clock A. M.

ST. LOUIS, June 8, 1910.

Met pursuant to adjournment on Wednesday, June 8, 1910, at 10:30 o'clock A. M.

No proceedings were had and an indefinite adjournment was taken.

ST. LOUIS, November 21, 1910.

Pursuant to notice of the Special Master, the parties met on Monday, November 21, 1910, at ten o'clock in the forenoon.

No proceedings were had and by consent an adjournment was taken until Monday, November 28, 1910, at ten o'clock A. M.

ST. LOUIS, November 28, 1910.

Met pursuant to adjournment as above on Monday, November 28, 1910, at ten o'clock A. M.

No proceedings were had and by consent a further adjournment was taken until Thursday, December 8, 1910, at ten o'clock in the forenoon.

(*Notice of Hearing Before Master.*)

To the above-named Parties and to Percy Werner, Counsel for the Plaintiff, and Paul Bakewell, Luke E. Hart, and Henry S. Priest, Counsel for Defendant:

You and each of you are hereby notified that on November 21, 1910, Monday, at ten o'clock in the forenoon of that day, at the office of Percy Werner, Attorney for the Plaintiff, in the Rialto Building, on Fourth & Olive Streets, in the City of St. Louis, I will resume the taking of testimony in the said cause, when and where you and each of you will appear.

HENRY H. DENISON,
Special Master.

465 ST. LOUIS, December 8, 1910.

Met pursuant to adjournment as above, on Thursday, December 8, 1910, at ten o'clock in the forenoon.

Present:

Mr. Henry H. Denison, Special Master.

Messrs. Percy Werner and Simeon M. Johnson, on behalf of the Complainant.

Messrs. Luke E. Hart and Henry S. Priest, on behalf of the Defendant.

The following proceedings were had:

Mr. JOHNSON (to the Master): We seem to have arrived at a point of law where we want to ask your intervention.

Though Mr. Werner, we asked Mr. Hart to produce Mr. Johnston. There were some loose ends of this testimony not entirely cured by the stipulation. And in addition to that, we were to introduce such supplemental matters that Mr. Maxwell might think advisable in view of the record, when it was written out.

During the progress of the hearing it developed that shoes were being made with the word "Makers".

It also developed that between the date of the entering of the decree and the date—which we think was six or seven months later—shoes were being made without the word "Makers" on them.

All "American Lady" shoes from the date—possibly in March or April; maybe May; whatever it may be—are now stamped with the word "Makers".

The MASTER: Did you say that had been in testimony here?

Mr. JOHNSON: Yes. I will read it, from page 372. This was Mr. J. T. Johnston who was testifying:

"Q. To your knowledge, did you prior to November 15, 1909, ever stamp on the ball of any "American Lady" shoe produced at the "American Lady Factory" the words "Hamilton-Brown Shoe Company, Makers?"

A. I don't remember, Mr. Johnson, whether we have or not. We have had that for a long time on our cartons and have had a bottom stamp of that kind, but whether we have used it prior to that time or not, I cannot answer.

Q. You would have the die, of course?

466 A. We would not have the die if it has not been in use for some time because we don't retain those dies after we discontinue using them.

Q. I understood you to say that you were doing that now, Mr. Johnston: am I wrong in that impression?

Mr. HART: That is objected to. The period of this inquiry is limited, as I understand it, to the period prior to November 15, 1909, and it is immaterial what they are doing now.

The MASTER: The objection is overruled.

A. By that you mean that we are stamping the bottoms of some of our shoes "Hamilton-Brown Shoe Company, Makers" on the ball?

Mr. JOHNSON:

Q. Yes.

A. We are today stamping some of them that way.

Q. For the purpose of leading to another question, I will ask you, did you do that prior to November 15, 1909?

A. I cannot answer you as to just when we began doing that: I don't remember.

Q. Then, tracing it further: you would have the stamp you are using now?

A. The one we are using today, yes.

Q. And you would have the order or invoice from the die maker for that stamp?

A. We could find that.

Q. You could find that out for me so as to tell when you began using that stamp, whether before or after November 15, 1909?

A. Yes."

Mr. JOHNSON: There are a great many of these loose ends and we have simply waited for some final culmination of all this matter so as to get it in shape, but as we get it, in view of the stipulation made and this evidence appearing on the record, they have, since the date of the actual rendition of this decree and its entry—principally its entry—been making shoes on which the word "Makers" does not appear.

Of course, the whole question in one of the interpretation of the Court's decree, and we contend that any sale of the shoe, without the word "Makers" on the shoe, is a violation of the terms of the decree, and even if it be not, according to the terms of the decree they must account to us for every shoe that is not so stamped. They

claim to have done that—to account for any shoes—whether
467 stamped on the bottom of the shoe or on the facing, because they put them in cartons with the word "Makers", and next, they having stamped—from a certain period to the date we are now inquiring about, perhaps all shoes with "Hamilton-Brown Shoe Company" that that is a sufficient designation. But, of course, these contentions must be met by evidence, pro or con, fully developing each side of the question.

Therefore, we claim that we are entitled to profits on all shoes up to the date of the final closing of your inquiry, if they are stamped not in pursuance of the decree.

Mr. Maxwell writes me, and I will read what he says, not with a view to making it more impressive, but simply because it states the the point better than I can.

"The defendants are, of course, liable for shoes improperly marked, made and put upon the market after the date of the decree in the Circuit Court, to the same extent as for similar acts prior to the date of the decree. I am of opinion that there is nothing in the decree or in any rule of procedure which requires the Master to exclude evidence of such shoes. The only time limit fixed by the decree is the commencement of the suit; the Court of Appeals having held that the plaintiff was not entitled to recover for the defendants' infringements prior to the beginning of the action. The court could not suppose that the defendants would violate the decree in view of the specific injunction contained in it; therefore, did not fix and could not have been expected to fix that as a time to which the recovery of damages must be limited. But now since it appears that the defendants have sold shoes improperly marked, notwithstanding the decree, the Master in my opinion would be justified in awarding damages for such infringements, although subsequent to the decree. The Master will, of course, state the fact in his report so that the defendants may be protected from any further suit for such damages. In other words, the record will show the period covered by the award of damages. I do not think that a supplemental bill is necessary to bring this matter before the court, because the damages cover acts which are forbidden by the decree itself."

Now, the evidence we have to offer would be offered in a very limited time and could be the subject of a stipulation, the same as we have heretofore done.

Mr. Hart tells us that Mr. Johnston is busy at this time, either taking stock, closing up the year, or something of that kind, but we have had access to their factory books before. We could have access to their factory books now. We could take the serial
468 numbers, multiply by thirty-six, and find (just as we did) what proportion of those were "Vassar" shoes and shoes other than "American Lady," and give us the net result, with the same figures as to the prices of the shoes and the same factory profit, down to the date when they began to use the word "Makers."

It might be suggested to Mr. Johnston to come back and tell us when they paid for the die which had the word "Makers," which

would fix beyond the [perodventure] of a doubt, it seems to me, when they started to use the die which had the word "Makers" in it.

W have asked Mr. Hart to produce Mr. Johnston, but he has not brought him here, I suppose simply as tending to raise the point and disputing our right to do so. However, we want to respectfully insist that he must be brought here to give us this information.

Judge PRIEST: If the contention of the complainants is the proper interpretation of this reference, then there can be no termination to the reference so long as a suggestion might exist that perhaps the defendant, even at this time, is doing something in violation of this decree; so that you would have the Master continuing during the life of the contestants of this decree, to make inquiry as to whether there had been any violation of it or not.

The theory of this proceeding is this:

First. The plaintiffs have a right which has been infringed by the defendant. That right is established by the decree. The decree establishes two things: first, an accounting for the damages which the complainant has suffered between the institution of the suit and the date of the rendition of the decree. That is the first relief.

The final relief is an injunction against doing those things prohibited by the decree.

The first issue is submitted to your Honor for determination as to the measure of damages from the institution of the suit down to the rendition of the decree. With respect to the further compliance of the order no reference is made to your Honor whatsoever. That is a question of contempt, to be reported by the court, and if the court finds the decree has been violated since it was entered—that is, that it has not been observed by the defendant—then the court may impose such penalty as proper, and that penalty may take the form of allowing these complainants damages for a violation of the decree.

469 But the decree and reference, so far as your Honor is concerned, is limited distinctly between the institution of this suit and the entry of this decree, for the purpose of ascertaining the damages these complainants have sustained by reason of things being done which the decree says should not have been done from the institution of the suit down to the entry of this decree. That seems to be perfectly plain.

The MASTER: Have you the decree before you, Judge Priest?

Judge PRIEST: No, but I cannot understand that any——

The MASTER: I do not understand that the language of the decree bears out exactly your contention. Whether it may be necessarily limited, as a matter of law, to your contention is——

Judge PRIEST: I do not pretend to question the terms of the decree, but you can see by a moment's reflection, that it is not possible for the court to contemplate that the decree is going to be violated. It reserves the right to determine that question and inflict a proper punishment for it.

Do you suppose the court would for a moment, make a reference to your Honor to find the measure of damages from the institution

of the suit down to the entry of the decree, and also add in the decree that you shall find such damages as accrue to these complainants by reason of the violation of the decree? You cannot, for a moment, place any such construction on it as that.

Mr. Hart has handed me a memoranda here, and it seems to me that these gentlemen by their conduct have adopted that construction.

For instance, on page 10 of the record:

"The MASTER: What are the dates between which this inquiry is limited?

Mr. WERNER: I should say January 29, 1906, to November 15, 1909, the latter being the date of your appointment and the date of the entry of the interlocutory decree."

The MASTER: It is not necessary to argue that point, because the examination hitherto has been conducted on that theory entirely.

Judge PRIEST: I say, the gentlemen by their conduct in this case, have placed that construction upon this decree, and no other construction could be given to it, for the court would not
470 for one moment contemplate the idea that these defendants, after the date of that decree, would violate it; nor could it submit to your Honor for determination and investigation as to whether the decree had been violated, and these complainants, in consequence of that violation, were entitled to recover damages. That is a matter the court reserves to itself. The enforcement of its decree is the injunctive feature of the decree.

If these gentlemen want to call that to the attention of the court by an information as for contempt and a measure of damages, the way is open to them. The contest then will be as to whether these defendants have violated that decree.

Here is the proposition as decided by the Master, on page 22 of the record:

"The MASTER: I understand, of course, that these inquiries are limited to the shoes manufactured and sold in that period between those dates; although that expression is not included in the question each time, it must be meant and I shall rule that counsel must confine himself in these questions to the shoes manufactured and sold between the dates January 29, 1906, to November 15, 1909."

The MASTER: I did so rule.

Judge PRIEST: Your Honor so properly ruled and could not otherwise rule.

Mr. WERNER: If your Honor please, in reply to what Judge Priest has said, and first upon the theory upon which this has been submitted and has been tried before your Honor, I want to say that counsel for complainant had no more right to presume, than Judge Priest says the court had, that there would be any violation of the terms of the decree——

Judge PRIEST: Let me ask you this question, directly and categorically: suppose the defendant had violated the order of the decree: what would be your process? To apply for contempt, would it not?

Mr. WERNER: That would be open to us if we wanted to punish you for contempt.

Judge PRIEST: If the court had found we violated the decree, would you get compensation for the violation——

Mr. WERNER: We are entitled to that under the terms of this decree.

Judge PRIEST: No, you are not.

471 Mr. WERNER: That is the difference between us.

I want to say with reference to my remark made in the early stage of this proceeding, I did not presume, at the time I made that, that there had been any violation of this decree after the date it was entered. In fact, I supposed long before it was entered in November, they had commenced to conform with what was practically indicated in the opinion of the Circuit Court of Appeals they would have to do. Long subsequent to the commencement of this hearing it cropped out. I think the first intimation was a serial number of a pair of shoes which did not have the word "Makers" on and which was of such a letter and number as to make it evident it was a shoe that was manufactured subsequent to November 15, 1909.

Judge PRIEST: Do you mean to say that in a contempt proceeding you would not be entitled to remedial damages?

Mr. WERNER: I did not say that. I say we are entitled to these damages under the terms of this decree.

We want to show exactly subsequent to November 15, what we have shown prior to November 15, and I say the Master is not limited by the terms of the decree, because the only limitation in the decree is since the commencement of this suit, to inquire into the damages.

Judge PRIEST: Your interpretation at the beginning was that the inquiry was limited to November 15.

Mr. WERNER: No, not limited. I did not dream we would have occasion to go beyond the date of the entry for the same reason that you said you did not dream——

Judge PRIEST: Your construction of the decree was the same as mine, that the decree was limited to that date——

Mr. WERNER: We now understand that they did not commence to put the word "Makers" on these shoes until the following spring, and we contend we have a right to show the number of shoes manufactured and sold since November 15, 1909, down to the date where they commenced to use the word "Makers" on the shoes, and that we have that right under the express terms of the reference.

Judge PRIEST: In other words, at first the proper construction of that decree, conceded by yourself and concurred in by the Master, was that his inquiry was limited to November 15, and now because you think you have discovered that the decree has

472 been violated you give a construction to that decree which will enable the Master to inquire into a contempt of the decree.

Mr. JOHNSON: You will find somewhere in this record, and I am endeavoring to find it, that I claimed we could offer evidence subsequent to November 15, if it turned out——

Mr. WERNER: It was the correct practical construction because none of us dreamed at the time we started in this hearing that the decree was not being strictly complied with by the defendant.

Mr. JOHNSON: The Master did say that the inquiry was limited to the terms of the decree, and there is no question about what——

Judge PRIEST: You gentlemen have acted on that interpretation throughout. Now, the interpretation of a decree does not depend upon a violation of the decree subsequently.

Mr. WERNER: The decree is absolutely plain. It simply fixes one date——

Judge PRIEST: And you fix another by interpretation.

Mr. WERNER: We did not suppose at that time we would have to go beyond November 15, because we had no knowledge at that time of any failure—that you were not strictly complying with it. This is subsequent information that has come to us during the course of this hearing.

Judge PRIEST: The proper place to submit that information is before the court, where we can contest it, and not before the Master here.

Mr. WERNER: If we cared to pursue the contempt feature we might do that, but there is nothing vindictive in this proceeding.

Mr. HART: On page 363, Mr. Johnson, you said:

"Q. I do not want to repeat that each time: I want you to understand that my inquiry when it begins at one end, starts with January 29, 1906, and when I am trying to end it, for the present purpose, it goes only up to November 15, 1909."

Mr. JOHNSON: There is no question about that.

Mr. HART: And on pages 449 and 450 you say:

"Tell us whether the Hamilton-Brown Shoe Company manufactured at any time between the scope of this inquiry, which
473 you understood without my repeating in each question, January 29, 1906, and November 15, 1909, a style number 6207?"

Mr. WERNER: This hearing was commenced and prosecuted in ignorance of facts of which we are now possessed.

Judge PRIEST: We are not conceding that fact at all. We are saying the Master has no jurisdiction. If you gentlemen claim we have violated the decree, the proper presentation of that matter would be before the court.

Mr. JOHNSON: That is one way.

Judge PRIEST: That is the only way unless you file a supplemental bill, and in a proceeding for contempt the court has always administered for a violation of the decree, compensation to the complainant for his damage. I can show your Honor a number of authorities on that.

The MASTER: My view of this hearing is that the decree of the court directed me to examine with regard to the assessment of damages, whatever the defendant had done after a certain date and up to the date of the filing of the decree.

I cannot conceive that the court in entering that decree and referring the matter to me for examination, had contemplated that

I should have any authority to act beyond the time when the decree was entered.

If the decree has been violated subsequent to the entry of the same, of course there is a remedy of a proceeding for contempt, and there is also, without proceeding to that, the remedy by a supplemental bill, and I take it for granted that it would be in the power of the court, as a punishment for the contempt, to direct the Master to proceed to examine any infringement of the decree after it had been entered. That possibly would be construed to be a punishment for the violation of the decree.

I am not clear whether I could properly take this testimony and return it to the court, in order that the court might allow an amendment of the pleadings to correspond to the proof, or a supplemental bill based upon what had developed before me, a practice which is not foreign to the powers of the court, because the court can always direct that the pleadings or the decree shall be amended to correspond to the proof that is taken.

I have not any doubt whatever that such might be the case that the court might take such action. My only doubt is whether, for the purposes of this hearing, I have the authority to take that testimony and refer it to the court as perhaps proof that the
474 decree has been violated, or for the purpose of bringing the matter before the court so that amendments could be made.

It seems to me that the complainant has the right to have this testimony brought before the court, but I am not clear that I have the authority to take it for that purpose, and if counsel have any authority which they can show me, in which the court has endorsed a proceeding by which the Master has taken testimony with regard to infringements after the entry of the decree, I would be very glad to have that done, so that I might have a reason for basing an opinion upon a finding of the court.

At the same time, I am of the opinion that it is the duty of the Master to take the testimony which is presented and have the court determine, when the testimony comes before the court, whether the Master has exceeded his authority in taking that testimony and whether the court can properly enter a judgment upon the finding of the Master, if he has included that testimony in his accounting, because if the testimony is not presented to the court, the court can have nothing to base its opinion on as to whether the Master has exceeded his authority or not.

I would very much prefer, before I pass finally upon that matter, that the counsel will furnish me an authority if they can, where the Master's action in conducting an accounting of matters which occurred subsequently to the entry of the decree has been approved.

Judge PRIEST: I will venture to say that there is not one in the books, where the Master, without the direction of the court, undertakes to act as amicus curiæ of the court and report issues not directed by the decree of any court.

Mr. HART: We [content] that they have taken the position indicated on the record, and we having opened our books and records and submitted to them, they are estopped now from backing up

or taking any other position or placing any other construction upon the decree.

That construction was placed upon it at the very outset of the taking of the testimony. Mr. Werner himself stated that that period was the——

Judge PRIEST: We are arraigned here without notice, without specifications, for a criminal charge—and contempt is a criminal charge—with a violation of this decree, and that whole is precipitated here without specifications against us or without the court ordering the inquiry.

475 Mr. WERNER: When I stated I put that construction—I say again, I did it in ignorance of the fact that they did not commence to obey the decree until the following March or April.

Judge PRIEST: Then we are guilty of contempt and your remedy is to apply for contempt——

Mr. WERNER: That is not our sole remedy. We are at liberty to take that proceeding if we choose. I should not think you would invite it,——

Judge PRIEST: I challenge it. I want the issue made before the court.

Mr. JOHNSON: If Judge Priest's contention is true, our only remedy would be for a contempt, we could not file a supplemental bill——

Judge PRIEST: I say, the remedy you apply for is contempt. We are responsible to the court if we violated that decree.

Mr. JOHNSON: Is it your contention that we cannot file a supplemental bill?

Judge PRIEST: No. I have not considered it at all. I have considered the proper interpretation of this decree under the reference, and in which you gentlemen have concurred, and I say the Master has no power to take testimony.

Mr. HART: At the very outset of the taking of testimony in this case, it was stated to the Master and to counsel that the Hamilton-Brown Shoe Company was doing the very things that it was claimed by counsel for the complainant that it was doing in violation of the decree, and they were invited to bring that matter before the court on contempt proceedings. It was stated to the Master and to counsel for complainant at the very outset.

Mr. WERNER: I wish you would show it on the record.

Mr. HART: You were invited to bring this matter up. I stated it to you.

Mr. WERNER: There is no real dispute between us as to the facts. The question is as to the Master, has the Master power to report them subsequent to November 15? It is not whether, in addition to this, we can go into court and have you punished for contempt. The question is whether the decree is broad enough to allow you to take an accounting and award damages down to the time you file your report. We contend you can under the terms of the decree. They contend you cannot. The question is up to your Honor to decide it.

476 Judge PRIEST: I understand the Master has ruled our way and has called upon you for authorities.

Mr. JOHNSON: Even if he held your way, in order to present the matter to the court, whether in ruling your way he had properly ruled, he would have to hear the evidence, so the court will know, in view of what it is deciding, whether he is right or wrong.

The MASTER: I can only say that the Master has always made it a practice to be very cautious in doing anything that would be overstepping his authority, not only in this, but in other cases, and if that decree can be so construed that I have that authority, I would be very glad to have an authoritative statement from a court in a similar proceeding, showing that I would be right in so doing.

I have not the slightest doubt at all but there is a way to bring this matter before the court.

I recollect very well once sending a matter to the court and applying myself for contempt proceedings and I was sustained by the Court, Judge Adams on the bench. But that was a case in which I doubted my authority.

In this matter I shall have no hesitation whatever in assuming to hear that testimony, and assuming that authority, providing I can be convinced that that has been the interpretation of the law in such matters by the court which is superior to me.

There is no doubt whatever that this testimony can be laid before the court. Whether this is the proper way to do it is what I want to know and if it is, I will take it.

Judge PRIEST: If it was a proper way we would not be objecting.

Mr. WERNER: And if we thought it was improper we would not be insisting. It is only a question of power and not a question of estoppel.

The MASTER: I want the assistance of counsel to aid me in coming to a right conclusion. I do not wish to make a mistake in a matter of this importance. Whether the matter be large or small in regard to the damages which are alleged to have accrued after the filing of the decree is a matter of very little consequence and could not affect the right of the Master.

Mr. JOHNSON: We certainly were promised that stamp.

Mr. HART: You asked the witness for it but I told you at the time you had no right to ask the witness, and the Master overruled the objection.

477 Judge PRIEST: The Master said: "It is simply for the purpose of refreshing the memory of the witness." That was the qualification. Not that you had a right, but simply to refresh his memory.

Mr. JOHNSON: The question is an unusual one. It is not one case in a thousand where an injunction is violated and that may account for the paucity of authority and inability now to be ready with some references.

Judge PRIEST: If you gentlemen find authorities, will you submit them to us?

Mr. JOHNSON: Certainly. We think that is both ethics and courtesy and due to you anyway.

At this point recess was taken until three o'clock on Thursday, December 8, 1910.

ST. LOUIS, December 8, 1910.

Met pursuant to adjournment as above, on Thursday, December 8, 1910, at three o'clock P. M.

Present: Same parties as heretofore.

Owing to the inability of Mr. Kribben to be present to testify (due to being engaged as a witness in another court), a further adjournment is taken until Friday, December 9, 1910, at 10:30 o'clock in the forenoon.

ST. LOUIS, December 9, 1910.

Met pursuant to adjournment as above, on Friday, December 9, 1910, at 10:30 o'clock in the forenoon.

By consent of all of the parties, a further adjournment was taken until Friday, December 9, 1910, at 2:30 o'clock P. M.

(Testimony for Complainant.)

ST. LOUIS, December 9, 1910.

Met pursuant to adjournment as above, on Friday, December 9, 1910, at 2:30 o'clock P. M.

Present:

Mr. Henry H. Denison, Special Master.
Messrs. Percy Werner and Simeon M. Johnson, on behalf of the Complainant.
Mr. Luke E. Hart, on behalf of the Defendant.

The following proceedings were had:

478 BERTRAM D. KRIBBEN, a witness of lawful age, being duly produced, sworn and examined on behalf of the complainant, testified as follows:

Direct examination.

By Mr. WERNER:

878*a* Q. State your name?
A. Bertram D. Kribben.
879*a* Q. Your residence is where?
A. City of St. Louis, State of Missouri.
880*a* Q. And your occupation?
A. An accountant.
881*a* Q. How many years have you followed the business of an accountant?

The MASTER: Can we not shorten that? I do not suppose there will be any question about Mr. Kribben being an expert accountant?
Mr. HART: I do not think so.

Mr. WERNER:

882*a* Q. You are also what is known in Missouri, under the Missouri statute, as a "certified accountant"?

A. Yes, I passed the examination.

883*a* Q. Mr. Kribben, you were selected some time last spring to examine the books of the defendant in this case, with reference to the product of the "American Lady" Factory and made an examination of the Factory, did you not?

A. A partial examination, yes.

884*a* Q. Subsequent to that, I believe the stipulation entered into last with reference to the output of that factory, was entered into; you have seen that stipulation?

A. Yes, sir.

885*a* Q. I will ask you whether in that connection you also made an examination of the books of the defendant at the jobbing end of that business, with reference to getting at the items of expenditure as shown by the books, relative to the jobbing of "American Lady" shoes?

A. I did.

886*a* Q. Did you do this in connection with any accountant of the defendant; if so, who was it?

A. Mr. Buckingham was present at the time when I examined the books.

887*a* Q. What books and papers did he submit for your examination?

A. Practically whatever I called for. I wanted to get at the operations of the Company as to the sales and as to the expenditures, and I began to examine the books, when he suggested that they had statements prepared by certified public accountants, Messrs. Haskins, Sells, which showed all the details, and of course they were
479 far better adapted for my purposes than going through the books; so the first three periods covered by my exhibits, numbers, 3, 4 and 5, were taken from the examination made by Haskins & Sells.

888*a* Q. Submitted to you by Mr. Buckingham.

A. Yes. Exhibit 6 was made from data submitted by Mr. Buckingham, which had been prepared along the same line that Haskins & Sells' examination covered.

889*a* Q. Have you prepared a written report of that examination?

A. Yes, sir.

890*a* Q. Will you kindly submit it?

A. Yes, sir. Mr. Hart has it in his hands.

Mr. WERNER: Mr. HART: I believe you have had an opportunity to examine that report and we formally offer it in evidence.

The report last referred to is marked by the Master, "Complainant's Exhibit, Kribben AA, Dec. 9, 1910, Henry H. Denison, Special Master" and is in the words and figures as follows, to-wit:

ST. LOUIS, May 4th, 1910.

Percy Werner, Esq.,

DEAR SIR: In submitting herewith the following exhibits relative profits
to the amount of damages in re Wolf et al. vs. Hamilton-Brown Shoe Co., let me say that in Exhibit 1 the data are taken from the annual

reports of Haskins & Sells, Certified Public Accountants, showing the conditions and transactions of the Company for the various years, except the year 1908-9, which is taken from data furnished me by Mr. Buckingham, the Hamilton-Brown Shoe Co.'s expert. It was more convenient, as well as preferable, to use these data, instead of compiling them from the general books of the Company, as these reports and data are prepared annually for the Company and present the facts which were needed in compact and easily accessible form.

The purpose of Exhibit 1 was merely to itemize the principal items of Exhibit 2, which latter exhibit shows in condensed form annually the per cent. of jobbing profit on the total operations of the Company.

Exhibit 2, it will be noticed, shows this percentage both including and excluding the amount from time to time spent for advertising, which amount is employed in the subsequent exhibits for the purpose of determining the net profits.

The numbers of pairs adopted in the calculations are taken from the statement submitted by you to me and by Mr. Bakewell to you, and under your directions I have similarly adopted in the
480 following exhibits the values set forth in said statements touching the American Lady Factory total output and net factory profits.

The deduction for product marked "Maker" was on the assumption that the yardage of top band marked "Makers" and bought from E. H. Kluge & Co. covered 4 pairs per yard, and the order number, quantity and dates touching the Kluge purchases were taken from a statement furnished the Hamilton-Brown Shoe Co. by Kluge through Kluge's agent, W. M. Taggart, and which purports to cover all purchases from Kluge by the Shoe Co., of top bands and other markings between Feb. 1, 1906, and Nov. 15, 1909.

Exhibits 3, 4, 5, 6 and 7 are computations and summary of profits realized by the Shoe Co., calculated in the same manner as the Bakewell statement, except that no profits are calculated on product marked "Makers" and the profits are moreover separately stated and so that the amount thereof, both including and excluding advertising, will appear.

This, I think, covers the extent of the matters asked for.

It will no doubt be contended by the Shoe Co., that the amounts spent for advertising the American Lady were greatly in excess of the amount spent for advertising other brands. The actual amount so spent for American Lady could not be accurately determined, and in the computations hereafter set forth the results are so stated that either the advertising is rejected altogether or the proportional part which the output of American Lady (not marked Makers) bears to the total shoe output of the Company constitutes the amount of expense so credited for advertising.

Yours truly,

(Signed) B. D. KRIBBEN.

EXHIBIT 1.

Deductions from Income.

	1905-6	1906-7	1907-8	1908-9
Interest	148,523.20	133,778.29	120,528.22	150,332.20
Taxes	21,887.78	27,461.32	27,965.79	34,971.49
Insurance	9,918 92	16,479.07	15,656.87	13,487.87
Uncollectible accounts	14,517.37	25,053.84	24,172.64	16,691.46
Depreciation Fixtures & Factories	48,741.26	3,039.42	3,718.82	
" Real Estate & Buildings	45,362.78		40,000.00	40,000.00
Miscellaneous	880.99		2,694.20	
Advance Boston House				73,772.03
	9,832.30	205,841.94	234,736.54	329,255.05

Selling and General Expense.

Salaries, Traveling Solesmen	273,425.41	296,080.45	274,453.83	276,320.03
Expense, " "	168,483.77	213,508.76	213,324.95	276,261.03
Salaries, Officers, Clerks, etc	134,576.67	158,094.21	171,289.73	190,998.52
Rent	28,000.08	28,000.08	28,000.08	39,100.08
Postage	22,642.66	32,370.99	26,330.13	26,586.92
Stationery & Printing	25,821.71	22,648.48	15,824.26	19,861.41
Premiums to Salesmen	13,214.95	5,995.91	8,973.60	16,290.50
Collection charges, etc	8,109.24	11,776.52	13,155.26	18,238.87
Commercial Agency Subscriptions	6,855.25	5,567.04	5,092.44	3,623.90
Light, Heat & Power	4,423.58	4,265.53	4,371.18	3,200.16

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Donations, Contributions, etc	2,560.50	6,229.55	4,015.78	
Auditing	1,440.00	1,526.25	1,016.19	1,145.19
Supplies, Shipping Department	3,046.37	6,187.18	3,758.35	
Transportation & Entertaining Customers	5,571.72	8,532.81	9,487.40	9,157.22
Suppers, Employes' overtime	3,098.00	6,166.25	1,813.50	4,022.28
Telephone & Telegraph	2,050.27	2,549.14	3,079.55	3,080.51
Prizes Salesmen "Over the Mark"	3,113.50	3,925.00	2,955.00	2.000.00
Christmas, Employes	1,590.00	1,570.00	1,385.00	1,500.00
Painting Walls & Ceilings	1,080.00			
Legal Expense	2,269.15	5,098.20	5,231.52	419.15
Repairing Buildings & Fixtures	455.43	1,073.70	715.22	3,487.07
Annual Banquet	504.05			
Affidavits	650.50	870.25	864.50	589.50
Miscellaneous	2,943.35	5,516.02	7,050.48	18,966.32
Appraising		1,280.00		
Drayage	4,293.98	4,908.70	3,482.74	4,472.39
Total	720,220.14	833,741.02	805,671.05	919,321.05
Advertising, Salaries	6,587.50	18,855.80	23,636.36	8,449.71
" Other	142,504.56	194,724.72	123,911.05	203,481.07
" Catalogues		20,300.21	18,125.65	34,639.75
Total Advertising	149,092.06	233,880.73	165,673.06	246,570.53
Total	869,312.20	1,067,621.75	971,344.11	1,165,891.58

	1905-6	1906-7	1907-8	1908-9
Selling & General Expense	869,312.20	1,037,621.75	971,344.11	1,185,891.58
Deductions from Income	289,832.30	2,058,841.94	234,736.54	342,363.52
Profit & Loss Charges	12,620.49	15,472.15	15,627458	68,185.52
Total	1,171,764.99	1,288,935.84	1,221,708.23	1,596,440.62
Additions to Income	162,349.21	131,540.34	93,944.80	110,630.30
Profit & Loss Credits	7,601.65	3,299.74	3,691.98	6,314.16
Total	169,950.86	134,840.08	97,636.78	116,976.46
Selling Expense, etc., Total	1,001,814.13	1,154,095.76	1,123,071.45	1,479,464.16
Sales, net	10,778,244.32	11,752,344.58	11,274,555.59	11,415,399.16
% of Sales	9.2948	9.82013	9.96998	12.9603
% Factory Discount	12.5	12.5	12.5	12.5
% Jobbing Profit	3.2052	2.67987	2.53002	0.4603X

Addenda 1908-9 Statement.

Depreciation of trunks	4,832.19	
" of Furn. & Fixtures	8,276.28	13,108.47
Profit & Loss Items, Salaries		20,000.00

Percentage After Deducting Advertising.

Selling & General Expense	720,220.14	833,741.02	805,671.05	939,321.05
Deductions from Income	289,832.30	205,841.94	234,736.54	342,363.52
Profit & Loss Charges	12,620.49	15,472.15	15,627.58	68,185.52
	1022,672.93	1,055,055.11	1,056,035.17	1,349,870.09
Deduct Totals (as above)	169,950.86	134,840.08	97,636.78	116,976.46
	852,722.07	920,215.03	958,398.39	1,232,893.63
% of Sales	7.9115	7.8300	8.5005	10.800
% Factory Discount	12.5	12.5	12.5	12.5
% Jobbing Profit	4.5885	4.67	3.9995	1.7

485 EXHIBIT 2.

Sales.	Sales pairs.	Deduct "Makers."	Difference.
Jan. 29, '06, to Dec. 10, '06..	491,849.00	200,000.00	291,849.00
Dec. 10, '06, " Dec. 12, '07..	514,829.00	120,000.00	394,829.00
Dec. 12, '07, " Dec. 11, '08..	579,187.00		579,187.00
Dec. 11, '08, " Nov. 15, '09..	724,178.00	212,000.00	512,178.00

Yardage of Top Bands "Marked Makers" Purchased.

Order No.	Date.	Yards.	Order filled.
14,284	Feb. 19, '06	50,000	Dec. 31, '06
26,281	July 23, '07	30,000	Jan. 31, '08
38,934	Feb. 1, '09	15,000	Apl. 30, '09
44,123	Sep. 16, '09	3,000	Jan. 31, '10
38,963	Jan. 30, '09	15,000	Apl. 30, '09
40,004	Mch. 17, '09	10,000	Mch. 29, '09
41,493	May 28. '09	10,000	July 30, '09

x Loss.

[On margin:] Covered by stipulation.

486 EXHIBIT 3.

January 29, 1906—December 10, 1906.

Total shipments of American Lady shoes by Factory to Jobbing Department	491,849 pairs
Deduct 61,000 yds. bands marked Makers, 4 to yard	244,000 "
	247,849 "
Price	2.00
	$495,698.00
12½% Store Discount	61,962.25
Net price to Factory of all American Lady not marked Makers	433,735.25
Value of total product of American Lady Factory during above period, less 12½%	$1,204,357.80
% of output of American Lady shoes not marked Makers	36.0138%
American Lady Factory profits 10 months, 91,025.50; 36.0138% thereof is	32,781.25
Jobbing profit during above period on American Lady Shoes, excluding advertising,—4.5885%. 4.5885%, $495,698.00—Jobbing profit on shoes billed and not marked "Makers"	22,745.11

Total profit on American Lady shoes not marked "Makers" during above period, excluding cost of advertising	55,526.36
Jobbing profit, including advertising, 3.2052%, $495,398.00	15,888.62
Add Factory profits above	31,781.25
Total profit on American Lady shoes not marked "Makers," including cost of advertising during that period	48,639.87
Factory profit above	32,781.25
Store Discount	61,962.25
Total	$94,743.50

It is further claimed that defendant should not have credit for disbursements for Depreciation of Fixtures and Factories, Depreciations of Buildings and other items, throughout the whole period from January 29, 1906, to November 15, 1909. The disallowance of these credits would increase the jobbing profit pro tanto and in proportion to the amount which shoes not marked Makers bear to the total output.

487 EXHIBIT 4.

December 10, 1906, to December 12, 1907.

Total shipments of American Lady shoes by Factory to Jobbing House	514,829	pairs
Deduct 30,000 yards top bands marked Makers, 4 to yd	120,000	"
	394,829	
Price	2.05	
	$809,399.45	
12½% store discount	101,174.93	
Net price to Factory of all American Lady shoes not marked Makers, less 12½%	$708,224.52	
Total product of American Lady Factory during above period	1,362,108.29	
% of output of American Lady shoes not marked Makers	51.9948%	
Factory profit during above period of all shoes at American Lady Factory, 113,067.02; 51.99% thereof is	58,788.95	
Jobbing profit on American Lady shoes not marked Makers, excluding advertising	37,798.83	

Total profits during above period on American Lady shoes not marked Makers, excluding advertising	96,587.78
Factory profit above	58,788.95
Jobbing profit on American Lady not marked Makers, but including advertising—2.6798% on $809,399	21,690.84
Total profit during above period on American Lady shoes not marked Makers, including advertising	80,479.79
Factory profit above	58,788.95
Store discount	101,174.93
Total	$159,963.88

488 EXHIBIT 5.

December 12, 1907, to December 11, 1908.

Total shipments American Lady shoes by Factory to Jobbing House	579,187 pairs
Price	2.10
	$1,216,292.70
Less 12½%	152,036.60
Net price American Lady shoes to Factory, not marked Makers	1,064,256.10
Total product of American Lady Factory during above period, less 12½%	1,655,834.21
% output of American Lady shoes	64.2831%
Factory profit of American Lady Factory during above period $213,301.20 x 64.28% equal profit on American Lady shoes	137,095.29
Jobbing profit on American Lady shoes not marked Makers, excluding advertising—3.9995% x $1,216,292	48,645.64
Total profit during above period on American Lady shoes not marked Makers	185,740.93
Factory profit as above	137,095.29
Jobbing profit on American Lady shoes, including advertising, 2.53002% x $1,216,292	30,772.46
Total profit during above period on American Lady shoes not marked Makers, including advertising	167,867.75
Factory profit above	137,095.29
Store discount	152,036.60
Total	$289,131.89

489 EXHIBIT 6.

December 11, 1908, to November 15, 1909.

Total shipments American Lady shoes by Factory to Jobbing House	724,178	pairs
Deduct 53,000 yards top bands, 4 pair to yard	212,000	"
	512,178	"
Price	2.10	
	$1,075,573.80	
12½% store discount	134,446.72	
Net price American Lady shoes to Factory, not marked Makers	941,127.08	
Total product American Lady Factory during above period, less 12½%	1,721,654.26	
% of output of American Lady shoes not marked Makers	54.664%	
Total American Lady Factory profits during above period—$185,072.18 x 54.664% equals profit on American Lady shoes	101,167.97	
Jobbing profit on American Lady shoes excluding advertising, 1.7% x $1,075,573.80	18,284.75	
Total profit during above period on all American Lady shoes not marked Makers	119,452.72	
Factory profits as above	101,167.97	
Total loss on American Lady shoes if advertising be included—0.46% x $1,075,573.80 equal loss on jobbing	4,950.88	
Total profit during above period on American Lady shoes not marked Makers, including cost of advertising	96,217.09	
Factory profits above	101,167.97	
Store discount	134,446.72	
Total	$235,614.69	

490 EXHIBIT 7.

Summary.

Profits on American Lady Shoes not Marked "Makers."

	Advertising—		Total factory profits.
	Excluded.	Included.	
1/29/05—12/10/06..	$55,526.36	48,669.87	94,743.50
12/10/05—12/12/07..	96,587.78	80,479.79	159,963.88
12/12/07—12/11/08..	185,740.93	167,867.75	289,131.89
12/11/08—11/15/09..	119,452.72	96,217.09	235,614.69
	$457,307.79	$393,234.50	$779,453.96

Mr. WERNER:

891*a* Q. Mr. Kribben, in referring to Exhibit 1 of this report, I notice two headings, one "Deductions from Income" and the other "Selling and General Expense":

Without at present entering into the details of these two headings, will you explain the purpose of separating these two items into these two headings?

A. It is the practice of accountants, in order to get at the true profits, to deduct items which in Exhibit 1 are included under "Deduction from Income" from the income, instead of using them as credits in the nature of expense.

In the opinion of accountants, it is the preferable way of stating the facts for the purpose of disclosing the true results and operations of the business.

892*a* Q. Taking up the items under "Deductions from Income"; the first item that you have there is "Interest"; will you kindly explain what that covers?

A. It is interest, evidently, that was paid during the course of that particular year, for some purpose or another, by the firm. It was an expenditure.

893*a* Q. Interest on borrowed money or interest on capitalization?

A. I don't know. I did not examine the details of it. An item paid and charged against interest. As a matter of fact, for the purpose of mathematical results, the items as stated on Exhibit 1, known as "Deductions from Income" and "Selling and General Expense" might be added together and deducted from the gross profits. The result would be the same, but the method of stating it would be, in the practice of accountants, objectionable.

894*a* Q. But the propriety of the deduction may become a matter of legal importance; that is the object of my now making these inquiries?

491 A. I did not go into the merits of any "Deductions from Income" or of any expense.

895*a* Q. You have grouped them all here?

A. I have taken them as I found them in the statements.

896*a* Q. You cannot tell us what that interest charge is for?

A. No.

897*a* Q. "Taxes"; "insurance"; "uncollectible accounts", I suppose explain themselves, and also "Depreciation fixtures & factories"; "Depreciation real estate & buildings" and "Miscellaneous."

You have, of course, given credit for all these "deductions from Income" in your estimate of profits?

A. Certainly.

898*a* Q. There is a final item under the year of 1908-9 "Advance Boston House" of some seventy-three thousand dollars: do you know what that is for?

A. No, sir.

899*a* Q. On Exhibit 1 you also make a separate heading of "Advertising?"

A. Yes, sir.

900*a* Q. That, of course, is a portion of the large items of expense?

A. It is merely a part of the expense account separately stated.

901*a* Q. The figures under the head of "Advertising" are divided into three classes: "Salaries"—probably self-explanatory. The second is "Other" and the third is "Catalogues"; can you explain what is covered by the heading "Other?"

A. That would be any other form of advertising, save and except catalogues; and salaries; whatever it might be.

902*a* Q. Do you know any of those items?

A. No, sir, I did not go into the items of anything. I took the totals as I found them.

903*a* Q. Now, if you will take Exhibit 2?

That sheet (Exhibit 2) as I understand, shows the total claimed expense in making the total sales from the jobbing house?

A. It is a recapitulation of Exhibit 1, with the total sales added and the deductions drawn therefrom.

904*a* Q. And that you have divided into two classes: "Percentage of jobbing profit, allowing advertising expense" and "Percentages after deducting advertising."

A. Yes, sir.

905*a* Q. Taking the first sub-division; you reduce that to "Per cent of sales"; "Per cent Factory Discount"; "Per cent Jobbing Profit:"

What does that "Per cent of Sales" mean?

492 A. That is the amount of the "Selling Expense" divided by the amount of "Net Sales."

906*a* Q. You have indicated that just above that, "Sales Net"; what does that represent?

A. That is the net amount of sales made during the year under which the figure appears.

907*a* Q. Sales of what?

A. The product of the Hamilton-Brown Shoe Company.

908*a* Q. The total product?

A. Total sales of all of their product.

909*a* Q. That is, all the factories; of everything they jobbed?

A. Yes, sir.

910*a* Q. Whether manufactured by them or otherwise?

A. Yes, sir.

911*a* Q. The same thing is true with reference to the "Selling Expense?"

A. Everything; their total selling expense and their total sales are shown with respect to all of their operations on the books.

912*a* Q. You explained, I believe, how you arrived at the "Percentage of Sales"?

A. Yes.

913*a* Q. That, you mean, is the percentage of expense of sales?

A. The percentage which the expense bears in amount to the net amount of the sales. In other words, I gave you the value; its selling expense divided by the amount of the sales.

914*a* Q. And the "Per cent Factory Discount?"

A. That is attained from the practice of the factories allowing the store a discount of 12½% on the values at which the factory bills the manufactured article to the store.

915*a* Q. That is on the theory that the store settles with the factory by deducting 12½%, and the store then makes whatever profit it can out of that 12½ per cent?

A. I presume so.

916*a* Q. Then the third item "Per cent of Jobbing Profit" is, of course, the difference between those?

A. Those two prior items.

917*a* Q. That is, taking it under 1905-6 the percentage of "Jobbing profit" is 3.2?

A. 3.2052.

918*a* Q. That is the amount, out of that 12½ per cent factory discount, which the jobbing end made after deducting all items of expense of whatever character?

A. Yes, sir.

919*a* Q. And so on for the other years, as you have indicated?

A. Yes, sir.

920*a* Q. The following group of figures represents the same thing, except that you made no deduction for expense of advertising?

A. As stated in Exhibit 1.

493 921*a* Q. That, of course, increased the percentage of "jobbing profit" under each period, that for the first period being 4.5885?

A. Yes, sir.

922*a* Q. I notice in this Exhibit you have figures on "Sales" and "Yardage of top bands": that, I believe, has been covered by the stipulation heretofore entered into by counsel?

A. All except the first item of "Deduct Makers" which has been changed by the stipulation from 200,000 in the first year, to 244,000 pair in the first year, but this Exhibit was prepared before that stipulation was entered into.

923*a* Q. You say, then, we may neglect that portion of Exhibit 2 under "Sales" and under "Yardage" as having been covered by our stipulation?

A. That is covered by the stipulation.

924*a* Q. Following Exhibit 2, you have Exhibits 3, 4, 5 and 6, with a recapitulation on Exhibit 7: these Exhibits, from 3 to 6, inclusive, cover separate periods as shown at the head of each Exhibit?

A. In conformity with the stipulation entered into between the parties, using the same values, excepting that in these three exhibits I have computed the profits only upon such goods as are not marked "Makers", as the stipulation does not state the quantity of shoes not marked "Makers"; it includes all shoes.

925*a* Q. Where did you get your figures as to the number marked "Makers"?

A. From the stipulation. The stipulation gives the gross output of the shoes, in the statistical part of it, and then mentions the numbers marked "Makers" later on during the course of the stipulation.

926*a* Q. At the bottom of Exhibit 3, you make the statement, I see, that it is claimed that the defendant should not have credit for certain disbursements: you have given credit for those?

A. They have all been considered.

927*a* Q. And that is true not only of the first period for which this memoranda appears on Exhibit 3, but also on four, five and six?

A. Yes, on all of them.

928*a* Q. You have allowed it in all, leaving it a matter for future determination whether or not the items of deduction are properly deducted?

A. Yes, sir.

929*a* Q. As far as I am concerned, counsel for complainant find these Exhibits (3 to 6, inclusive) self-explanatory.

Turning to the final one, Exhibit 7, marked "Summary" I notice your last column is headed "Total Factory Profits": can you explain what that means by reference, say to Exhibit 3, for the first period?

494 A. That is a mere recapitulation of the last sub-head on Exhibit number 3.

Mr. JOHNSON:

930*a* Q. Mr. Werner asked me if that figure, $94,743.50, which appears on your Exhibit 7 and Exhibit 3, appears anywhere on Exhibit 2?

A. No.

931*a* Q. The proper heading of that column should be "Total Factory Profits, including 12½% discount" should it not?

A. It is the 12½ per cent discount and the percentage of "Total Factory Profits" which shoes not marked "Makers" bear to the whole output of shoes.

932*a* Q. In other words, in that column you have taken the whole of the profits, without giving them any credit whatever for any expenses of the jobbing department?

A. Substantially so.

Mr. WERNER:

933*a* Q. This all has reference to "American Lady" shoes not marked "Makers"?

A. Altogether. These exhibits I have prepared from 3 to 7, inclusive, do not embody any "American Lady" shoes marked "Makers" under the stipulation entered into between the parties.

934*a* Q. So that the result of this examination and summary of yours is that for the total period, January 29, 1906 to November 15, 1909, the total profits on "American Lady" shoes not marked "Makers", excluding the expense item of "Advertising", but including all other items shown in detail on the other exhibits, is $457,307.79?

A. Yes, sir.

935*a* Q. Of course, if in addition to excluding the expense of "Advertising", you exclude those "Deductions from Income" indicated by "Interest"; "Taxes"; "Insurance"; "Uncollectible accounts"; "Depreciation Fixtures & Factories"; "Depreciation Real Estate & Buildings"; "Advance Boston House"—whatever that may be—as indicated on Exhibit 1, the profits would be correspondingly increased?

A. They would.

936*a* Q. The same is also true with reference to the items shown on Exhibit 1, under the heading of "Selling and General Expense": if any or all of those should be eliminated, of course the profits altogether would be correspondingly increased?

A. Of course.

Mr. WERNER: I believe that is all.

Mr. JOHNSON: If anything occurs to us that we have forgotten we will ask it later.

495 By consent of the parties, the cross-examination of Mr. Kribben will be deferred until a later session.

Mr. WERNER: Counsel for complainant desire it to be understood that in offering the results in detail of the examination made by Mr. Kribben, of the books and papers of the defendant, it reserves the right to claim, and expects to claim, that certain of the items under the head of "Deductions from Income" and "Selling and General Expense", for which defendant has been given credit in making the computation of profits, should not have been allowed as credits and in diminution of the profits to which complainant lays claim.

At this point adjournment was taken until Saturday, December 10, 1910, at 10:30 o'clock in the forenoon.

ST. LOUIS, December 10, 1910.

Met pursuant to adjournment as above, Saturday, December 10, 1910, at 10:50 o'clock in the forenoon.

Present:

Mr. Henry H. Denison, Special Master.

Messrs. Percy Werner and Simeon M. Johnson, on behalf of the Complainant.

Messrs. Luke E. Hart and Henry S. Priest, on behalf of the Defendant.

The following proceedings were had:

Bertram D. Kribben.

Direct examination resumed.

By Mr. WERNER:

937*a* Q. Mr. Kribben, referring to Exhibit 1, of your report, should the Master decide that certain items of "Deductions from Income" or charges against the expense of doing the jobbing business, were not properly allowed in determining the profits—specific items, for instance, such as taxes, insurance, uncollectible accounts, depreciation of real estate and buildings, can you indicate how that would be done in conformity with——

A. I do not understand the question.

938*a* Q. I mean, can that be done by simple arithmetical calculation from the data given, by following the method you pursued on Exhibit 6?

A. It would simply change the percentage to the extent to which these items were eliminated or changed.

939*a* Q. Purely a matter of arithmetical calculation from the data given?

A. That is all.

Mr. WERNER: That is all.

496 Judge PRIEST: I do not know that I comprehend Mr. Werner's question.

Mr. WERNER: I will explain that, broadly speaking, Mr. Kribben calculated this allowing everything that your books showed that could be possibly charged to the expense of doing the jobbing business, bringing down the percentage of net profits of the jobbing end (as we who have been through this case know it means the amount that is saved of a certain 12½% discount allowed by the factory to the warehouse), to a minimum.

He has, however, made a separate calculation showing what the profits would be if you include the expense of advertising and if you exclude the expense of advertising.

Otherwise he has taken into account many items, such as "taxes"; "insurance"; "uncollectible accounts"; "advance Boston house" (and we have not yet found out what the latter means), that may hereafter be determined as improperly allowed in estimating the profits.

My question merely was designed to elicit whether it would be a mere matter of arithmetical calculation for the Master, if he decided to strike out some of these items; whether the Master could do it from the figures given.

Judge PRIEST: Does that report state the specific item of "interest" and "uncollectible accounts"?

Mr. WERNER: Yes. It states an item of "interest" and just what that covers we, perhaps will have to ask you to explain.

Judge PRIEST: I do not understand what you mean by your concluding statement in yesterday's proceedings.

Of course the testimony of this witness is taken just as the testimony of any witness offered by the complainant.

I do not want to concede that you would be entitled to any more than you would be entitled to under the rules of taking testimony, and in respect to the testimony of this witness we make no concession at all.

Cross-examination.

By Mr. HART:

940*a* Q. Mr. Kribben, you say that Mr. Buckingham submitted to you whatever books of the Hamilton-Brown Shoe Company you called for?

A. Yes, sir.

941*a* Q. And you called for whatever books you deemed were necessary in order to arrive at the determination as to what had been the net profits of the Hamilton-Brown Shoe Company from its sales?

497 A. I called for whatever books I deemed necessary for the purpose of making the calculation I was directed to make under the stipulation.

942*a* Q. From the books and documents submitted to you by Mr. Buckingham you came to the conclusion that the expenses of the Hamilton-Brown Shoe Company were as itemized on Exhibit 1 of your report to Mr. Werner?

A. Yes, sir.

943*a* Q. In making your deductions, referring particularly to the "Advertising" account, you did not determine whether the amount of money which the Hamilton-Brown Shoe Company spent for advertising, was spent with respect to the entire business of the Hamilton-Brown Shoe Company or whether or not it was devoted exclusively to the particular brands of shoes sold by the Hamilton-Brown Shoe Company?

A. I asked whether we could determine the exact amount spent for advertising the "American Lady" shoes, and was answered that that could not be done without a great deal of trouble; we would have to go into every advertisement. I saw that; that it would take weeks of time.

I took the amount spent for advertising from the statement submitted to me, just exactly as it was there submitted.

944*a* Q. You did not undertake, then, to go into the different

items of advertising, to determine what amount of advertising was to go to the "American Lady" shoes?

A. No; I say it could not be done within the time the report was required of me.

945*a* Q. You came to the conclusion it could not be done within that time?

A. I came to the conclusion, from what they told me, that it would take a month or more to get that, and it was accordingly not done.

946*a* Q. So that in making this calculation with respect to advertising, you apportioned the entire amount spent for advertising upon the entire amount of business done by the Hamilton-Brown Shoe Company: is that correct?

A. In the ultimate calculations I apportioned the advertising exactly the same as all the rest of the expenditures.

That is, the advertising bears the same percentage—of advertising "American Lady"—and other items, bear the same percentage of expense with respect to the whole output as the "American Lady" shoes do to the amount charged ultimately in Exhibits 3, 4, 5, 6 and 7.

In other words, the "American Lady" shoe is charged with its percentage of advertising which it bears to the whole advertising done by the firm, just the same as it bears to the output of the firm of all the shoes.

498 947*a* Q. The percentage of advertising, according to your calculation here, which is apportioned to the "American Lady" line of shoes, bears the same relation to the whole of the sales that "American Lady" shoes bear to all of the business done by the Hamilton-Brown Shoe Company?

A. Yes, sir.

948*a* Q. That would only be correct, however, in the event that the same proportion of advertising was done with respect to "American Lady" shoes as done to the other lines of shoes?

A. I could not determine that for the data was not available in convenient form for the purpose of determining that fact and hence I adopted the method of this distribution.

949*a* Q. But you had no information to the effect that the same amount of advertising was done with respect to the "American Lady" shoes, as was done with respect to the other lines of shoes of the Hamilton-Brown Shoe Company?

A. Except as stated on page 2 of my report, where I made the statement:

"It will no doubt be contended by the Shoe Company that the amounts spent for advertising the "American Lady" were greatly in excess of the amount spent for advertising other brands. The actual amount so spent for "American Lady" could not be accurately determined, and in the computations hereafter set forth the results are so stated that either the advertising is rejected altogether or the proportional part which the output of "American Lady" (not marked "Makers") bears to the total shoe output of the Company constitutes the amount of expense so credited for advertising."

950*a* Q. But you do not know whether or not this calculation is correct?

A. It is correct on this basis——

951*a* Q. But you do not know what amount of advertising was done by the Hamilton-Brown Shoe Company with respect to the "American Lady"?

A. I couldn't separate that.

952*a* Q. Therefore you do not know what deduction should be made from the profits on "American Lady" on account of advertising?

A. That would have to be determined first before the computation could be made.

953*a* Q. I notice in your report here, for instance in your "Summary" where you state that the total factory profits for the first period—the period from January 29, 1906 to December 10, 1906—are $94,743.50:

Do you wish to convey the impression by this report that the total factory profits on "American Lady" shoes, not marked "Makers", during that period was $94,743.50?

A. The figures speak for themselves.

499 The store allowed a discount of $61,962.25—that is the second last item on page 3—, and it also showed the store discount shown in the upper part of the statement, that thereafter, after allowing that discount, the factory made a gross profit of $91,025.50, and 35 per cent of that profit is $32,781.25, an item making the aggregate factory profit $94,743.50. That is not taking into consideration, however, the selling expense or the other expense of the store.

954*a* Q. If that was allowed as a discount it could not be considered as a profit to the factory, could it?

A. In order to determine what the factory actually made—they allowed that discount; of course that would be the gross factory profit, because they earned that, but in selling they turned over to themselves, in another branch of the department, the proceeds of the sale.

955*a* Q. Have you taken into consideration the fact that the record shows that the factory gets credit for only 87½ per cent of the billing price of the shoes?

A. Yes; that has been deducted. That is the 12½%.

956*a* Q. But that 12½% could not be considered a profit to the factory?

A. The factory sells, of course, at 87½%.

957*a* Q. So the actual profit, according to your own figures, would be $32,781.25?

A. On the shoes not marked "Makers", yes.

958*a* Q. And that would be excluding the 12½% discount——

A. Excluding the 12½% discount.

959*a* Q. —which was allowed to the store to cover selling expense?

A. Yes, sir.

960*a* Q. This item of interest which you have referred to up there: will you explain, please, what that item means?

A. I don't know. It simply appeared as a "deduction from income" on the books; an amount spent for interest, but what for I don't know. I did not go into any of the details, I only handled the gross totals.

961*a* Q. Do you know whether or not that represents interest on borrowed money or loans?

A. I don't know from my own personal knowledge, but I presume so. That is what it would indicate to me as an accountant.

Judge PRIEST:

962*a* Q. Your only information was gained from an examination of the books?

A. That is all.

500 Mr. HART:

963*a* Q. There is nothing on the books to indicate what that was for?

A. I did not look at the books. As I stated, I took this from the report of Haskins & Sells, the total "deductions from income" as being a more convenient method of arriving at the result.

The MASTER:

964*a* Q. Is that report of Haskins & Sells which you have referred to, a report which that firm made to the Hamilton-Brown Shoe Company?

A. Yes. They audit them annually. I took the auditor's figures in place of the books.

Mr. WERNER:

965*a* Q. The report as tendered you by Mr. Buckingham, with the books?

A. Yes.

Mr. HART: That is all.

Judge PRIEST: I have not had time to go over the testimony given on direct examination, and I may want to further examine Mr. Kribben.

The MASTER: You shall have that opportunity.

Redirect examination.

By Mr. JOHNSON:

966*a* Q. Were any books submitted to you showing a separate account for "American Lady" advertising as contradistinguished from any other advertising?

A. I did not look into the books on the question of advertising at all. I merely took the total advertising from the figures submitted in the report of Haskins & Sells and the report handed to me.

967*a* Q. Did the statement submitted to you show any separation or distribution——

A. My Exhibit 1 is practically a copy of the statement submitted to me.

968*a* Q. —of the total advertising?

A. Yes.

969*a* Q. Were you advised in any way what the separate amounts, if any, expended for "American Lady" advertising were?

A. My best recollection of that is that I asked Mr. Buckingham whether that could be determined. He smiled when I asked the question and said, "I don't see how you are going to do it without going into all the vouchers and determining what we paid for it and then figuring the expenses of the catalogues, salaries and other things with respect to that." I said, "Yes, I can see that is
501 going to take a considerable period of time", and inasmuch as the report was wanted within a day or two, I did not go into that.

970*a* Q. As I get it, those accountants had not made any such estimate in the advertising as they reported to their principal?

A. I did not see it in their report.

971*a* Q. You would have seen it had it been there?

A. Yes, surely.

Mr. WERNER:

972*a* Q. In other words, their books showed that the charge on account of any specific brands was made a general charge against the whole business?

A. I did not examine the books. I limited my examination to the totals submitted by that report.

Mr. JOHNSON:

973*a* Q. Then all expenditures, as I gather from your answer to Mr. Hart, were pro rated just the same as the advertising?

A. Yes; everything pro rated to the amount of the output which "American Lady" shoes not marked "Makers" bore to the whole output.

Judge PRIEST:

974*a* Q. Bore to the whole output of "American Lady" shoes?

A. Bore to everything.

The MASTER:

975*a* Q. You mean, the proportion which it bore to the whole output of the manufactory?

A. To the whole business.

Mr. WERNER:

976*a* Q. That includes all they manufactured and jobbed; everything they sold?

A. Yes, sir.

977*a* Q. The entire operations?

A. Yes.

Mr. JOHNSON: I think that is all.

Mr. WERNER: It now becomes a question whether we are to be allowed to go into the period subsequent to November 15, 1909.

The MASTER: I will make the ruling this afternoon.

Mr. WERNER: We would like to have an explanation of that "interest" item and that "advance to Boston house" amount. We ought to know what those items mean and perhaps we ought to examine some witnesses on those items.

Mr. JOHNSON: Do you claim that that interest item includes interest on your capitalization?

502 Judge PRIEST: I do not know anything about it.

At this point an adjournment was taken until Saturday, December 10, 1910, at two o'clock P. M.

ST. LOUIS, Dec. 10, 1910.

Met after recess on Saturday, December 10, 1910, at two o'clock in the afternoon.

Present: Same parties as heretofore, with the exception of Judge Priest and Mr. Bakewell.

The following proceedings were had:

The MASTER: With regard to the question which was presented to me before adjournment, as to whether complainant could proceed with proof of profits earned after the issuing of the temporary injunction and before the going in of the report of the Master, I have not been furnished with any authorities which clearly and explicitly cover the ground as claimed by the complainants, and in the short time which I have had in which to examine the question for myself, I have not been able to cover the entire ground, as I have not found a decision explicitly to this point, but I do find that the Supreme Court has decided that it is the duty of the Master to take all the testimony with regard to infringements up to the time of the bringing in of his report.

My idea is that a question with regard to a trade-mark, or unjust competition in trade, is governed by the same rules (so far as I have been able to find) as that with regard to infringement in patent cases, and my conclusion is that a preliminary injunction is a quasi injunction, as it were, and while it is the duty of the defendant to obey it and while a disobedience of the temporary injunction could be proceeded against by contempt or any other proper remedy, yet I am of the opinion that it is the duty of the Master to report all the testimony with regard to profits from the time when the bill was filed until he makes his report to the court.

The continuance of the earning of profits after the temporary injunction was granted, might well be made by the defendant without any intention of violating a temporary injunction, in perfect ignorance that his action was a violation, and while he would subject himself to the processes of the court for a violation, I do not see anything in the position which prevents the Master from following the rule laid down by the Supreme Court and reporting all the damages or profits in this case which the complainant can show to have accrued between the time of the filing of the bill and the

return of the report of the Master.

503 I am obliged, from the examination which I have made, to hold that in this case the complainant is entitled to produce evidence, if it can, with regard to any profits which have been earned since November 15, 1909, up to the time when such profits ceased to be earned, if that period occurs during the time of the hearing before the Master.

I do not think that the fact that counsel for the complainant have hitherto stated that the examination was between the date of the filing of the bill and the fifteenth of November, 1909, operates as an estoppel to correct a mistake or misapprehension that they may have been under in so stating.

I do not think that the ruling of the Master made in accordance with that statement by the counsel for the complainant and made relying upon the misapprehension of the counsel of the complainant, if such existed when he made that statement, deprives the Master of the right to proceed with the hearing and take the testimony regarding the profits which have been earned since the 15th of November, 1909, if any such profits have been made.

I think I stated day before yesterday, or yesterday, that I thought it was the duty of the Master in any event to take the testimony offered, even though it might be in conflict with his own views upon the matter, and even though he had sustained an objection to the introduction of the testimony because otherwise the court to whom the report would be returned would have no basis upon which to determine whether the Master was in error or not. So that in either event, I think it is the duty of the Master in this case to have this testimony introduced as offered, providing any should be offered, even though the Master had been of the opinion that the testimony was incompetent.

As I said before, I am obliged to rule, in view of such authorities as I have been able to find, that it is competent for the complainant to proceed to show, if he can, the profits after the 15th of November, 1909, until such profits ceased to be earned. There can be no final decree under perpetual injunction until the coming in of the Master's report, and I am convinced that it is the duty of the Master to take such testimony as may be offered, with regard to the profits earned from the time named in the order until the coming in of the Master's report, or until such time as the profits cease to be earned, otherwise the final decree cannot include all the profits which have been earned, and that is clearly the intention of the order of the court.

Mr. HART: The defendant excepts to the ruling of the Master.

504 Mr. WERNER: In view of your Honor's ruling, we had an understanding with defendant's counsel that they will bring us a statement of the number of "American Lady" shoes manufactured and sold between November 15 and the date—I would suggest further that we agree that the profits on those shoes be calculated at the average profits from January 1906 to November 15, 1909, if that is satisfactory to you, without trying to find out

what the actual profits were. I understand they would naturally be greater the longer you do business.

Mr. HART: The store profits you mean?

Mr. WERNER: No, the total profits. So far as you have the actual, all right.

Mr. JOHNSON: You call "store profits" jobbing profits. We mean store profits.

Mr. HART: I will see Judge Priest about that. I suppose there will be no objection to it.

Mr. WERNER: I have further to suggest that in addition to that, you supply us with the explanation of the two items for which I asked this morning, occurring in the overhead charges, the first with reference to the item of "interest" and the second with reference to the item "advance to Boston House", so that the Master will be in a position to know whether they are proper items to allow as a "deduction from income" or going to a diminution of the profits.

Mr. JOHNSON: I would suggest that while we agree on the average amount of profits that we average your overhead charges, so we could apply—for instance, if we should want to claim (as we will) that overhead charges of a certain nature should be deducted, we would have the average overhead charge on that particular item, so as to take it out.

Mr. WERNER: If we agree on a basis of average, it will apply all through.

Mr. JOHNSON: For instance, take interest, depreciation, and so on, all the way through.

Mr. HART: I will take that up with Judge Priest.

Mr. WERNER: With that understanding, Mr. Johnson, may I say that the complainants close?

Mr. JOHNSON: Unless there are some ends we have left open. If there is some exhibit that we have referred to and not
505 said it is in evidence, we want to offer it and make it a part of the record, but I do not think there is.

Mr. WERNER: As the record now stands, some information is to be supplied that is not there, and if we deem essential we want to put it in.

Mr. HART: I suppose the Master would allow you then to re-open the case.

Mr. JOHNSON: We do not want to foreclose ourselves.

Mr. HART: The next step would be to cross-examine Mr. Johnston and Mr. McElroy.

Mr. JOHNSON: I do not see how we could close if you have not cross-examined Johnston and McElroy. I thought they had been cross-examined. We have no other independent testimony.

At this point adjournment was taken until Monday, December 19, 1910, at ten o'clock in the forenoon.

ST. LOUIS, December 19, 1910.

Met pursuant to adjournment as above, on Monday December 19, 1910, at ten o'clock in the forenoon.

No proceedings were had and by consent of all the parties a further adjournment was taken until Tuesday, December 20, 1910, at ten o'clock A. M.

ST. LOUIS, December 20, 1910.

No proceedings were had on Tuesday, December 20, 1910, and by consent of the parties an adjournment was taken until Tuesday, December 27, 1910.

On Tuesday, December 27, 1910, no proceedings were had and by consent of the parties, a further adjournment was taken until Monday, January 9, 1911.

There were no proceedings had on Monday, January 9, 1911, and by consent of the parties a further adjournment was taken until Tuesday, January 10, 1911, at 10.30 o'clock in the forenoon.

ST. LOUIS, Jany. 10, 1911.

Met pursuant to adjournment as above, on Tuesday, January 10, 1911, at 10:30 o'clock in the forenoon:

Present:

Mr. Henry H. Denison, Special Master.

Messrs. Percy Werner and Simeon M. Johnson, on behalf of the Complainant.

506 Messrs. Paul Bakewell and Luke E. Hart, on behalf of the Defendant.

As the parties were preparing a stipulation which was not ready for signature, no proceedings were had and an adjournment was taken until January 10, 1911, at 2:30 o'clock P. M.

ST. LOUIS, Jan'y 10, 1911.

Met pursuant to adjournment as above, on Tuesday, January 10, 1911, at 2:30 o'clock in the afternoon.

Present same parties as at the morning session.

No proceedings were had as the stipulation being prepared by Messrs. Bakewell and Hart was not yet completed.

An adjournment was taken until Wednesday, January 11, 1911, at 10:30 o'clock A. M.

(Testimony for Complainants.)

SAINT LOUIS, January 11, 1911.

Met pursuant to adjournment as above, on Wednesday, January 11, 1911, at 10:30 o'clock in the forenoon.

Present:

Mr. Henry H. Denison, Special Master.

Messrs. Percy Werner and Simeon M. Johnson on behalf of the Complainant.

Messrs. Paul Bakewell and Luke M. Hart, on behalf of the Defendant.

The following proceedings were had:

Mr. WERNER: I was going to state, so as to show the purpose of this examination, that a stipulation has been entered into; it simply lacks our signatures, because certain pages are to be recopied. This brings the accounting down to March 9, 1910.

That is not offered at this time, because it is not ready, but it is agreed on, I understand.

JOHN T. JOHNSTON, recalled testified on behalf of the complainants as follows:

Direct examination.

By Mr. WERNER:

978*a* Q. Mr. Johnston, will you please tell us what method of marking the "American Lady" shoes was adopted or used on March 10, 1510?

507 Mr. BAKEWELL: I object to that on the ground that it already appears from the ruling of the Master, that the inquiry in regard to the marking of the shoes has been fully gone into so far as relevant and material to this inquiry.

If the complainant has any shoes marked in any way which the defendant must account for under the ruling of the Master, those shoes should be produced.

It appears from the record already that all the shoes marked in such a manner that, under the ruling of the Master they must be accounted for by the defendant, have already been accounted for, not only by virtue of testimony had in this case, but by virtue of stipulations made of record, and therefore the complainant has no right to inquire into any shoes other than those already accounted for and covered by the stipulation in this case.

Mr. WERNER: I will say, your Honor, in explanation, that the question of a stipulation has been entered into in pursuance of your last ruling, bringing down the accounting to a date fixed by the defendant as March 9, 1910.

The purpose of this inquiry is to ascertain whether on or after that date, all shoes were marked with the word "Makers" on the soles.

In other words, why March 9, 1910, was selected as the termination of the period of the stipulation.

Mr. HART: Mr. Werner states that the purpose of his inquiry is to determine if all the shoes——

Mr. WERNER: Whether all "American Lady" shoes manufactured subsequent to March 9, 1910, were stamped with the word "Makers".

Mr. HART: Mr Werner states that his purpose is to inquire if all the shoes were marked with the word "Makers" subsequent to that date:

He has no right to inquire in regard to any shoes marked with the word "Makers", or if the shoes were marked with the word "Makers".

Mr. Werner states that he has produced here certain shoes, which

the Master has ruled the defendant has to account for, and the stipulation that has just been entered into covers all of those shoes.

The stipulation ends with the date March 9, 1910.

508 Now, if the question was so framed as to inquire whether or not any shoes were made or sold subsequent to March 9, 1910, marked as indicated in that stipulation, then the question might be proper. But the question in its present form is not proper because it inquires in regard to matter which the Master has ruled he has no right to go into, and which, under the decree in this case, he obviously has no right to go into.

Mr. Werner has a right to inquire, as I say, under the ruling of the Master, in regard to shoes that were marked as indicated in that stipulation, but he has no right to——

Mr. JOHNSON: We will adopt your form of question, for the first part, and then raise the question further.

Mr. WERNER:

979*a* Q. The question as he suggests it is: Whether subsequent to March 9, 1910, the "American Lady" shoes manufactured and sent from your factory to the jobbing house, were marked with the belt trade-mark on the sole thereof and without the word "Makers"?

Mr. HART: And with the words "American Lady."

Mr. WERNER:

980*a* Q. With the words "American Lady" but without the word "makers"—the words "American Lady" put in the belt trade-mark, and not the word "makers".

Mr. HART: The stipulation makes no reference to the word "makers" on the sole——

Mr. WERNER: But the reason the Master allowed us to go into a period subsequent to November 15——

Mr. BAKEWELL: Why do you interrupt Mr. Hart? Let him finish.

Mr. HART: The stipulation refers to a shoe marked on the sole thereof with the belt trade-mark of the Hamilton-Brown Shoe Company, within which the words "Hamilton-Brown Shoe Company" and the words "American Lady".

That is the stipulation that is entered into here and that specifies the manner in which the shoes were marked to March 9, 1910.

Mr. WERNER: Then I will ask the witness:

981*a* Q. Were the shoes so marked subsequent to March 9, 1910?

Mr. BAKEWELL: How do you mean—"so marked"?

509 Mr. WERNER: As indicated by Mr. Hart: with the belt trade-mark and the words "American Lady" inside the belt.

Mr. BAKEWELL: I object to that for the reason already stated in the record. We have already had impertinent inquiry enough in this case, it seems to me.

Mr. WERNER: You have brought this down to March 9, 1910, a date arbitrarily fixed by yourselves. I want to ascertain why you fixed that date.

Mr. BAKEWELL: That appears in the record.

Mr. WERNER: If there was any change in the marking at that time, I want to know what it was, so as to know whether the shoe subsequently manufactured are marked with the word "Makers" on.

Thes purpose is obvious.

The MASTER: The objection will be overruled and the testimony will be taken subject to the objection.

A. As near as I can remember now, our shoes were marked at that time—March 10, 1910, just as we are marking them today.

Mr. WERNER:

982*a* Q. During the period which has elapsed since March 9, 1910, were they marked or not as they had been marked prior to that time, or was there any change in the marking on March 10?

Mr. BAKEWELL: I make the same objection as heretofore made.

The MASTER: The question may be answered subject to the objection.

A. I don't remember that we were marking them different at that time. I don't remember those dates.

Mr. WERNER:

983*a* Q. So far as you know, the method of marking the "American Lady" shoes, subsequent to March 9, 1910, was the same as prior to March 9?

A. As prior to March 9?

984*a* Q. Yes; March 9, 1910.

A. I don't remember just the date that we made any change in marking them in the way we are marking them today—at this time.

510 985*a* Q. How are you marking them today?

Mr. HART: That is objected to.

The MASTER: The witness may answer, subject to the objection.

A. I went out in our factory when they telephoned me to come down here this morning, and took a pair of shoes out of a case and brought them down with me to show you how they are marked.

Mr. BAKEWELL: Produce the shoes.

The MASTER: If your counsel wishes you to produce them you may do so.

Mr. BAKEWELL: The witness produces a carton containing a pair of "American Lady" shoes, the carton being marked on the lid with the name "Hamilton-Brown Shoe Company" and the name "American Lady", and on the end thereof marked with the picture of Martha Washington and the words "American Lady"; the belt trade-mark of the Hamilton-Brown Shoe Company, this belt consisting of a black band upon which appears in white letters the words "Hamilton-Brown Shoe Company", and in the center of the belt, in red, the word "Makers".

The pair of shoes inside this carton each bears upon the sole

thereof the strap trade-mark of the Hamilton-Brown Shoe Company, upon which strap appear the words "Hamilton-Brown Shoe Company" and the word "Makers" in the center of each belt.

On the right hand shoe is a silk facing bearing in yellow the name "American Lady" and also in yellow the strap trade-mark of the Hamilton-Brown Shoe Company, upon which strap trade-mark appear the words "Hamilton-Brown Shoe Company" and in the center of the strap trade-mark the word "Makers".

Mr. JOHNSON: Is there any objection to giving the serial number of those shoes?

Mr. BAKEWELL: The serial number marked on the white lining of each shoe is 35618A.

The Master is asked to mark the carton above referred to——

Mr. WERNER: I am inquiring only about the shoe.

Mr. BAKEWELL: We have already referred to what he produced and we produced the carton with the shoe.

511 Mr. WERNER: I understand you have that carton in once, but if you want to put another one in here there is no objection.

The MASTER: I suppose the distinction is that this is carton which is used since the 10th of March.

Mr. WERNER: I believe it is identical with the exhibit already offered.

Mr. BAKEWELL: Defendant's counsel asks that the carton and the shoes be marked by the Examiner for the purpose of identification.

Whereupon the carton last referred to is marked by the Master, "Exhibit 498, 1/11/1911, Henry H. Denison, Master"; and the shoes last referred to are marked, "Complainant's Exhibit 499, 1/11/1911, Henry H. Denison, Master."

Mr. WERNER: We offer no objection to that, but offer the shoe.

986*a* Q. Now, Mr. Johnston, if I understand you, this method of marking "American Lady" shoe with the Hamilton-Brown Shoe Company belt trade-mark with the word "Makers" inside the belt is the method that you have now adopted and uniformly use in marking "American Lady" shoes?

A. Yes sir.

987*a* Q. And that has prevailed since March 9, 1910, to the best of your recollection?

A. To the best of my recollection, yes. I am not sure as to those dates.

988*a* Q. I will say now that it is not a question of showing that there might be a single case of omission, but that substantially at that time that method was adopted and put into practice and is now uniformly used?

A. Yes, sir.

Mr. JOHNSON: Mr. Werner, you might draw attention to the inside of the shoe also; that is, the silk facing.

Mr. WERNER:

989*a* Q. With the silk facing also marked as indicated?

A. You understand, Mr. Werner, all shoes would not have a silk facing.

990*a* Q. Of course, it depends upon the different class.

Mr. BAKEWELL: I submit that under your own ruling they cannot go into this inquiry in regard to shoes which you have already said are outside of the accounting, and I respectfully submit that this is utterly irrelevant and immaterial. There must be some line drawn in regard to this inquiry.

512 The MASTER: I understand from the tenor of this inquiry that it is the purpose of ascertaining why March 9, was fixed as the date upon which the marking of the shoes as controverted was changed, and for the purpose of ascertaining whether at that time the system of marking the shoes was changed to correspond with the shoes and the carton now produced by the witness.

If that is the purpose of the inquiry, and I understand it to be, it seems to me that this testimony would be relevant, but I do not see why it cannot be done by some direct and straightforward questioning.

Mr. WERNER: I do not think I care to pursue it further. I understand the witness to say that that is used in some styles of "American Lady" shoes, but in others it is not. But that so far as the marking of the sole is concerned, that is uniform and has been since that time.

A. Yes, sir.

Mr. BAKEWELL: We do not admit that the ruling of the Master is proper.

Mr. WERNER:

991*a* Q. Mr. Johnston, you are still superintendent of the "American Lady" factory?

A. I am.

992*a* Q. And have been during the past year?

A. Yes sir.

993*a* Q. Will you produce a statement of the number of "American Lady" shoes manufactured and marked on the soles as indicated—as I understand they are all now marked—subsequent to March 9, 1910, down to the present time; or, if is simpler, the end of the fiscal year 1910?

Mr. BAKEWELL: I object to this.

In the first place, I consider it a breach of the understanding between counsel and a breach of the stipulation.

The record shows that the Master has already ruled that the defendant does not have to account in this accounting for shoes marked as are this particular pair of shoes, each of which bears prominently on the sole thereof the name "Hamilton-Brown Shoe Company" with the word "Makers".

The stipulations have been made with the [understand-] between counsel and in harmony with the ruling of the Master, that the

defendant did not have to account for the shoes marked as are this particular pair of shoes produced by the witness this morning.

Now, the counsel having obtained under the ruling of the Master, the inquiry in regard to these shoes, notwithstanding our objection, now deliberately ask the witness to account for the number of shoes thus marked.

513 I respectfully submit that it is clearly out of this accounting—the scope of this accounting under the rulings heretofore made by the Master, and therefore the witness should not be required to answer this question.

Mr. JOHNSON: I think we ought to say that we want to raise the question that the use of the word "Makers" on the shoes is not in conformity with the decree.

There is nothing in the stipulation except to cover certain periods of time.

If we have been able to show by this witness, according to our theory of the case, that they are still continuing to mark "American Lady" shoes with the belt trade-mark or any other form we are entitled to have the ruling of the Master, and they are entitled to object, as to whether that is in compliance with the decree——

Mr. BAKEWELL: I respectfully submit——

Mr. JOHNSON: I want to say this with reference to some of these shoes: these shoes were none of them marked "American Lady" on the sole. They were all marked "Hamilton-Brown Shoe Company, Makers"; and the Oxfords—the low cuts and other styles which would not have this extended top, if we are correct in the proof we want to offer, would not have this silk facing at all, and there would not be anything on the shoe that it was "American Lady" in the sense that it was "Hamilton-Brown Shoe Company, Makers", save, possibly the carton.

So we want to know the method of marking, and think we are entitled to it. We are not going to take much time on that. We simply want your Honor to say we are right on that and we are not going to press it with any undue insistence, but we do claim that the word "Makers" is not a sufficient way of designating these shoes.

Mr. BAKEWELL: I respectfully submit to the Master that on this record, made this morning, it shows that counsel for the complainants are acting disingeniously, for they first tell your Honor that they are entitled to have the earlier questions put to this witness answered simply to show when the change was made and the Hamilton-Brown Shoe Company began to put "Makers" on the sole.

Having opened the door to that inquiry, now they are seeking to make an utterly impertinent inquiry in accordance with the rulings made by the Master on this record heretofore, and are seeking to make us account for all of the shoes marked with the name "Hamilton-Brown Shoe Company" and the word "Makers" on the sole, whether or not those shoes had the words "American Lady" on any part of the shoe itself.

514 In the first place, we are not here to account for any shoes that are not marked with the name "American Lady" at all, and we are certainly not here to account, under the rulings of the

Master heretofore made on this record, in respect to shoes which bore on the soles thereof, or any part thereof, the word "Makers" associated with the name "Hamilton-Brown Shoe Company."

Mr. JOHNSON: We resent the statement that we are acting disingenuously. We sometimes go along the line of least resistance.

I told you last night we were going to ask about "Makers" and you told me you were going to object.

We insist that it is competent and ask for a ruling.

The MASTER: It is sometime since a ruling was made upon that point. I may not have it entirely clear in my mind, but my recollection is that I based my ruling upon my interpretation of the decision of the Court of Appeals, and that I interpreted the decision of the Court of Appeals to be that the Hamilton-Brown Shoe Company was not obliged to account for shoes marked in this way, with the words "Hamilton-Brown Shoe Company, Makers".

At the same time, if I recollect rightly, I held that if I could be convinced that I was in error I would be very ready to acknowledge it.

The hearing has proceeded heretofore upon the theory of accounting for all shoes which were not marked with the word "Makers", but did have the name "American Lady" upon them.

Now, I still hold to my opinion that the defendant is not obliged to account in this hearing for shoes which were marked as this shoe, marked with the words "Hamilton-Brown Shoe Company, Makers", basing my ruling upon my interpretation of the decision of the Court of Appeals.

But the counsel for the complainant now state that they expect to take the ground and have the court above determine whether the word "Makers" is a sufficient compliance with the decree.

I do not think that the testimony they are asking now to offer is competent, but I do think that if the complainant desires to raise that question before the Circuit Court, upon the return of the Master's report, that they are entitled to have this matter so presented that the court may determine whether I was in error or not when I excluded the testimony.

I do hold that the question is incompetent, but at the same time I shall allow the question to be answered, subject to the ob-
515 jection, in order that the court may ascertain and determine whether I was in error or not.

Mr. BAKEWELL: In that connection I wish to say this:

There is some limit to the power of the Master in this matter. Your warrant is the decree in this case. And simply because these gentlemen say they want to raise a question in the Court of Appeals, which, on the face of the decree, I respectfully submit, is outside of the scope of this inquiry, you are going far beyond your power to permit this—and I say it respectfully, but technically and exactly—utterly impertinent inquiry in regard to a ma-ter that has no more to do with this case than an inquiry into other shoes entirely different, not marked with the name "American Lady", that the Hamilton-Brown Shoe Company may have manufactured.

I ask you to realize that if you permit this inquiry to proceed,

you are doing—I submit you have already done by your ruling—but you are doing in this case a gross injustice to a reputable house in the city of St. Louis and pressing an impertinent inquiry into the private affairs of the Hamilton-Brown Shoe Company, and I ask that before you allow any such inquiry to proceed under these circumstances, that you will give me an opportunity to present the matter to the court, with a view of protecting what I conceive to be the private, valuable, personal rights of the Hamilton-Brown Shoe Company.

Mr. JOHNSON: I do not think your Honor ought to be much in doubt.

I am not as familiar with equity practice as is Mr. Bakewell, but it seems to me that in all these lines of inquiry some method must be presented, stating what we expect to prove and getting into this record what the evidence is.

My reading with reference to these equity hearings is that we should get into the record what the evidence is.

Any statement will satisfy us, as to what this production is, whether it is large or small.

We have already in the record the amount of the production of all their shoes during the year 1910.

I called your attention to that this morning and I asked you whether you wanted to have that and you said, yes——

Mr. BAKEWELL: You say a good many things about what you said to me yesterday, that I don't recall.

Mr. JOHNSON: I did not say yesterday; I said this morning. I called your attention this morning to the fact that you had a statement for 1910 for all your shoes and I asked you if you wanted it.

516 If you do not remember, I am sorry for your memory.

But be that as it may, it is in this record, but not the number of "American Lady" shoes. We have to get the number of "American Lady" shoes for the balance of the period. It won't take any time at all.

Mr. BAKEWELL: I stand on my objection.

Mr. JOHNSON: We insist on our question.

Mr. BAKEWELL: I ask that before the Master permit this inquiry that I may be allowed to proceed to the Court.

The MASTER: I am perfectly clear in my mind that the question is incompetent.

I am also perfectly clear in my mind that the testimony must be taken in order that the court above may have an opportunity of knowing upon what I base my ruling.

But at the same time, if the counsel states that he desires to ask the court to direct me as to my duty in having this testimony entered in the record, I will give the counsel an opportunity of so doing, but I cannot make an application to the court myself. I think it would be improper for me to do it.

I think I know my duty and I am perfectly satisfied with my ruling. Therefore I cannot ask the court to instruct me in the matter.

If counsel will state when and how soon he can make the appli-

cation to the court, I will lay the hearing over to give him an opportunity to do so.

Mr. HART: May I suggest that the counsel have not asked for the testimony over the Master's ruling? The Master has sustained the objection and they have not asked to go——

Mr. BAKEWELL: I wish to say now that I would ask to have the matter laid over so I may present this matter to the court on next Tuesday morning.

Mr. WERNER: We will not ask for it over the Master's ruling.

Mr. JOHNSON: I think we will have this record show that we except to the Master's ruling and now offer to show that the sale of "American Lady" shoes——

Mr. BAKEWELL: I would never have made the stipulation if I supposed this matter was coming up.

Mr. JOHNSON: —for the year 1910, subsequent to March 9, as stated in the stipulation—that the percentage of sale of "American Lady" shoes by the respondent for that year was the same as
517 during the preceding year of 1909; and the percentage of profit, both factory and jobbing and of overhead expenses, was the same.

We have excepted to the ruling and state we offer to prove that.

Mr. BAKEWELL: I object to the statement of counsel. So far as I am concerned I can only say that I agreed to the stipulation which was referred to in the early part of this testimony, upon the theory that there would be no inquiry in regard to "American Lady" shoes sold by the Hamilton-Brown Shoe Company, marked on the soles thereof with the name "Hamilton-Brown Shoe Company" and the word "Makers." This was in harmony with the course of this case as taken up to this morning's session.

I simply take the position that the complainant's counsel must state in the record whether or not they insist upon pursuing this inquiry. If they do, the Master having given me permission to make application to the court, I shall do so, with the Master's authority, on Tuesday morning, to have the court rule upon the question of whether or not under the Master's warrant (the interlocutory decree in this case), and in view of the former rulings of the Master on this record, this line of inquiry in regard to shoes such as were produced at the session this morning by Mr. Johnston, can be inquired into.

Mr. WERNER: The complainant's counsel is aware that the hearing has proceeded thus far in conformity with the rulings of the Master and the opinion expressed this morning.

The purpose of the line of inquiry was simply to save the question as to whether that method of marking was in compliance with the decree, and we are willing to stand on the exception as it now appears in the record, and drop further inquiry.

The MASTER: The objection will be sustained.

To which ruling the complainants, by counsel, then and there, at the time, duly excepted.

Mr. WERNER: That is all with Mr. Johnston, I believe.

(No cross-examination.)

WILLIAM CLARKSON CLINTON, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the complainant as follows:

518 Direct examination.

By Mr. WERNER:

994*a* Q. State your full name, please.
A. William Clarkson Clinton.
995*a* Q. You reside in this city?
A. Yes, sir.
996*a* Q. And you have lived here for some years?
A. All my life.
997*a* Q. You are connected with the defendant, the Hamilton-Brown Shoe Company?
A. Yes, sir.
998*a* Q. For how long have you been connected with them?
A. About twenty-one years; I couldn't say positively.
999*a* Q. What has been your special connection, say during the last five years?
A. Assistant buyer.
1000*a* Q. What do your duties as assistant buyer include?
A. Includes ordering of the goods.
1*c* Q. That is, shoes jobbed which are not manufactured by the defendant? Is that what you mean by that?
A. I don't know as I could answer that just the way you would want me to. We change very often, you know. Five or six years ago I may have just been ordering eastern shoes, certain factory shoes. Now I am ordering them all.
2*c* Q. But I mean, you refer to shoes manufactured by others than the defendant; manufactured by eastern manufacturers or others? That is all the goods you buy and job?
A. We buy from our own factory just the same. We order everything just the same as we would from an eastern concern.
3*c* Q. But you are buyer of the goods from foreign manufacturers?
A. Yes, sir.

Mr. BAKEWELL: What has the buying from foreign manufacturers to do with any issue in this case?
Mr. WERNER: We will see.
Mr. BAKEWELL: Allow me to finish.
The only inquiry you are permitted to go into under this decree is as to the number of "American Lady" shoes sold by the complainant—or, rather, the defendant—since the filing of the bill in this case, and marked in a particular manner.
Because the complainant has this decree they are not entitled to inquire into the question as to whether or not the Hamilton-Brown Shoe Company buys shoes from other manufacturers. That is entirely outside of this inquiry.
It already appears from the record in this case in the testimony

taken before you by witnesses produced on behalf of the
519 complainant, that all the "American Lady" shoes they are entitled to inquire into here have been accounted for, and that all of those shoes were made by the Hamilton-Brown Shoe Company and emenate from the factory of the Hamilton-Brown Shoe Company.

Now this is an utterly impertinent inquiry, I respectfully submit, whether or not other shoes that emenate from the Hamilton-Brown Shoe Company are manufactured by the Hamilton-Brown Shoe Company or manufactured by others and purchased by the Hamilton-Brown Shoe Company.

Therefore, I respectfully submit that this inquiry is utterly irrelevant and immaterial and without the scope of your power in this case.

Mr. WERNER: At present I am only fixing the status of this witness. The purpose of the inquiry will develop.

Mr. BAKEWELL: It also appears by the stipulation already entered into, dated June 4, 1910, at the first page of the statement:

"That the defendant, among other factories, owns a factory building located at 21st and Locust Streets, St. Louis, Missouri, known as the American Lady Factory, at which factory, during said period, it manufactured all the shoes marked with the name "American Lady" which it has sold during said period".

I respectfully submit that this inquiry is utterly without the scope of this accounting and only another evidence of the attempt to go into impertinent matters.

(Previous question read.)

A. In a certain way, I was.

The MASTER: I do not see what relevancy there can be in the question as to the buying of shoes from foreign manufacturers, unless it is cumulative of the testimony already in the case where proof was taken with regard to shoe- jobbed by the Hamilton-Brown Shoe Company, which were made by other manufacturers than themselves, and which testimony shows that shoes so bought from other manufacturers and sold by the Hamilton-Brown Shoe Company, were stamped upon the sole in the same manner as the shoes which were actually made by the Hamilton-Brown Shoe Company.

If this examination is for the purpose of establishing further that fact, if it be the fact, or for the purpose of showing that there
520 were shoes bought from other manufacturers, which were stamped with the words "American Lady", it would be pertinent. Otherwise, I do not see that it is.

Mr. WERNER: I will say that the object is neither of those stated. We understand it is conceded on the record that the shoes bought from foreign manufacturers are stamped with the trademark.

The object will be indicated, if your Honor will allow me to go on, by one or two questions.

Mr BAKEWELL: May I ask what you said was conceded on the record?

Mr. WERNER: That the shoes manufactured by foreign manufac-

turers bear the belt trade-mark of the Hamilton-Brown Shoe Company.

Mr. BAKEWELL: I never conceded anything of the kind.

Mr. WERNER: It appears on the record. If it were not conceded, it would be competent to show that.

Mr. HART: Where the Master states he is unable to see the relevancy, and counsel indicate they will show the relevancy as they progress, they ought to indicate to the Master what the testimony will show, so the Master can determine whether or not the testimony will be relevant and whether or not counsel are going to be able to fulfill their promise to the Master in that regard.

Mr. WERNER: It is a very frequent occurrence for reputable counsel, who say they will show the connection, to be indulged and allowed to make some inquiries of the witness.

The MASTER: The witness has already answered this question, and I do not see the relevancy of either the question or the answer, but if the counsel assures me that in his further examination he will show what its relevancy will be, I will allow him to do so, although I think the proper way to do would be for counsel to state how he expects to make that relevant and what is the purport of the inquiry.

Mr. WERNER: I think that will develop within a question or two.

4*c* Q. I will show you a shoe known as the "Minden" shoe and ask you whether that is a foreign make, or your own manufacture? It appears in your Shoelight catalogue, No. 4, on page 91. That is, the catalogue of the Hamilton-Brown Shoe Co.

521 Mr. BAKEWELL: I object to this question and to the witness examining these shoes referred to, for the reasons already stated by me.

And furthermore, that it is utterly immaterial in trade-mark law, whether the concern dealing in shoes and fathering the shoes it sells, manufactures the shoes themselves or buys the shoes from some other concern that manufactures such shoes for it.

The question in these cases of unlawful and unfair competition (and this, in accordance with the decision of the Court of Appeals in this case, is, if anything, only a case of unfair competition), is whether or not the shoes of the defendant have been sold as and for the shoes of the complainant.

Therefore, when the name of the defendant appears on the shoes, or in association with the shoes, whether the defendant has actually manufactured the shoes or not is utterly immaterial; the name of the defendant on the shoes tends to establish the essential point, to-wit: that the shoes emanate from the defendant and do not emanate from the complainant and that the defendant is responsible for the character and the quality of the shoe.

Consequently, this inquiry is utterly irrelevant and immaterial and also irrelevant and immaterial because it appears from the shoes themselves that they are inquiring about and which they propose to hand to the witness, that they are not shoes within the

compass of this inquiry, since they are not shoes marked with the name "American Lady", but other and distinct shoes marked with another name, to-wit, the name "Minden".

Nothing, I submit, could be more utterly irrelevant and immaterial to this inquiry on this accounting, in this alleged "good will" case, than this question as put to the witness by the complainant's counsel.

Mr. WERNER: We admit the relevancy does not appear as yet.

(Previous question read.)

The MASTER: I think the objection is well taken, but the witness may answer that question subject to the objection.

It is a preliminary question and the answer may be very nearly, yes or no.

Mr. BAKEWELL: We take exception to that.

522 A. (After examining shoe). It is a foreign make.

Mr. WERNER:

5c Q. I will ask you whether your foreign make shoes are packed by the manufacturer and shipped to you in cartons?

Mr. BAKEWELL: That is objected to for the reason stated in the last objection, and also as irrelevant and immaterial, because it is immaterial whether the concern from whom the Hamilton-Brown Shoe Company buys these shoes sells these shoes to Hamilton-Brown Shoe Company in cartons or not; especially when that inquiry has relation to shoes that we are not accounting for and do not have to account for in this action.

The MASTER: The objection is sustained, but the question is still preliminary and subject to the answer of yes or no.

The witness may answer subject to the objection.

(Previous question read.)

A. Yes, sir.

Mr. WERNER:

6c Q. Examine the carton which I hand you, marked "Minden" —which I will have marked as an exhibit—and a description of which I will read into the record, and state whether that is the character of carton used by the shipper of the foreign shoe mentioned, and of other shoes?

Mr. BAKEWELL: I object——

The MASTER: Wait a moment, Mr. Bakewell.

It seems to me that the logical sequence of this would be to have the counsel read this into the record in such a way that it may all come together, and then you can make your objection; that will make one objection instead of two or three.

Mr. WERNER: The carton bears an end label with the word "Minden" in prominent letters in the center.

Following that is the stock number, 8139.

"Kind, Pat. Tip Blucher, Imitation Welt."

Underneath those words are the words "Last, Imperial Size".

In the upper righthand corner of this end label appears the number "2603" in small figures, and the belt trade-mark with the words "Hamilton-Brown Shoe Company" in the belt, and inside the belt, on a red background, the word "Makers" in white letters.

Underneath the belt appear the words "Keep the quality up" similar to——

523 Mr. BAKEWELL: I object to counsel stating a conclusion. You can use that in your argument.

The MASTER: Have you put a description of the shoe into the record as you wish it to be, or only about the carton?

Mr. WERNER: Only the carton.

Mr. BAKEWELL: Counsel for the defendant objects to this question for the following reasons:

For all the reasons stated in the prior objection and for the following additional reasons:

It is utterly immaterial to any issue in this case whether the Hamilton-Brown Shoe Company has its shoes made at a factory which it completely owns and by agents which it employes, or has certain of its shoes made, if such be the fact, like the "Minden" shoe, by some other agents, either at a distance or in the same city.

It might well be contended, if that were an issue in this case, that the Hamilton-Brown Shoe Company is no less the maker of a particular shoe it fathers and sells under its own name because the concern that makes the shoe is an independent corporation from the Hamilton-Brown Shoe Company or an independent factory, it being immaterial whether the agents, in the one case, or the manufacturer, are directly or indirectly employed by the Hamilton-Brown Shoe Company.

But, to show the absurdity of this inquiry and how utterly irrelevant and immaterial it may be to any issue in this case, suppose we were to concede, for the purpose of this case, that these shoes marked "Minden" are purchased by the Hamilton-Brown Shoe Company and not actually made by the Hamilton-Brown Shoe Company in a factory actually owned by the Hamilton-Brown Shoe Company:

Let us go further and suppose we are to concede, for the purpose of this case, that by selling shoes in cartons marked with the name "Minden" (said shoes being also marked with the name "Minden"), and having on the end of the carton a statement to the effect that the Hamilton-Brown Shoe Company made the shoes, in doing this the Hamilton-Brown Shoe Company had to a certain extent, as to those "Minden" shoes, been guilty of deceit, fraud or misrepresentation—granting all this, I respectfully submit, for the sake of argument, how would that be any more material or relevant to the inquiry in this case than if the President of the Hamilton-Brown Shoe Company had murdered his mother-in-law?

524 It is not within your province as a Master to punish this defendant for its sins.

You are here to take an account only of what it may be obliged to pay the complainant, if anything (I say it will never have to pay

the complainant a penny), in respect to the shoes which have to be accounted for under the terms of this decree.

Therefore, from any point of view, I respectfully submit that this inquiry is utterly irrelevant and impertinent and should not be permitted to continue.

Mr. WERNER: In reply I desire simply to state the object in offering this exhibit in proof, is to show that the use of the word "Makers"—at least as applied to the cartons—is simply to indicate that the Hamilton-Brown Shoe Company are shoe makers; that the word "Makers" is used in that sense.

The MASTER: That is a matter of argument only.

Mr. WERNER: Yes, but it is relevant to show the use they make of it, as showing the interpretation to be placed upon it.

Mr. BAKEWELL: May I make a suggestion before you rule on that? That inquiry cannot be pertinent even on the gentleman's theory, so far as the shoes to be inquired about in this inquiry are concerned, because out of the mouths of the witnesses they have produced here it has been proved as a matter of fact that as to the "American Lady" shoes sold and accounted for, they were actually made and accounted for by the Hamilton-Brown Shoe Company, and it is so provided, not only in the stipulation of June 4, 1910, but by the stipulation which we have made today.

Mr. JOHNSON: The word "Makers" has another meaning as these people use it—and we do not say they do not use it honestly; the presumption is they do use it honestly—with reference to shoes of their own make and other makes; the inde-rminate use of it—it cannot mean "Makers" in one instance and not mean "Makers" in another instance. It means what their conduct——

Mr. BAKEWELL: For the purpose of this case, it is sufficient if it means what it appears to mean even in regard to this inquiry that you are now making, to-wit, that the shoes as sold by the Hamilton-Brown Shoe Company, emanate from the Hamilton-Brown Shoe Company, which concern fathers those shoes, and do not emanate from the complainant in this case.

525 The MASTER: We will get back to the question, which calls for an answer, yes or no.

I think it is wholly irrelevant and the objection is sustained, but the witness may answer yes or no.

To which ruling of the Master the complainant, by its counsel, then and there, at the time, duly excepted.

A. I cannot say that it is that way today. I haven't examined any cartons from the east for quite a while. I couldn't answer positively that that is exactly the way they come now or not.

Mr. WERNER:

7c Q. At one time they did come in packages similar to that which you hold in your hand?

Mr. BAKEWELL: I object to the use of the words "at one time" because that is very indefinite. It may relate to a period of time prior to the filing of the bill in this case, which concededly would be outside of the scope of this inquiry.

Mr. WERNER:

8c Q. I am inquiring as to whether you recognize that as a package that came from the eastern manufacturer?

Mr. BAKEWELL: I understood you to say in your question——

The MASTER: The objection is sustained.

To which ruling of the Master, counsel for the complainant, then and there, at the time, duly excepted.

Mr. HART: I submit that the Master has no right to take testimony, relevant or otherwise, with reference to other periods than the period of this inquiry.

The MASTER: That is very true, if you choose to make the objection so technical as that. The objection will be sustained as to the question in that form.

To which ruling of the Master the complainant duly excepted.

Mr. WERNER: Will you note our exception and allow him to answer it?

The MASTER: No, not in this case, because the question is not limited to the period under inquiry.

526 Mr. WERNER:

10c Q. I will limit it and ask you, whether subsequent to January 29, 1906, the "Minden" shoe came in a carton like that—at any time during that period?

A. I don't know as I could answer that. I don't know whether this carton ever came from the east or not.

11c Q. Is the "Minden" shoe manufactured in the east?

A. Yes sir.

12c Q. Those shoes were packed in cartons and shipped here from the east in cartons; not repacked here?

A. Unless the cartons may have been broken or smashed; then we may have packed them in cartons made and labeled here.

13c Q. But the shoe is packed in the east in a carton? Your foreign shoes are brought here in cartons?

The question is, whether those cartons at any time subsequent to January 29, 1906, at any time, were labeled as the carton which you hold in your hand?

A. 1906?

14c Q. Yes.

A. That is too far back for me to remember.

15c Q. Referring to your Shoelight catalogue No. 4, marked "Complainant's Exhibit 6" and Shoelight Catalogue No. 5, marked "Complainant's Exhibit 7"; can you refresh your recollection?

Mr. JOHNSON:

16c Q. Any time since January 1906?

Mr. HART: I think it appears from the testimony of the witness that he is unable to state that that character of carton came from the east at all.

A. 1906 is a long time back for a man to state.

Mr. WERNER:

17*c* Q. You have been familiar with the "Minden" shoe and have been purchasing it for the last five years, have you not?

A. Yes, sir.

18*c* Q. And they come to you in cartons?

A. Yes, sir.

19*c* Q. You are thoroughly familiar with that: I will ask you whether that carton is one of the cartons that come shipped to you?

A. It looks very similar to the carton——

20*c* Q. The carton that comes to you?

A. Yes, sir.

21*c* Q. And you so identify it to the best of your ability?

A. Yes, sir. I couldn't say positively from 1906, very well.

22*c* Q. Of course, when you sell them they go out in the carton in which you receive them? You do not repack them here?

A. In some cases——

23*c* Q. In isolated cases where the cartons are broken you said; otherwise they are shipped out and sold in the same cartons
527 in which you received them from the manufacturer; that is the course of business? Is that right?

A. Yes, sir.

Mr. BAKEWELL: Are you testifying, Mr. Werner?

Mr. WERNER: I will ask Mr. Denison, the Master, to mark this carton.

Mr. HART: Do I understand it is being offered in evidence or simply identified?

Mr. WERNER: We now offer the "Minden" shoes and the "Minden" carton.

Thereupon the carton last referred to is marked by the Master, "Complainant's Exhibit 500, Henry H. Denison, Master, 1/11/11"; and the shoes last referred to are also marked by the Master, "Complainant's Exhibit 501, Henry H. Denison, Master, 1/11/11".

Mr. BAKEWELL: We object to the shoes and the cartons for the reasons already stated in our objections to the questions relating to them, as utterly irrelevant and immaterial to this inquiry and entirely outside of the scope of this accounting.

The MASTER: The objection is sustained.

To which ruling of the Master the complainant, by its counsel, then and there, at the time, duly excepted.

Mr. WERNER:

24*c* Q. Mr. Clinton, I will show you a pair of ladies shoes stamped on the bottom "Hamilton-Brown Shoe Company" on each sole thereof, in the belt trade-mark. Within the circle made by the belt appear the words "Own Make".

Is that shoe manufactured by the Hamilton-Brown Shoe Company or is it a foreign make?

Mr. BAKEWELL: In order to save time on the record, I will ask the Master if I may consider that the objections heretofore made to the several questions put to this witness in regard to the "Minden"

shoe, may be applied with the same force and effect to this pair of shoes inquired about, without the necessity of repeating those objections?

The MASTER: I think that is the proper thing to do.

Mr. BAKEWELL: With that understanding and adhering to all of those objections, which I believe are fresh in the memory of the Master, I object to these shoes as irrelevant and immaterial and ask for a ruling.

528 The MASTER: The same objections as before made in regard to the "Minden" shoe?

Mr. BAKEWELL: Yes, sir.

The MASTER: The objection is sustained.

To which ruling of the Master the complainant, by its counsel, then and there, at the time, duly excepted.

Mr. JOHNSON: We will note our exception in regard to each and every ruling reparately.

Mr. BAKEWELL: I want to note another objection.

I also specifically object to those shoes for another and distinct ground, unless it be shown that those shoes are shoes made or sold by the Hamilton-Brown Shoe Company since the date of the decree in this case, to-wit, since January 29, 1906.

Mr. WERNER: I think that is material, because the object is to show that they do use the marking "Own Make" in connection with certain shoes and not "Makers", as throwing light on the proper interpretation to put on the word "Makers".

The MASTER: It seems to me that that is all a matter of argument and I have sustained the objection to the question, but it calls for an answer of yes or no, as I understand it.

Mr. WERNER: I can put it in that form.

(Previous question read.)

The MASTER: He may answer that question, whether that is a foreign make or or made in the factory here.

Mr. WERNER:

25*c* Q. I think that shoe is called the "Iowa" in the catalogue.

A. (After examining shoe.) We made this.

Mr. HART: We object to any further questions in regard to it unless the witness is positively able to identify that shoe as a product of the Hamilton-Brown Shoe Company.

Mr. WERNER: I am asking that.

A. I say, to the best of my knowledge. I am not positive; I would not atempt to be positive.

26*c* Q. What is your best knowledge?

A. There is no telling how long that shoe has been made, you know.

529 Mr. WERNER: I offer these shoes in evidence.

Mr. BAKEWELL: That is objected to as utterly irrelevant and immaterial to any inquiry in this case, for the reasons which I

have objected of record to the questions in regard to the "Minden" shoe.

The MASTER: The objection will be sustained.

To which ruling of the Master, the Complainant, by its counsel, then and there, at the time, duly excepted.

Mr. WERNER: I ask that these shoes be marked "Complainant's Exhibit 502, Own Make, 1/11/11"; whereupon the shoes are marked accordingly, by the Master.

Mr. BAKEWELL: I ask that those shoes be excluded, your Honor, because it does not appear from the testimony of this witness, with any certainty, that the Hamilton-Brown Shoe Company ever made those shoes, or that they were made or sold by the Hamilton-Brown Shoe Company since the date of the filing of this bill.

If the shoes were otherwise relevant or material, they could not be presented in this case unless they were shoes sold by the Hamilton-Brown Shoe Company since the filing of the bill.

The MASTER: I think my sustaining the objection of defendant's counsel to this testimony is a sufficient indication that these shoes are wholly irrelevant to this inquiry, and I so rule. But I think the counsel is entitled to have them marked if he has any reason to suppose that he can introduce them in evidence and make such use of them as he thinks may be proper in the court.

The shoes will be marked as requested by counsel, but the objection to their introduction is sustained.

Mr. JOHNSON: We except to the ruling of the Master.

Mr. WERNER: I have only one other pair on the same line as the "Minden":

27*c* Q. Will you look at the shoe marked "Quaker" and state whether that is of your make or foreign make?

Mr. BAKEWELL: Counsel for the defendant objects to this inquiry for the reason that it does not appear that the inquiry is limited to the time since the filing of the bill; because the inquiry relating to these shoes—which do not profess or pretend to be "American Lady" shoes—no matter how they may be marked or tagged, is utterly irrelevant and immaterial to any inquiry in this accounting.

530 Without repeating in detail my former objections to the questions put to this witness in relation to the "Minden" shoe, I ask that those objections in full stand on the record as applied to this inquiry.

The MASTER: The objection is sustained and the witness may answer the question subject to the objection.

To which ruling of the Master, the complainant, by its counsel, then and there, at the time, duly excepted.

Mr. BAKEWELL: I do not understand that when the objection is sustained the witness may answer the question.

The MASTER: I do.

(Previous question read.)

A. I don't know; I can't answer that question. It is impossible for me to answer it.

Mr. WERNER:

28*c* Q. Has the Hamilton-Brown Shoe Company manufactured any shoes marked "Quaker", since 1906.

Mr. BAKEWELL: The same objection is made as that heretofore made.

The MASTER: The same ruling will be made.

To which ruling of the Master the complainant, by its counsel, then and there, at the time, duly excepted.

A. Have we made them?

Mr. WERNER:

29*c* Q. Yes; shoes marked "Quaker"?

A. Yes, sir.

30*c* Q. Before you manufactured the shoes styled "Quaker" did you purchase the shoe styled "Quaker" from a foreign manufacturer?

Mr. BAKEWELL: That is objected to as irrelevant and immaterial, both the inquiry as to the time and in other respects.

The MASTER: Objection sustained.

To which ruling of the Master, the complainant by its counsel, then and there, at the time, duly excepted.

Mr. BAKEWELL: Do I understand you to say, Mr. Denison, when I object to their inquiring in regard to shoes made or sold—and by the way, the inquiry in this accounting is limited to shoes sold——

531 The MASTER: Entirely.

Mr. BAKEWELL: —at a time which I may state antedate the date of the decree in this case, that they are, nevertheless, entitled to an answer to that question?

(Here ensued colloquy on that subject).

Mr. WERNER:

31*c* Q. I will ask you this: since January, 1906, and before you commenced to manufacture the "Quaker" shoes, did you buy the "Quaker" shoes from a foreign manufacturer?

Mr. HAKT: If you remember.

A. I don't know that we did. I think the "Quaker" shoe was made in our "Sunlight Factory" all the time. That is the best I know.

M. WERNER: We will not offer the "Quaker" shoe in evidence. That is all we care to ask Mr. Clinton.

(No cross-examination).

Mr. BAKEWELL: Have you any more testimony to take?

Mr. JOHNSON: Not right at present.

Mr. BAKEWELL: It is stipulated and agreed that the stipulation

referred to by Mr. Werner at the opening of the session this morning (a copy of which is now in the hands of Mr. Denison, the Master, not yet signed), in the form in which it is in the hands of Mr. Denison, will be at once signed, and is considered signed by the counsel for the complainant and counsel for the defendant, with this understanding, however:

That both counsel for the complainant and counsel for the defendant reserve any and all objections that may be made to anything contained in said stipulation on the ground that it is either irrelevant or immaterial.

Defendant's counsel states that in view of this stipulation being made, we waive the cross-examination of the witness, McElroy, but reserve for the present the right to cross-examine the witness, Johnson.

At this point recess was taken until 2:30 o'clock P. M., on Wednesday, January 11, 1911.

ST. LOUIS, Jan'y 11, 1911.

Met after recess on Wednesday, January 11, 1911, at 2:30 o'clock P. M.

532 Present: Same parties as at the morning session.

The following proceedings were had:

(Stipulation as to Certain Items in the Kribben Report, etc.)

It is stipulated between counsel for complainant and counsel for defendant in this case, subject to the objection of either party as to its competency, relevancy and materiality to any issue in this case, as follows:

That the item of $73,772.03 designated as "Advance to Boston House" under the heading "1908-9" of Exhibit 1 of the Kribben report; and the item designated as "Allowances to Boston, $103,075.14" under the heading "1909-10" on page five of the formal written stipulation of this date, represent allowances made by the wholesale house of Hamilton-Brown Shoe Company on goods shipped by it to what is known as the "Boston House", being a separate and distinct corporation from the defendant Company, and the amount received by the Hamilton-Brown Shoe Company from the "Boston House" for goods shipped to it was $73,772.03 and $103,075.14 less than the price at which the goods were billed to that house, and those items do not represent moneys paid by the Hamilton-Brown Shoe Company to the "Boston House" or advances by the Hamilton-Brown Shoe Company to the "Boston House."

(Complainant's Offer to Introduce Evidence as to Amounts Paid as Dividends During Certain Periods by Hamilton-Brown Shoe Co., and Exception to Master's Ruling.)

MR. JOHNSON: We desire in connection with the matter of interest contained in the several stipulations, on capitalization, to offer

evidence as to the fact of the amount declared and paid as dividends during the respective periods covered by the stipulations, and also as to the amount carried as surplus by the respondent during the same periods as covered by the stipulations.

Mr. BAKEWELL: In other words, Mr. Johnson, I understand you want to inquire in regard to the dividends paid by the Hamilton-Brown Shoe Company on its capitalization of all its business, paid and distributed among its stockholders.

That being so, counsel for the defendant objects to the same upon the following grounds:

Dividends paid to the stockholders of this corporation are the profits on its entire general business—on its whole business.

533 Under his construction of the decree in this case, the Master has allowed the complainant to inquire as to, and there has been produced here in evidence in the shape of testimony and exhibits, or by stipulation, an exact account of the profits made by the defendant corporation on all its "American Lady" shoes sold since the filing of the bill, up to and including March 9, 1910; on all shoes sold by the Hamilton Brown Shoe Company during said period, marked with the name "American Lady" and sold in cartons bearing prominently thereon the name "Hamilton-Brown Shoe Company" and the name "American Lady", and on the end of said cartons the strap trade-mark of the Hamilton-Brown Shoe company, bearing thereon the name "Hamilton-Brown Shoe Company, Makers", but which shoes did not bear on the soles of each shoe the name "Hamilton-Brown Shoe Company, Makers."

We have already objected to that testimony for grounds which appear on the record, and we insist upon and stand upon that objection; but we respectfully submit, that upon no possible lawful theory, consistent with the terms of the decree in this case, can the Master or the Complainant's counsel inquire on this accounting in respect to the said dividends, because they represent profits on the whole or entire business of the Hamilton-Brown Shoe Company during the period above referred to, and therefore include profits other than the profits made by the Hamilton-Brown Shoe Company in the manufacture and sale of its "American Lady" shoes.

By the testimony already taken in this case and by the stipulations of record and filed with the Master, the profits made by the Hamilton-Brown Shoe Company on its "American Lady" shoes, covered by the range of inquiry already permitted by the Master over our objections of record, have been separated from the general profits of the Hamilton-Brown Shoe Company, and are at most, on any theory, all that can possibly be inquired into under the terms of this decree.

The warrant for the Master's inquiry is found in the decree and nowhere else.

Therefore, for the reasons above stated, we respectfully submit that this inquiry in regard to the general profits of the Hamilton-Brown Shoe Company cannot be gone into, as the same is without the scope of the power of the Master under the warrant of this decree and is, therefore, utterly irrelevant, incompetent and immaterial, to any issue before the Master on this accounting.

We ask a ruling on this by the Master and that any such inquiry be excluded.

534 This offer and objection is made of record upon the theory that if the Master rules that the inquiry is proper, there is a witness here present who can answer the inquiry.

The MASTER: If I correctly understand the offer made by the counsel, it seems to me that the stipulations having shown the amount of the profits which have been made upon the sale of the "American Lady" shoe during the period in controversy, that it is wholly immaterial whether that amount, or any portion of it had been distributed in dividends to the stockholders.

I am not able to see how that could be competent or relevant on this examination.

From my view of the matter, I cannot see how it would either increase or diminish the profits, as shown by the stipulation which is in the record, and unless the offer tends to do one or the other, it seems to me to be wholly irrelevant and I sustain the objection of counsel for the defendant to the offer.

Mr. JOHNSON: We note an exception.

May we say we offer James J. Wolf?

Mr. HART: Mr. Johnson stated that if the Master sustained the objection he would simply tender the proof now and let the Master sustain the objection.

The MASTER: If counsel for defendant can furnish the items subject to the objections made of record by counsel for defendant, which he insists upon and adheres to, and the ruling of the Master supporting the objection of defendant's counsel, he may do so.

Mr. HART: Defendant's counsel gives on the record the following data in regard to the dividends declared and paid by the Hamilton-Brown Shoe Company during the period since the filing of the bill and during the fiscal years 1906, 1907, 1908 and 1909.

The dividends declared and paid in December 1906, were six per cent on the capital.

In December, 1907, they were four per cent. cash dividend, and forty per cent stock dividend.

In December, 1908, twenty-eight per cent. cash dividend.

In December, 1909, fifteen per cent. cash dividend.

The amount carried to surplus during the respective years was:

December	1906	$500,000
"	1907	Nothing
"	1908	Nothing
"	1909	$300,000

535 Mr. JOHNSON: We respectfully note an exception to the Master's ruling on this specific feature of the case.

Mr. BAKEWELL: Are you ready to announce that you have closed?

Mr. JOHNSON: I do not want to say I have closed, for I may have forgotten something. I have been over this record very carefully and I don't know of anything I have forgotten. I am stating

in good faith to you, that if there is anything else, it will be only a trifle. But I do not want to be foreclosed by some mere trifle.

Mr. BAKEWELL: I would like the Master to adjourn this meeting until some date when counsel for complainant will announce that his case is closed or it is not closed.

Mr. JOHNSON: I cannot announce my case as closed until you send our witnesses back. The whole thing must be predicted upon your bringing back some of our witnesses. If you cross-examine any witnesses we must redirectly examine them.

Mr. BAKEWELL: Defand-nt's counsel states now that if the complainant's counsel will announce his case closed now, there will be no cross-examination of any of the witnesses.

(After further discussion, it was agreed by the parties that counsel for complainant would consult Mr. Maxwell and advise counsel for defendant early next week as to whether or not complainant's case is closed).

Whereupon adjournment was taken until Thursday, January 19, 1911, at 10:30 o'clock in the forenoon.

Stipulation Made Between the Complainant and the Defendant on the Accounting Before Henry H. Denison, Master.

For the purpose of shortening the taking of proofs before the Master, and subject to the terms and conditions herein stated, it is stipulated as follows:

That the Hamilton, Brown Shoe Company, the defendant in this cause, was at all the dates hereinafter mentioned engaged in the manufacture and sale of shoes at St. Louis, Missouri, exclusively at wholesale.

That the said defendant, among other factories, owns a factory building located at 21st and Locust Streets, St. Louis, Missouri, known as the American Lady Factory, at which factory,
536 during said period, it manufactured all the shoes marked with the name American Lady which it has sold during said period, said period covering the time between November 15, 1909, and March 9, 1910;

That at said American Lady Factory the defendant corporation also manufactured shoes other than the shoes marked with the name American Lady;

That the wholesale house or department of the Hamilton, Brown Shoe Company, the defendant herein, during said period and now, is located at 12th Street and Washington Avenue, St. Louis, Missouri;

That the shoes sold by Hamilton, Brown Shoe Company during the said period, which were marked with the name American Lady, were all manufactured at the said American Lady Factory of the Hamilton, Brown Shoe Company and billed by that factory to the said wholesale department of the Hamilton, Brown Shoe Company at 12th Street and Washington Avenue, St. Louis, Missouri;

That every pair of shoes marked with the name American Lady manufactured and sold by Hamilton, Brown Shoe Company between

November 15, 1909, and March 9, 1910, as said shoes were sold and shipped by said Hamilton, Brown Shoe Company, was sold and delivered to its customers in a carton, each of which cartons bore prominently on the lid thereof in white letters on a black background at the head of said lid, the words "Hamilton, Brown Shoe Co.'s" and at the foot of said lid, in equally prominent letters, the name "American Lady," while at the front end of each of said cartons appeared the name "American Lady" and the belt trade mark of the Hamilton, Brown Shoe Company, which belt trade mark consisted of a black strap in the center of which was a red background, the words "Hamilton, Brown Shoe Company" appearing in white letters on the black strap and the word "Makers" appearing in white letters on the red background; said particular way of marking each of said cartons being exemplified by "Defendant's Exhibit, American Lady Shoe Carton, January 31, 1910, Henry H. Denison, Master;"

That attached to the stipulation of June 4, 1910, in this cause, and marked "Exhibit A" is a duplicate of the label and markings thereon appearing on the lid of each carton containing American Lady shoes sold by defendant since the filing of the bill in this cause;

That attached to the stipulation of June 4, 1910, in this cause, and marked "Exhibit B" is a duplicate of the end label appearing on the end of each of said cartons except as to the word
537 "Special" on said label, the word "Special" appearing on the cartons of defendant's American Lady shoes known as Special but not appearing on the cartons of defendant's American Lady shoes which are not known as Special;

That the following schedules are correct; and all the American Lady shoes named in these schedules may be, for the purposes of this accounting, treated as having been sold by the defendant during such respective periods.

1909.

November 15, 1909, to December 10, 1909.

1. During the above named period said American Lady Factory of Hamilton, Brown Shoe Co. made and billed to said wholesale department of Hamilton, Brown Shoe Co. 28,413 pairs of American Lady shoes, at a gross price of $2.10 per pair, making a gross total of	$59,667.30
From the above amount there was deducted an arbitrary store discount of 12½% or	7,458.41
Making the net price on said American Lady shoes for which said American Lady Factory was credited by the wholesale department of	52,208.89
2. During the above named period said American Lady Factory shipped to Hamilton, Brown Shoe Co.'s said store, of all kinds of shoes, including American Lady shoes	124,129.50

3. The total so-called factory profit of said American Lady Factory for the above named period of all shoes made at said American Lady Factory, shipped to the said wholesale department of Hamilton, Brown Shoe Co., and sold by Hamilton, Brown Shoe Co., including American Lady shoes, and without allowing for cost of advertising or selling or interest on capital, was..... 11,274.84

42% of said total factory profit, being the proportion of the product of said factory represented by shoes marked American Lady and made and sold during said period, amounts to..... 4,735.43

1910.

December 10, 1909, to March 9, 1910.

1. During the above named period said American Lady Factory of Hamilton, Brown Shoe Co. made and billed to said wholesale department of Hamilton, Brown Shoe Co. 191,039 pairs of American Lady shoes at a gross price of $2.10 per pair, making a gross total of..... 401,181.90

From the above amount there was deducted an arbitrary store discount of 12% or..... 50,147.74

Making the net price on said American Lady shoes for which said American Lady Factory was credited by the wholesale department of..... 351,034.16

2. During the above named period said American Lady Factory shipped to Hamilton, Brown Shoe
538 Co.'s said store, of all kinds of shoes made, including American Lady shoes..... 475,968.28

3. The total so-called factory profit of said American Lady Factory for the above named period on all shoes made at said American Lady Factory, shipped to said wholesale department of Hamilton, Brown Shoe Co. and sold by Hamilton, Brown Shoe Co., including American Lady shoes, and without allowing for cost of advertising or selling or interest on capital invested, was..... 20,494.71

74% of said total factory profit, being the proportion of the product of said factory represented by shoes marked American Lady and made and sold during said period, amounts to..... 15,166.09

The above schedules and statements therein contained are made with the distinct understanding that none of the same is to be considered in any way as an admission by the defendant that "the total factory profits made" on American Lady shoes, for each of the two periods of time hereinbefore mentioned, actually represents the net profits made by Hamilton Brown Shoe Co. during each of

said periods, on shoes marked with the name American Lady and sold by Hamilton, Brown Shoe Co. during said periods, defendant contending that its actual net profits on said shoes sold during said periods marked with the name American Lady were much less than the so-called "total factory profits" made on American Lady shoes, because the expense of advertising and selling said shoes and the interest on the capital invested has not been deducted in arriving at said so-called "factory profits."

It is also stipulated that during said period (from November 15th, 1909, to March 9th, 1910) every shoe sold by defendant and marked with the name American Lady was also plainly marked on the sole of each shoe with the belt trade mark of Hamilton, Brown Shoe Co. bearing upon said belt trade mark the name Hamilton, Brown Shoe Co. and in the center of said belt trade mark the name American Lady; and as to 17,872 pairs of said shoes sold by Hamilton, Brown Shoe Co. during said period, one shoe of each pair bore on the inside top facing of said shoe the name American Lady associated with said belt trade mark of Hamilton, Brown Shoe Co., on which belt trade mark appeared the name Hamilton, Brown Shoe Co. and the word "Makers" in the center of said belt trade mark, an exact duplicate of said top facing being attached to the stipulation in this cause of June 4, 1910.

It is further stipulated that the report of the witness Kribben, Exhibits 1 and 2, referring to the year 1908-9, is for the full fiscal year to Dec. 10, 1909, and that if the report of the witness Kribben had been extended so as to cover said period from Nov. 15,
539 1909, to March 9, 1910, he would have annexed to said report four schedules in words and figures as follows: the first two of said schedules covering the period from Dec. 10, 1909, to Dec. 10, 1910, so that the Master may assume that one-fourth of the amounts specified in said two schedules represents the proper amounts to be specified therein for the period between Dec. 10, 1909, and March 9, 1910:

EXHIBIT 1-A.

1909–10.

Deductions from Income:

Interest	$162,853.70
Taxes	61,347.50
Insurance	13,270.78
Uncollectible accounts	54,599.81
Depreciation of Fixtures	13,721.21
Depreciation of Real Estate and Buildings	100,000.00
Allowance to Boston	103,075.14
	508,868.14

Selling and General Expenses:

Salaries, Traveling Salesmen	$335,043.19
Expenses, Traveling Salesmen	273,593.73
Salaries, officers, clerks, etc.	207,203.10
Rent	39,100.08
Postage	14,208.58
Stationery and Printing	21,982.38
Premiums to salesmen	11,792.58
Collection charges, etc.	13,008.57
Commercial Agency Subscriptions	7,439.85
Light, Heat and Power	3,859.49
Donations, Contributions, etc.	1,560.18
Supplies, Shipping Department	7,127.43
Transportation and Entertainment of Customers	7,797.72
Suppers Employees overtime	4,343.60
Telephone and Telegraph	2,813.56
Prizes, Salesmen "Over the Mark"	1,800.00
Christmas, Employees	1,918.00
Legal	6,041.99
Repairing, Buildings and Fixtures	3,077.46
Affidavits	278.00
Drayage	9,931.00
Miscellaneous	15,856.99
Total	$989,777.48
Advertising, Salaries	11,469.92
" Other	180,316.23
" Catalogues	14,674.28
Total Advertising	$206,460.43
Total	1,196,237.91

540 EXHIBIT 2-A.

1910.

Percentage of Jobbing Profit:

Allowing Advertising Expense:	
Selling and general expense	$1,196,237.91
Deductions from income	508,868.14
Profit and loss charges	36,132.46
	$1,741,238.51
Additions to income	$148,254.72
Profit and Loss Credits	7,549.52
Total	155,804.24
Selling expense, etc., total	$1,585,434.27
Sales, net	$12,964,877.77

% of sales	12.2287
% of Factory Discount	12.5000
% of jobbing profits	.2713

Percentage After Deducting Advertising:

Total selling expense, etc., as above	1,585,434.27
Less, advertising	206,460.43
Remainder	$1,378,973.84
% of Sales	10.6362
% of Factory discounts	12.5000
% of jobbing profits	1.8638

EXHIBIT 6-A.

November 15, 1909, to December 10, 1909.

Total shipments of American Lady shoes by factory to Jobbing Department	28,413	pairs
Price	$2.10	
Amount	$59,667.30	
12½% Store Discount	7,458.41	
Net price to factory of all American Lady shoes	$52,208.89	
Value of total product of American Lady Factory during above period, less 12½.%	$124,129.50	
% of output of American Lady shoes	42%	
American Lady Factory profits during above period, $11,274.84 x 42% equals profits on American Lady shoes	4,735.43	
Jobbing profit on American Lady shoes excluding advertising, $52,208.89 x 1.7%	$887.55	
Total profit during above period on all American Lady shoes (excluding advertising)	$5,622.98	

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Factory profit as above	4,735.43
Jobbing loss on American Lady Shoes if advertising be included, 0.46% x $52,208.89	240.16
Total profit during above period on American Lady shoes, including cost of advertising	4,495.27

EXHIBIT 6-B.

December 10, 1909, to March 9, 1910.

Total shipments of American Lady shoes by factory to Jobbing Department	208,911	pairs
Deduct 4468 yards band marked "Makers," 4 to yard	17,872	
	191,039	
Price	2.10	
Amount	$401,181.90	
12½% store discount	50,147.74	
Net price to factory of all American Lady shoes	$351,034.16	
Value of total product of American Lady Factory during above period, less 12½%	$475,968.28	
% of output of American Lady shoes	74%	
American Lady Factory profits during above period, 74% x $26,494.71 equals profits on American Lady shoes	$15,166.09	
Jobbing profit on American Lady shoes excluding advertising, 1.86% x $351,034.16	$6,529.24	
Total profits during above period on all American Lady shoes, excluding advertising	$21,695.33	
Factory profit as above	15,166.09	
Jobbing profit on American Lady shoes not marked "Makers" but including advertising, .027% x $351,034.16	947.79	
Total profit on American Lady shoes during above period, including advertising	$16,113.88	

It is further stipulated and agreed that of the amount expended by Hamilton, Brown Shoe Company on account of "advertising" for each year covered by this stipulation, as shown by the report of the witness Kribben and this stipulation, for each of the respective periods shown by the report of the witness Kribben and this stipulation twenty per centum (20%) of said "advertising" had reference exclusively to the American Lady shoes, and twenty per centum (20%) of said "advertising" had reference exclusively to American Gentleman shoes; and that forty per centum (40%) of said "advertising" referred exclusively to the American Lady shoes and the American Gentleman shoes, each of which (American Lady Shoes and American Gentleman shoes) was given equal prominence in said "advertising."

542 And it is further stipulated and agreed that up to November 15, 1909, fifty per centum (50%) of said "advertising" of American Lady shoes, including catalogue advertising, had prom-

inently associated with the name American Lady and with name Hamilton, Brown Shoe Co., St. Louis, U. S. A., the words "With the character of the woman." As illustrations of what is included in the said "advertising," where the words "with the character of the woman" were used prior to November 15, 1909, reference is here made to "Complainant's Exhibit, No. 5, Henry H. Denison, Master," which is a catalogue of Hamilton, Brown Shoe Co. bearing prominently thereon and therein the name Hamilton, Brown Shoe Co., wherein, opposite page 96 thereof, is the picture of Martha Washington, the words "American Lady Shoe" and the words "With the character of the woman," and also the advertisement as shown at page 73 of said catalogue marked "Complainant's Exhibit No. 5, Henry H. Denison, Master"; and also as illustrated in "Complainant's Exhibit No. 6, Henry H. Denison, Master," which is another catalogue of Hamilton, Brown Shoe Company bearing prominently thereon and therein the name Hamilton, Brown Shoe Co., St. Louis, U. S. A., and which catalogue contains, opposite page 96 thereof, the picture of Martha Washington, the words "American Lady Shoe" and the words "With the character of the woman," and also as it may be elsewhere exhibited in the record of this cause, so far as the same may be relevant or material to this accounting.

It is further stipulated and agreed that the defendant, Hamilton, Brown Shoe Company, has, from the 29th day of January, 1906, to December 17, 1907, had invested in its business, over and above borrowed moneys, $2,500,000.00, and thereafter, up to the present time, $3,500,000.00, upon which no allowance for interest is made in the report of the witness Kribben or in the schedules contained therein; and that the proportion of said amount which is and was at all times during the period of this accounting devoted exclusively to the American Lady line of shoes is the proportion which the total amount of American Lady Shoes manufactured during each of the periods of this accounting bore to the total amount of sales of all shoes by the Hamilton, Brown Shoe Company, viz., January 29, 1906, to December 10, 1906, 10.59+% or $264,774.65 of the capital invested by the Hamilton, Brown Shoe Company in its business was devoted exclusively to the American Lady line of shoes; December 10, 1906, to December 12, 1907, 8.775+% or $219,375.59 of the capital invested by the Hamilton, Brown Shoe Company in its business was devoted exclusively to the American Lady line
543 of shoes; December 12, 1907, to December 11, 1908, 10.57+% or $370,009.90 of the capital invested by the Hamilton, Brown Shoe Company in its business was devoted exclusively to the American Lady line of shoes; December 11, 1908, to December 10, 1909, 12.63+% or $443,188.98 of the capital invested by the Hamilton, Brown Shoe Company in its business was devoted exclusively to the American Lady line of shoes; December 10, 1909, to March 9, 1910, 12.05+% or $421,986.47 of the capital invested by the Hamilton, Brown Shoe Company in its business was devoted exclusively to the American Lady line of shoes.

It is further stipulated and agreed that nothing in this stipulation is to be construed as waiving, on defendant's part, any ob-

jection or exception heretofore made on the record on behalf of defendant, and that defendant makes this stipulation subject to the objections made by the defendant and incorporated in said stipulation of June 4, 1910.

As this stipulation is made for the purpose of saving the taking of proofs and of shortening the accounting before the Master, it is stipulated that in the taking of further testimony neither party shall question or dispute anything contained in the schedules set forth in this stipulation or any of the matters stipulated herein.

Executed In Triplicate, and each page hereof initialed by counsel for complainant and counsel for defendant, at St. Louis, Missouri, this 11th day of January, 1911.

LAWRENCE MAXWELL, JR.,
SIMEON M. JOHNSON,
PERCY WERNER,
Solicitors for Complainant.

H. S. PRIEST,
By PAUL BAKEWELL;
PAUL BAKEWELL,
LUKE E. HART,
Solicitors for Defendant.

ST. LOUIS, Jany. 19, 1911.

Met pursuant to adiournment as above on Thursday, January 19, 1911, at 10:30 o'clock in the forenoon.

No proceedings were had and by consent of the parties adjournment was taken until Monday, January 23, 1911, at 10:30 o'clock A. M.

544 ST. LOUIS, Jany. 23, 1911.

Met pursuant to adiournment as above on Monday, January 23, 1911, at 10:30 o'clock A. M.

No proceedings were had and by consent of the parties a further adiournment was taken until Wednesday, February 1, 1911, at 10:30 o'clock in the forenoon.

ST. LOUIS, February 1, 1911.

Met pursuant to adjournment as above, on Wednesday, February 1, 1911, at 10:30 o'clock in the forenoon:

Present:

Mr. Henry H. Denison, Special Master.
Mr. Percy Werner appeared on behalf of the Complainant.
Mr. Luke E. Hart appeared on behalf of the Defendant.

The following proceedings were had:

MR. WERNER: The complainant announces that it is prepared to rest its case in chief. It, however, desires to make the following suggestions:

FIRST: In going over the record we discover certain merely verbal inaccuracies and mistakes, which are self-evident, a copy of which

we will hand to the stenographer in order that she may compare them with her notes. They are rather unimportant details.

Second. We would like to have substituted, or substitute ourselves for the slightly mutilated copy of catalogue known as "Shoelight No. 4", (Complainant's Exhibit No. 6), a perfect or complete copy.

Third. There are some data which were to be supplied by the defendant which might be still necessary to complete the record. We, of course, expect these to be supplied.

Fourth. We ask that a formal exception be noted to each of the rulings of the Master where objections to the testimony offered by complainant were sustained, and where such exceptions may not have been noted at the time (I am not conscious of any such omissions); but with that understanding, complainant announces formally that it has closed its case in chief.

Mr. HART: Defendant's counsel states that he is not willing to leave this matter of supplying anything further to complete the record, for future determination, referring particularly to the third clause of Mr. Werner's statement.

545 Counsel have had ample opportunity to determine whether or not they require anything additional to complete their proofs in chief.

This matter has been laid over twice for the purpose of giving them a chance to call for anything that is not already in the record, and defendant's counsel feels that it is not only fair to the defendant but to the Master that the complainants should definitely announce now that their proofs are closed, although counsel is willing that a perfect copy of "Shoelight No. 4" shall be substituted for the damaged copy which was identified as "Complainant's Exhibit 6".

With that exception, defendant's counsel asks the Master to rule that the complainants close their proofs in chief at this time.

Mr. WERNER: Complainant's counsel state that they believe that the data which they have suggested as possibly missing and necessary to complete the record, have probably been rendered unnecessary by reason of subsequent stipulations, and that is now the counsel's impression and understanding.

It was merely because it was thought possible that there might be some such omitted data necessary to a complete understanding of the record, that the suggestions referred to as contained in paragraph 3, were made.

As to whether or not the record should be kept open longer for supplying such data or should be closed now definitely, we submit to the Master.

The MASTER: I am of the opinion that the record has been kept open long enough since the last taking of testimony to allow of anything of this kind or omission as suggested, to have been pointed out and called for.

I think that the suggestion of the counsel for the complainant that those matters have all been covered, is correct, and the complainant not offering any further testimony at this hearing, I shall consider the complainant's case in chief to be closed.

(Request of Defendant that Complainant Specify What it Relies Upon for a Recovery, etc.)

Mr. HART: Complainants having now closed their proofs in chief, the defendant's counsel asks complainant's counsel to specify what it relies upon for a recovery in this case, and to state whether or not it relies upon profits or damages, or both, for a recovery in this case.

546 Mr. WERNER: I submit that I know of no rule or practice which requires a formal statement of this kind.

I submit to the Master that the record must speak for itself and we are not called upon at this time to make any formal declaration.

Mr. HART: Defendant's counsel states that it is his understanding that the defendant is entitled to such a statement by complainant at the time it closes its proofs in chief, and it asks the Master for a ruling on this request.

The MASTER: The Master is of the opinion that the request is a reasonable one and that the defendant is entitled to a statement before it goes into its proof, as to whether the complainant is relying upon profits alone, or upon damages alone, or upon profits and damages combined, and is of the opinion that complainant should so declare.

Mr. WERNER: Complainant will ask leave to note a formal exception to the ruling of the Master, and also to ask time to communicate with the leading counsel in the case, in Cincinnati, as to the request and your Honor's ruling, so that they may comply with the same.

Whereupon the Master declared an adjournment until Wednesday, February 8, 1911, at 10:30 o'clock in the forenoon.

ST. LOUIS, February 8, 1911.

Met pursuant to adjournment as above, on Wednesday, February 8, 1911, at 10:30 o'clock in the forenoon.

Present:

Mr. Henry H. Denison, Special Master.
Mr. Percy Werner appeared on behalf of the Complainant.
Mr. Luke Hart appeared on behalf of the defendant.

The following proceedings were had:

Mr. WERNER: In reply to the inquiry of defendant's counsel and the suggestion of the Master, complainant's counsel respectfully submit that they stand on the order of reference, which requires the Master to find and report both the damages and profits, and state that while they have no further proofs to offer, they shall expect to ask for both damages and profits so far as the same may be justified by the testimony before the master.

We have no other testimony to offer and our case in chief may be regarded as closed.

547 Mr. HART: Defendant's counsel does not believe that this statement by complainant's counsel meets the request of defendant's counsel made at the last hearing, or the direction of the Master at that hearing that the [complainants] should declare upon the record whether or not they are relying upon profits, or damages, or both, for a recovery in this case.

Defendant's counsel insists upon a declaration by complainant's counsel as to whether or not on the record as made up at this time, complainant will ask for a recovery of profits, or damages, or both.

Defendant's counsel feels that the statement by complainant's counsel that he will rely upon profits and damages insofar as they may be justified by the record, does not inform the defendant as to whether or not on this record the complainant will claim both damages and profits.

Defendant's counsel feels that it is entitled to a declaration by the complainant's counsel as to whether or not the complainant takes the position that upon the record as made up, it is entitled to both damages and profits, or to only damages, or profits, and for that reason it feels that the statement made by complainant's counsel is not sufficient, and does not meet with the request made at the last session, or with the direction of the Master that they should make such a declaration upon the record.

Mr. WERNER: I submit that the declaration just made by Complainant's counsel fully answers the inquiry of counsel and the suggestion of the Master. That the order of reference requires the Master to find both the damages and the profits, and complainant claims both under the record as made up.

At this point adjournment was taken until Thursday, February 16, 1911, at 10:30 o'clock A. M.

ST. LOUIS, Thursday, February 16, 1911.

Met pursuant to adjournment as above on Monday, March 6, 16, 1911, at 10:30 o'clock in the forenoon.

No proceedings were had and by consent of the parties adjournment was taken until Monday, March 6, 1911, at 10:30 A. M.

ST. LOUIS, Monday, March 6, 1911.

Met pursuant to adjournment at above on Monday, March 6, 1911, at 10:30 o'clock in the forenoon.

548 No proceedings were had and by consent of the parties a further adjournment was taken until Tuesday, March 7, 1911, at 10:30 o'clock in the forenoon.

(*Testimony for Defendant.*)

ST. LOUIS, March 7, 1911.

Met pursuant to adjournment as above, on Tuesday, March 7, 1911, at 10:30 o'clock in the forenoon.

Present:

Mr. Henry H. Denison, Special Master.

Messrs. Percy Werner and Simeon M. Johnson, appeared in behalf of the Complainant.

Messrs. Paul Bakewell, Hon. H. S. Priest and Luke E. Hart, appeared in behalf of Defendant.

The following proceedings were had:

Mr. Bakewell states that as complainants have announced their proofs in chief closed before the Master, the defendant now proceeds to take the following proof:

Mr. BAKEWELL: In order to make the record definite in one respect, defendant's counsel calls attention to the fact, as appears from page 535 of the typewritten record before the Master, when the shoes marked "Complainant's Exhibit 499" were offered in evidence in connection with the testimony of the witness, Johnston, that each of said shoes bears on the sole of the same the belt trade-mark of the Hamilton-Brown Shoe Company, bearing the name "Hamilton-Brown Shoe Company" and the words "Makers" in the center; the right shoe of said pair bearing on the top facing the name "American Lady" and the belt trade-mark of the Hamilton-Brown Shoe Company, upon which belt trade-mark appears the name "Hamilton-Brown Shoe Company" and the word "Makers".

The carton in which said shoes were presented at the time and in which the shoes were packed, was not formally offered in evidence by complainant's counsel.

Therefore, defendant's counsel here offers in evidence the said carton containing said pair of shoes, the said carton and the said pair of shoes having been identified by the witness, Johnston, and asks that the Master mark the carton "Defendant's Exhibit 498".

The lid of this carton, as already appears from pages 533 and 534 of the typewritten record, as well as the end of this carton, bear prominently thereon the name of the "Hamilton-Brown
549 Shoe Company" and the name "American Lady", as well as the belt trade-mark of the Hamilton Brown Shoe Company with the word "Makers" appearing thereon. For the rest, the said carton, "Defendant's Exhibit 498" speaks for itself.

Whereupon the carton last referred to is marked by the Master, "Defendant's Exhibit 498."

Mr. WERNER: The complainant objects to the introduction of this carton as evidence, because it is immaterial and irrelevant, and under the decree, which has been interpreted by the Court and by

the Master, and which clearly means, as we contend, that the matter accompanying the "American Lady" shoes must be matter impressed on the shoe or markings on the shoe, clearly indicating that the shoe thus marked is of the manufacture of the defendant, the Hamilton-Brown Shoe Company.

If this be the correct interpretation of the decree then clearly the carton now offered in evidence is incompetent and irrelevant and we object to its introduction.

The MASTER: The exhibit will be admitted subject to the objection.

(Stipulation as to Certain Sales by Hamilton-Brown Shoe Co. of American Lady Shoes, etc.)

NOTE.—The following stipulation is made by the parties:

It is stipulated that of the 17,872 pairs of shoes sold by the Hamilton-Brown Shoe Company between the dates November 15, 1909 and March 9, 1910, and one shoe of each pair of which bore on the inside top facing of said shoe the name "American Lady" associated with the belt trade-mark of the Hamilton-Brown Shoe Company, on which belt trade-mark appeared the name "Hamilton-Brown Shoe Company" and the word "Makers" in the center of said belt trade-mark (a duplicate of which said top facing is attached to the stipulation of June 4, 1910), and which shoes are specifically referred to at the bottom of page 4 of the stipulation of date January 11, 1911, twenty per cent of said shoes may be considered by the Master as having been sold by the Hamilton-Brown Shoe Company during the fiscal year 1909, and the remaining eighty per cent of which may be considered as having been sold during the next succeeding period, being the period between the dates December 10, 1909 and March 9, 1910, that being the first three months of the fiscal year 1910.

550 It is further stipulated that in the Exhibits 1 and 2 attached to the Kribben report, the figures under the heading "1905-6" of those exhibits are the figures for the fiscal year 1906, and the Master may assume that ten and one-half twelfths of the amounts specified under the heading "1905-6" in said two exhibits, represents the proper amounts to be specified therein for that portion of the fiscal year 1906, beginning with January 29, 1906 and ending December 10, 1906.

It is also stipulated that of the 120,000 pairs of "American Lady" shoes referred to on page 6 of the stipulation of June 4, 1910, at page 471 of the record, as having been sold by the Hamilton-Brown Shoe Company between December 10, 1906 and December 11, 1908, one shoe of each pair of which had attached to the inside lining thereof a silk top facing (a duplicate of which is attached to said stipulation), and which silk top facing bore upon it the name "American Lady" and the belt trade-mark of the Hamilton-Brown Shoe Company bearing the name "Hamilton-Brown Shoe Company"

with the word "Makers" in the center, the Master may assume that 60,000 pairs of said shoes were sold by the Hamilton-Brown Shoe Company between the dates December 10, 1906 and December 12, 1907, and that the remaining 60,000 pairs of said shoes were sold by the Hamilton-Brown Shoe Company between the dates December 12, 1907 and December 11, 1908.

It is further stipulated that the same rule with reference to prorating between two fiscal years, or any portions thereof, may be pursued by the Master in such instances as it may become necessary.

A. G. WHITE, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. BAKEWELL:

32c Q. What is your name?
A. A. G. White.
33[x] Q. Where do you reside?
A. 4512 Westminster Place.
34c Q. In the City of St. Louis?
A. Yes, sir.
35c Q. What is your occupation?
A. I am in the Advertising Department of the Hamilton-Brown Shoe Company.
36c Q. The defendant in this case?
A. Yes, sir.
37c Q. There has been put in evidence in connection with the complainant's proofs before the Master, five catalogues of the Hamilton-Brown Shoe Company, marked respectively, "Complainant's Exhibit 301"; "Complainant's Exhibit 8"; "Complain-
551 ant's Exhibit 7"; "Complainant's Exhibit 6," and "Complainant's Exhibit 5":

Do you know what is the practice or what has been the practice of the Hamilton-Brown Shoe Company with respect to the sending out of these catalogues, or to whom the catalogues are sent?

Mr. WERNER: That is objected to as immaterial and irrelevant, as it has no relevancy or bearing upon the question of the manner of marking the shoes in controversy.

The MASTER: The objection is overruled.

To which ruling of the Master the complainant by its counsel, then and there, at the time duly excepted.

Mr. WERNER: I would like to ask this witness some preliminary questions. Is he testifying from his personal knowledge——

Mr. BAKEWELL: I will bring that out.

The MASTER: The question requires an answer simply of yes or no: do you know the practice?

A. Yes, sir.

Mr. BAKEWELL:

38c Q. To whom are the catalogues of the Hamilton-Brown Shoe Company sent?

Mr. JOHNSON: That is objected to for the same reason as specified for the other question, and the competency, experience and knowledge of the witness has not been shown sufficient to entitle him to make an answer without further questions being propounded to him. We should be given an opportunity to find out the extent of his knowledge.

Mr. WERNER: And, of course, reiterating the former objection that the testimony is incompetent, irrelevant and is entirely immaterial.

The MASTER: The only objection made heretofore was with regard to the competency and relevancy of the question and answer. If the counsel for the complainant desire to test the knowledge and capacity of the witness to answer the question, they may ask the witness such question as is necessary to establish him as competent.

The following questions were put by Mr. Werner:

552 39c Q. What is your age, Mr. White?

A. Twenty-five years.

40c Q. Your position with the Hamilton-Brown Shoe Company today is what?

A. In the advertising department; I look after the work in the advertising department.

41c Q. Who is your immediate superior?

A. Mr. McLaughlin, the Advertising Manager.

42c Q. How long have you been working under him in your present position?

A. Since the first of January, 1910.

43c Q. What were you doing prior to January 1, 1910?

A. I was with Butler Brothers, of Chicago.

44c Q. So your connection with the Hamilton-Brown Shoe Company commenced in January, 1910?

A. Yes, sir.

Mr. WERNER: We renew our objection to this witness testifying as to what was done with the catalogues issued in 1906 to 1910, prior to his connection with the defendant, because it could be based only on hearsay.

Mr. BAKEWELL: This could not be based on hearsay, so far as the practice of the Hamilton-Brown Shoe Company to the knowledge of the witness is concerned, with respect to such of the catalogues as he is familiar with and limited to that.

The MASTER: With the question limited to such of the catalogues as the witness is familiar with the distribution of, he may answer the question.

Mr. JOHNSON: These all were issued prior to 1910, every catalogue here.

The Following Questions put by Mr. Werner:

45c Q. Your duties are office duties, are they not?

A. I am not in the office all the time. You might say they are office duties.

[45c Q.] What do they consist of?

A. I write copy for our different advertisements; lay them out and plan them; that sort of work, and look after the detail of the advertising department.

46c Q. You have nothing to do with the distribution of the catalogues?

A. Yes; that is under our department.

47c Q. That comes within your department?

A. Yes, sir. I am familiar with that work and its distribution.

48c Q. All you know is that calls are made on your department for a certain number of catalogues?

A. No; we send them out.

553 Mr. BAKEWELL:

49c Q. Are there any of the five catalogues to which I have called your attention, with which you are familiar and which, to your knowledge, have been sent out by the Hamilton-Brown Shoe Company since you occupied the position which you now hold with the Hamilton-Brown Shoe Company?

Mr. WERNER: We object to it as immaterial, irrelevant and having nothing to do with the questions involved in this accounting.

The MASTER: So far as the objection is made to the irrelevancy and incompetency, it is overruled.

To which ruling of the Master the complainant, by its counsel, then and there, at the time duly excepted.

A. This one, I know. (Indicating catalogue No. 6.)

Mr. BAKEWELL:

50c Q. Referring to "Complainant's Exhibit 8" being Shoelight No. 6?

A. Yes, sir.

51c Q. To your knowledge, what has been the practice of the Hamilton-Brown Shoe Company in respect to the distribution of that catalogue, Shoelight No. 6?

Mr. WERNER: I object to him stating what was the practice. Let him state, so far as he knows, what was done with them.

A. That catalogue was mailed——

The MASTER: He may answer the question.

A. That catalogue was mailed to the retail merchants who buy from the Hamilton-Brown Shoe Company.

Mr. BAKEWELL:

52c Q. So far as there are any prices of shoes given in this catalogue, do you know whether or not those are the wholesale prices or retail prices?

Mr. WERNER: That is objected to as immaterial and irrelevant.
The MASTER: He may answer.

A. They are wholesale prices.

Cross-examination.

By Mr. WERNER:

53c Q. Did you have any personal connection with the mailing of this catalogue?

A. Well, it is done by our department's orders.

554 53c Q. Did you have any personal connection with mailing them?

A. Simply seeing that it is done.

54c Q. What did you have to do with the preparation of the list of people to whom they were mailed?

A. That is kept in the place where the catalogue is printed.

55c Q. The list of those to whom you send them?

A. Yes, sir.

56c Q. That is what I mean: that is kept where the catalogue is printed and they send them direct from the printing establishment?

A. The printing establishment is our own.

57c Q. Yes, but it is sent direct from the printing room?

A. Yes, sir.

58c Q. Who makes up those lists; do you know?

A. Each salesman.

59c Q. Those lists are sent to the printers; the salesman sends in the list of the names to whom he wents the catalogue sent?

A. Yes; upon whom he calls.

60c Q. Anybody on whom he calls, whether they buy or not, prospectively or actually?

A. No; those whom he calls upon and buy, we send them to.

61c Q. You have no personal knowledge as to that fact, have you?

A. We know that they only go to the men who buy from us.

62c Q. How do you know that of your personal knowledge?

A. I couldn't ask everyone of the salesmen.

63c Q. Then you have no personal knowledge as to these mailing lists?

A. Yes, I know they are their accounts; the men that buy from them.

64c Q. Personally, have you that knowledge?

A. Do you mean personally, with several thousand accounts?

65c Q. Yes, that is what I mean. Have you, personally, knowledge whether the customers located all over the country, or the dealers to whom this catalogue is mailed, are customers of yours? You are not interested in that, are you? That is, your department is not interested in that?

A. Yes, because we want to send to only men that buy from us.

66c Q. You are interested in mailing to the names furnished you by the salesmen: that is the extent of your connection, is it not?

A. Yes; when the salesmen send in names they are looked up to see if they are merchants.

67c Q. Do you ever do it?

A. No, sir.

555 68c Q. When merchants send in requests for catalogues to your house, are those requests referred to your department?

A. Yes; we look them up in reports.

69c Q. You look them up in what reports?

A. Dunn's or Bradstreet's; to see if they are in business.

70c Q. And if they are in business you comply with the request and send them a catalogue?

A. Yes, sir.

71c Q. You do that as a matter of advertisement?

Mr. HART: That is objected to as calling for a conclusion.

Mr. WERNER:

72c Q. This is called the advertising department, is it not?

Mr. BAKEWELL: That is objected to as immaterial.

A. Yes, sir.

Mr. WERNER:

73c Q. When requests come in from merchants for your catalogues, and you find they have a proper rating in Dunn's or Bradstreet's, you comply with the request and send them a catalogue?

A. Yes, sir.

74c Q. You have been with them since January 1, 1910: of course, you are talking of the period subsequent to that, when your personal knowledge began?

A. Yes, sir.

75c Q. Is there any special time of the year that you mail out these catalogues?

A. Spring and fall.

76c Q. In the spring and fall?

A. Yes, sir.

77c Q. Is Shoelight No. 6 your last catalogue?

A. Shoelight No. 9.

78c Q. Then Shoelight No. 6, which was shown you, was not mailed after you came into the concern?

A. No; it was in force at the time I came. It was the current catalogue.

79c Q. But it had been distributed before you formed your connection with the house?

A. Just before I came.

80c Q. You had nothing to do with that?

A. I did; it was on my list.

Mr. BAKEWELL:

81c Q. It was the current catalogue?

A. Yes, it was the current catalogue.

Mr. WERNER:

82c Q. You formed your connection with the Hamilton-Brown

Shoe Company, you say in January 1910: you say Shoelight
556 No. 6 had been distributed in the spring and fall of 1909, as I understand?

A. Yes, sir.

Mr. BAKEWELL:

83c Q. Shoelight No. 6 was the current catalogue of the Hamilton-Brown Shoe Company when you went into the employ of the Hamilton-Brown Shoe Company?

A. Yes, sir.

84c Q. And was being distributed at that time?

A. Yes, sir.

Mr. JOHNSON:

85c Q. Do you mean to say that you distributed any of Shoelight No. 6 catalogues when you were actually there, after January 1, 1910, to these people whom Mr. Werner has asked you about?

A. Persons writing in?

86c Q. Yes?

A. Yes, sir.

87c Q. Those were the only ones to whom you did distribute it, were they not?

A. No; the salesmen send in requests to send to men on their lists.

Mr. WERNER:

88c Q. Those were special requests; the main lists were attended to in the spring and fall?

A. The mailing lists were attended to in the fall, just before I came.

Mr. BAKEWELL: In this connection, while it may be convenient to refer to the catalogue, defendant's counsel calls attention to the fact that the cover of "Complainant's Exhibit 8," Shoelight No. 6, bears upon it the following:

"A Handy Book for Merchants No. 6."

Below is the strap trade-mark of the Hamilton-Brown Shoe Company, bearing upon it the words "Hamilton-Brown Shoe Co." and the word "Quality" in the center of the belt trade-mark, and below that, in prominent red letters, are the words "St. Louis, U. S. A."

On the first page of said catalogue appears the following:

"Shoelight. Number 6.

Published semi-annually by
Hamilton, Brown Shoe Co.,

Handsomely illustrated
and giving a full description of the output of our

557 (7)

Great Specialty Factories.
This book will be a great help to the merchant
in ordering his shoes.
Place it where you can find it.
Detachable price list in back of book."

Below is the belt trade-mark of the Hamilton-Brown Shoe Company bearing upon it the name "Hamilton, Brown Shoe Co." In the center of the belt trade-mark are the words "Largest in the world."

To the left of the belt trade-mark are the words, "Destroy your old one."

To the right of the belt trade-mark are the words, "Do not cut this Shoelight."

Mr. JOHNSON: What is the use of encumbering the record with this?

Mr. BAKEWELL: I submit that it is a convenience. There are not any duplicates of this and I think it is proper for me to read it into the record.

The MASTER: If the counsel wishes to object, the objection is overruled.

Mr. BAKEWELL: I simply call the Master's attention to this fact, and also call his attention to the fact that each one of these catalogues introduced in evidence by the complainant, not only "Complainant's Exhibit 8," but "Complainant's Exhibit 301," another Shoelight catalogue; "Complainant's Exhibit 7," Shoelight catalogue No. 5; "complainant's Exhibit 6," Shoelight catalogue No. 4, and "Complainant's Exhibit 5," another Shoelight catalogue, all clearly show that these catalogues are addressed to and intended for the merchant, and are all associated with the name "Hamilton-Brown Shoe Co."

LUKE E. HART, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. BAKEWELL:

89c Q. What is your name?

A. Luke E. Hart.

90c Q. What is your age, residence and occupation?

558 A. I am thirty years old; I reside in St. Louis, Mo., and my occupation is that of an attorney at law.

91c Q. Mr. Hart, you have been associated with me in this case and in the taking of testimony in this case before the Master, have you not?

A. I have.

92c Q. It appears from the testimony taken by the complainant before the Master, that on or about March 9, 1910, the Hamilton-Brown Shoe Company began to mark all its "American Lady" shoes

by stamping the word "Makers" on the sole of each shoe, in connection with the name "Hamilton-Brown Shoe Company" and the belt trade-mark of the Hamilton-Brown Shoe Company:

What, if anything, do you know about this particular marking on the shoes of the Hamilton-Brown Shoe Company, taking place on or about the 9th day of March, 1910, and being continued thereafter?

The marking that I have in mind is illustrated on the pair of shoes marked "Complainant's Exhibit 499," which were introduced in connection with complainant's proof, and in connection with the testimony of one of the last witnesses called on behalf of the complainant, namely, Mr. John T. Johnston.

Mr. JOHNSON: That is objected to as incompetent and irrelevant. Mr. Hart's knowledge is not at all germane to this question.

I have understood the inquiry as limited to shoes that the Master has held are not marked with the word "Makers."

The source of Mr. Hart's knowledge could only be that which was communicated to him by his client, or some direction that he gave to his client, whereby they might, perhaps, follow his directions. What happened that way could not bind us, we not being present. Not what was the communication between them, either one to the other, but what they did which could be proved by the concrete particular action relative to the manufacture and production of the shoes.

Mr. BAKEWELL: I want Mr. Hart to testify if he knows what was the reason of that marking at that time; what were the facts which caused that marking. The shoes so marked are in evidence.

Mr. JOHNSON: We think Mr. Bakewell has been fair with us and we think that ought to be added to his question or considered in connection with it in order to show how pertinent our objection is, and we renew the objection, with that added statement of Mr. Bakewell's.

559 The MASTER: The Master rules that the reason why the shoes were so marked is wholly incompetent at this hearing.

If, however, the testimony is introduced or offered for the purpose of fixing a date at which that style of marking the shoes began, the testimony is competent, because that would be fixing a date at which this inquiry might be limited, and the witness may answer the question.

Mr. WERNER: I think the date has been stipulated as March 9, 1910.

Mr. BAKEWELL: Defendant's counsel states to the Master that he wishes to show why the marking on the shoes was changed at that time, so as to prevent the inference which complainant's counsel made at one of our last sessions before the Master, to-wit: that in the opinion of defendant's counsel and of the Hamilton-Brown Shoe Company, it was necessary, in order to comply with the opinion of the majority of the Court of Appeals in this case, and with the interlocutory decree, to place the word "Makers" on the soles of each shoe.

Defendant's counsel denies that that was the fact, or that any such inference was warranted or is warranted, from the fact that from, to-

wit, March 9, 1910, the defendant's shoes referred to in the preceding question were marked with the word "Makers" upon the sole of each shoe, and he offers to prove that fact by this witness, and he respectfully submits that it is proper for him to prove that fact so that this unjust inference which complainant's counsel did refer to at one of the last sessions, may not be made.

Having offered to prove this, defendant's counsel rests on the ruling of the Master.

Mr. WERNER: In reply to the suggestion of defendant's counsel as to what he desires to elicit from the witness by the question, complainant's counsel desire further to suggest that whether or not a particular inference is to be drawn from particular facts is a matter of deduction of counsel, the Master and the Court, and the purely mental cerebration or reason that a witness or party to a suit may have is not competent as evidence, and in the very nature of things is not susceptible of contradiction. Therefore, it has always been held that mere reasons why are simply mental conclusions, not susceptible of contradiction, and are not competent and proper as evidence.

We add this as a further reason for objecting to the testimony.

560 The MASTER: The statement of defendant's counsel that certain inferences were drawn by counsel for the complainant from an alleged fact with regard to the change in the marking of the shoes at a certain date, is purely a matter of argument and would apply to an argument appealing to the Master in coming to his conclusion in regard to the matter.

It seems to me that the question that counsel directed to this witness upon that particular point is wholly immaterial and irrelevant.

The witness may answer the question subject to the objection.

To which ruling of the Master the complainant, by its counsel, then and there, at the time duly excepted.

A. On February 15, 1910, the Master ruled that the marking "Hamilton-Brown Shoe Company" on the belt trade-mark of the Hamilton-Brown Shoe Company, in the center of which were the words "American Lady" and which appeared upon the soles of the "American Lady" shoes manufactured and sold by the Hamilton-Brown Shoe Company, was not a sufficient compliance with the interlocutory decree in this case, or the finding of the Circuit Court of Appeals ordering the entry of that interlocutory decree.

At the same time the Master ruled that it was a sufficient compliance with that decree and the finding of the Circuit Court of Appeals, to affix to said shoes a mark such as appeared on the silk facing upon one shoe of each of a great many pairs of shoes manufactured and sold by the Hamilton-Brown Shoe Company, and which consisted of the words "Hamilton-Brown Shoe Company" on the belt trade-mark of the Hamilton-Brown Shoe Company, enclosing the word "Makers."

After that ruling had been made, Mr. Bakewell, of counsel for the defendant in this case, and I consulted together in regard to the mat-

ter of this ruling, and we agreed that the ruling of the Master in reference to the mark consisting of the belt trade-mark; the name "Hamilton-Brown Shoe Company," and the name "American Lady," upon the soles of the "American Lady" shoes, was erroneous and was not warranted by the decree in this case nor the finding of the Court of Appeals.

We concluded that out of an abundance of precaution we would instruct the defendant to affix to the soles of the "American Lady" shoes the mark which the master had ruled was a sufficient compliance with the interlocutory decree and the finding of the Court of Appeals, and which consisted of the belt trade-mark of the Hamilton-Brown Shoe Company; the name "Hamilton-Brown Shoe Company" thereon, and the word "Makers" within the belt trade-mark.

561 I told Mr. Elroy, the superintendent of the "American Lady" factory, that we desired that that change should be made at that time, even though it was, in our opinion, entirely unnecessary and even though it might work a great hardship and burden upon the defendant.

Cross-examination.

By Mr. WERNER:

95*c* Q. Mr. Hart, I will ask you whether at or about that time you conveyed your conclusions in writing to your client?

A. No, sir; I did not. I was in conference with Mr. McElroy every day or so at that time and I told him this personally.

94*c* Q. I will ask you whether you have any knowledge of your associate, Mr. Bakewell, having conveyed your conclusions to your client in writing at that time?

A. I am sure he did not.

95*c* Q. I will ask you whether, when the opinion of the U. S. Court of Appeals was handed down in this case, you conveyed to your client any instructions or advice as to the marking of the shoes thereafter?

Mr. BAKEWELL: That is objected to as incompetent, irrelevant, immaterial and touching a particular (if there be any such private communication between counsel and client) which is not subject to investigation; and growing out of a matter not touched upon in direct examination.

Mr. WERNER: If it is competent at all—which we do not believe—as long as it is gone into we have a right to show what instructions they gave their client at the time the opinion of the U. S. Court of Appeals was handed down. That was evidently the time that they would need instructions.

Mr. BAKEWELL: I submit that my limited inquiry was confined to a certain fixed period, in regard to a particular matter happening at a particular time, and that this is not cross-examination.

Mr. WERNER: Suppose we show that they had given that instruction immediately when the U. S. Court of Appeals handed down the

decision, and that their client had either overlooked, neglected or refused to obey it, and they renewed it in March.

The MASTER: What difference would that make?

Mr. WERNER: I think the whole thing is immaterial; what advice they gave. But they have sought to inject it in here and I
562 think we are entitled to have the whole of it, and to see the communications that passed between them and their client with reference to the marking of these shoes.

The MASTER: The objection is sustained.

Mr. JOHNSON: May we obtain the answer under the same rule that your Honor has made with reference to our friend's question?

The MASTER: The witness may answer the question subject to the objection.

(Previous question read.)

The MASTER: That requires an answer of yes or no. I adhere to my ruling that it is immaterial, but the witness may answer the question in order to preserve it in the record.

You may answer that, yes or no.

A. I did not.

Mr. WERNER:

96*c* Q. Of course, you understand the question referred in a general way to the time immediately following the handing down of the opinion of the U. S. Court of Appeals, and to instructions not necessarily given by you personally, but you and Mr. Bakewell as associates:

So understanding the question, is your answer the same?

Mr. BAKEWELL: I object to that question of what Mr. Hart or Mr. Bakewell may have instructed their client.

The MASTER: There is not any such question before the Master, Mr. Bakewell. There is only a question as to whether any instruction was given.

Mr. BAKEWELL: Or whether any instruction was given, because it is not cross-examination in relation to the very particular and limited inquiry made on direct examination, and if answered might inquire into private communications between counsel and client that were most sacred and private; which are privileged and as such cannot be inquired into on this examination.

Mr. WERNER: That last ground would appeal very strongly to me had not defendant's counsel exposed themselves to it and given us part of those confidential and private communications which they gave to their client, namely, with reference to the adoption of the use of the word "Makers" on March 9, and themselves having opened the door.

Mr. BAKEWELL: I did not open the door to any such impertinent inquiry as is now made.

563 That is explained by the question and by the testimony of the witness on direct examination, that after the Master, in February, 1910, made a certain ruling on the record, which we conceived to be contrary to and not warranted by the opinion of the

Court of Appeals in this case and the interlocutory decree, a certain change was made in the marking, and the reason of that change and that change only was inquired about on the direct examination.

I respectfully submit that in regard to that matter and that matter alone can any cross-examination be had.

Mr. WERNER: If your Honor please, I am cross-examining him precisely on that point.

If it is competent to show that the use of the word "Makers" was adopted in March, 1910, by advice of these counsel, I have the right to show that they gave the same advice to their client when the opinion of the U. S. Court of Appeals was handed down, and that is the object of this inquiry.

The MASTER: I differ with you, Mr. Werner, on that point. The witness may answer the question that you have asked.

Mr. WERNER: You differ as to whether it would be proper cross-examination?

The MASTER: Yes; you are making the witness your own witness on direct examination in this matter.

Mr. WERNER: I had no intention or desire to do that. I am simply attempting to cross-examine him on that which was elicited.

(Previous question read.)

A. Mr. Bakewell gave instructions.

97c Q. In writing, to your knowledge?

Mr. BAKEWELL: I object to what Mr. Bakewell gave instructions about, or whether they were in writing or not. It is not cross-examination.

The MASTER: The objection is sustained.

To which ruling of the Master the complainant, by its counsel, then and there, at the time duly excepted.

Mr. WERNER: Am I entitled to an answer, subject to the objection?

Mr. JOHNSON: We do not propose to ask — the writing; simply if it was in writing.

The MASTER: The witness has stated that Mr. Bakewell gave instructions. The examination will have to stop here.

564 As I understand, the counsel desires to know what the instruction was that was given by counsel to his client immediately after the decision of the Court of Appeals.

I rule that the counsel has no right to an answer to that question and that is a question which I will not allow to be answered and made a part of the record, because nothing but the consent of the counsel and his client can make that competent evidence upon an examination of this kind.

To which ruling of the Master, the complainant, by its counsel, then and there, at the time duly excepted.

Mr. WERNER: We now ask that the entire testimony of this witness, Mr. Hart, be stricken from the record as incompetent, irrelevant, the mere conclusions of one of the counsel in the case and not matter susceptible of contradiction, or in any wise competent under the issues of the accounting.

We ask that it all be stricken from the record.

The MASTER: I have already ruled that the testimony, in my opinion, is incompetent and immaterial, and that, I think, is a sufficient ruling upon the testimony as adduced.

Mr. BAKEWELL: That is all the proof to be taken on behalf of the defendant and the defendant announces his case as closed.

Defendant's counsel suggests and submits to the counsel and the Master that a certain fixed date be named by the Master on which date the complainant shall serve on the Master the complainant's brief, and on the same date serve an exact copy of the same brief on the defendant's counsel.

That on that same day the defendant's counsel shall serve on the Master his brief on behalf of the defendant, and on the same day serve an exact copy of the same brief on the complainant's counsel:

To be exact, on the date fixed by the Master for the filing of these briefs, Mr. Bakewell will be served at St. Louis, with a copy of the complainant's brief, and Mr. Percy Werner will be served at St. Louis, with a copy of defendant's brief; that thereafter a certain date be fixed by the Master on which the complainant shall file his reply brief with the Master and an exact copy of said reply brief shall be served on Mr. Bakewell, at St. Louis; and that on the same day Mr. Bakewell shall serve on Mr. Werner, at St. Louis, a copy of defendant's reply brief, and deliver to the Master the defendant's reply brief.

At the suggestion of complainant's counsel it is agreed that the briefs shall be printed, and that instead of the respective par-
565 ties serving one copy on the other party, that the respective parties shall serve six copies.

The MASTER: I will direct that on March 28, the first briefs shall be filed; that on April 18, an answer shall be filed, and that if either counsel desire to make a reply to the answer which is due to be filed on April 18, they may have until the second day of May in which to do so.

NOTE.—It is stipulated and agreed between counsel for complainant and counsel for defendant that after the Master has prepared his report the same shall be printed in conformity with the rules of printing the record as the same exists in the United States Court of Appeals for the Eighth Circuit, and that he shall provide counsel for complainant with forty printed copies of his report and counsel for the defendant with forty copies of his report; that the cost of printing the report shall be taxed as costs in this case.

When the report has been printed the Master shall submit his bill for the same, and in advance of the determination of which party shall pay the costs on this accounting, the complainant shall pay to the Master one-half of the cost of printing the Master's said report and the defendant shall pay to the Master one-half of the cost of printing the said report.

Exceptions of Complainant Filed Before Master to the Report of the Master.

The complainant excepts to the report of the Master on the following grounds:

1. Because the Master in computing the profits due the complainant on the shoes marked "American Lady" only (Master's report, page 102), allowed in diminution of such profits the sum of $34,616.31 on account of advertising.

Overruled. Henry H. Denison, Master.

2. Because the Master in computing the profits due the complainant on shoes marked in addition to the words "American Lady" with the words "Hamilton-Brown Shoe Company" (Master's report, page 103), allowed in diminution of such profits the sum of $36,931.62 on account of advertising.

Overruled. Henry H. Denison, Master.

3. Because, although the Master found from the evidence that the profits made by the defendant by the sale of shoes having upon them the word "Makers" in addition to the words "American Lady," and "Hamilton-Brown Shoe Company," amounted to the sum of $132,740.77 (Master's report, page- 102, 105), the Master found that the complainant was not entitled to recover said profits.

566

Overruled. Henry H. Denison, Master.

4. Because, although the Master found from the evidence that the profits made by the defendant by the sale of shoes having upon them the word "Makers" in addition to the words "American Lady," and "Hamilton-Brown Shoe Company," amounted to the sum of $152,507.51 (Master's report, page- 102, 105), the Master in computing the profits on shoes so marked allowed in diminution of such profits the sum of $19,766.74 (Master's report, page 103), and said Master did not find that the complainant was entitled to recover said sum of $152,507.51 as the said profits on said shoes, but found that the complainant was not entitled to recover any of the profits on said shoes.

Overruled. Henry H. Denison, Master.

5. Because the Master sustained the objections of counsel for the defendant to the introduction of evidence offered by the complainant relative to "Minden" shoes and cartons enclosing said shoes (Master's record, pp. 548 to 554, inclusive, and pp. 555 to 563, inclusive; and Master's report, page- 42-43).

Overruled. Henry H. Denison, Master.

LAWRENCE MAXWELL,
SIMEON M. JOHNSON,
PERCY WERNER,
Solicitors for Complainant.

For the Master's views in passing upon the exceptions, see pp. 106 et seq., of the Report.

HENRY H. DENISON, *Master.*

(*Defendant's Exceptions to the Report of the Master.*)

567 Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

In Equity. No. 5262.

THE WOLF BROTHERS & COMPANY, Complainant,
vs.
HAMILTON-BROWN SHOE COMPANY, Defendant.

Exceptions to the Master's Report.

Exceptions taken by the defendant, Hamilton-Brown Shoe Company, to the report made herein by Henry H. Denison, Master, to whom this cause was referred "to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits, since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case and which are marked with the name 'The American Lady' and not accompanied with other matter clearly
568 indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company," in accordance with the interlocutory decree entered in this cause November 15, 1909.

By way of introduction to the said exceptions defendant states that it appears from the record before the Master on this accounting:

(1) That before the accounting proceeded, in order to save the expense of this accounting, defendant, by its solicitor and counsel, tendered to the complainant One Dollar as nominal damages and profits—all that, as defendant contends, the complainant is entitled to recover on this accounting (see stipulation filed with Clerk of this Court and dated January 31, 1910, and filed February 1, 1910).

(2) That at the very outset of this accounting, in reply to the notice served upon defendant's counsel by the Master, and before any testimony was taken before the Master, in harmony with the facts and stipulations as subsequently developed before the Master, defendant made a return in writing before the Master which is set forth in the record before the Master and also in the Master's report, said return setting forth, among other things, that since the filing of the bill the said defendant has sold no shoes marked with the name American Lady which were not also accompanied with other matter clearly indicating that the said shoes were made by the defendant, Hamilton, Brown Shoe Company.

(3) That although the record before the Master is quite voluminous, very little of that record, as appears from page 2 of our main brief before the Master, was matter which it was neces-
569 sary for the Master to consider or which it is necessary for the Court to consider; for almost all of that record is made up of testimony which was subsequently supplanted by stipulations

found in the said record, which stipulations were made to take the place of that testimony and to save further taking of proofs before the Master.

(4) That although the Master's report is quite voluminous, it is, as we believe, unnecessarily so, since the main facts in the case before the Master are simple and undisputed and were agreed to by stipulations which are found in the Master's report.

(5) That as the Master's report is largely composed of arguments to support his findings as to matters of law, the following exceptions are necessarily rather lengthy, to meet those arguments and to point out the errors in the Master's premises as well as in his conclusions.

(6) That after the proofs before the Master on this accounting were closed, and as appears from pages 625 and 626 of the transcript of the record before the Master and the ruling of the Master there made, the case was submitted to the Master on printed briefs of counsel and no argument other than that found in the complainant's and in the defendant's briefs before the Master was made before the Master. After the proofs before the Master were closed no oral arguments were made before the Master whatever, but the arguments made before the Master were made only in the printed briefs of counsel for complainant and counsel for defendant.

Having made this explanation, defendant, by its solicitors, presents the following exceptions to the Master's said report, which exceptions are numbered consecutively and are as follows:

570

I.

That the Master erred, in view of the terms of the interlocutory decree in this case (the Master's only warrant), in compelling the defendant to account before him for any of the American Lady shoes sold by the defendant since the filing of the bill, because it appears from the evidence before the Master and the stipulations of June 4, 1910, and January 11, 1911, and the exhibits referred to therein, that none of the shoes thus accounted for by defendant and marked "American Lady" were not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton, Brown Shoe Company.

II.

That the Master erred in holding that the defendant must account to the complainant for profits which it made from the sale, since the filing of the bill of complaint in this case, of American Lady shoes, every pair of which, as stipulated by stipulations of June 4, 1910, and January 11, 1911, was "sold and delivered to its customers in a carton, each of which cartons bore prominently on the lid thereof in white letters on a black background, at the head of said lid, the words, 'Hamilton, Brown Shoe Co.'s' and at the foot of said lid, in equally prominent letters, the name "American Lady," while at the front end of each of said cartons appeared the name "American Lady" and the belt trade-mark of the Hamilton, Brown Shoe Com-

pany which belt trade-mark consisted of a black strap in the center of which was a red background, the words 'Hamilton, Brown Shoe Company' appearing in white letters on the black strap and
571 the word 'Makers' appearing in white letters on the red background, said particular way of marking each of said cartons being exemplified by 'Defendant's Exhibit, American Lady Shoe Carton, January 31, 1910, Henry H. Denison, Master,'" and also by the exhibits attached to said stipulations.

III.

That the Master erred in holding that the carton in which each pair of American Lady shoes was sold and delivered by the defendant, and which bore prominently on the top label thereof the defendant's name and on the end thereof defendant's name and the word "Makers," as appears from the stipulations of June 4, 1910, and January 11, 1911, and exhibits attached thereto, was not such accompanying matter as clearly indicated "that such shoes were of the manufacture of the Hamilton, Brown Shoe Company," within the meaning of the opinion of the U. S. Circuit Court of Appeals and the decree in this case, and in ignoring and refusing to take account of the fact that each and every pair of American Lady shoes sold by defendant was sold and delivered in such a carton, and in holding that the defendant is obliged to account for American Lady shoes sold by it and which were sold and delivered to its customers in such cartons.

IV.

That the Master erred in holding that the defendant is obliged to account for shoes marked with the name American Lady and stamped on the shoes themselves or otherwise marked with the defendant's name, Hamilton, Brown Shoe Company and which were sold by defendant since the filing of the bill.

572 V.

That the Master erred in holding that the defendant must pay to the complainant all defendant's profits on defendant's American Lady shoes sold since the filing of the bill excepting such of those shoes as were marked on the shoes themselves not only with the name Hamilton, Brown Shoe Company but also with the word "Makers."

VI.

That the Master erred in his reference to the history of the interlocutory decree and in interpreting that decree as warranting a consideration of portions of the record before the entry of the interlocutory decree not specifically pointed out to him by complainant during the taking of proofs before the Master, for the following reasons:

That interlocutory decree is the decree of this Court. It is immaterial that complainant submitted one form of decree and defendant another, or which form the Court adopted. The decree is, and is

conclusively presumed to be, the decree of the Court and must be in harmony with the mandate of the United States Court of Appeals.

Furthermore, the preamble or recitals in said decree as to the former record, etc., is nothing more, in effect, than equity rule 80 (see Desty's Federal Procedure, vol. 3, 9th edition, p. 1799), which provides:

"All affidavits, depositions, and documents which have been previously made, read or used in the court, upon any proceedings in any cause or matter may be used before the Master."

573 But this rule has been interpreted by the Court, as pointed out at pages 5 and 6 of our main brief before the Master, in the case of Bell v. United States Stamping Co., 32 Fed. 550-551, to mean, in practice:

"The testimony on which the exception in relation to profits from saving in cost of manufacture is founded does not appear to have been brought before the master in making up the case on the accounting, so that it could be answered or explained on the other side, but to have been referred to in argument and requests for finding upon the case made. Equity rule 80 provides that such testimony may be used before the master. This is understood to mean that it may be brought before him without being retaken, by calling his attention to the parts relied upon in making up the case, when the opposite side may have opportunity to know what part is so brought into that hearing and relied upon. The master, therefore, had no basis for doing what this exception is for not doing."

This is the rule of practice also laid down by the well-known authority, Foster's Federal Practice (fourth edition), vol. II, Sec. 313, p. 992, in these words:

"SEC. 313. Evidence before a Master—'All affidavits, depositions and documents which have been previously made, read or used in the court upon any proceedings in any cause or matter, may be used before the master' (equity rule 80). These should, however, be regularly offered in evidence, so that the other party may have an opportunity to explain or rebut them. Otherwise they cannot be referred to upon the argument, or used in support of the report."

As we have said, the reason for this practice and this interpretation of equity rule 80 is obvious and essentially just.

574 Take the case at bar, for example: The record before the United States Court of Appeals consists of more than five hundred printed pages. The issues before that court related to a condition of affairs alleged to have existed prior to the filing of the bill, and the proofs relevant to that issue, of necessity, had to relate to the situation as it existed prior to the filing of bill (Humane Bit Co. v. Barnett, 117 Fed. 316). The issues on that record, briefly stated, were:

(1) Did the plaintiff hold a valid trade-mark which defendant had infringed?

(2) Had the defendant done, before the filing of the bill, the sum of those various things (recited at p. 414 of 165 Fed.) which plaintiff claimed constituted unfair business competition?

While the Master might have referred to the former record in

the Court of Appeals and this Court, which related to a condition of affairs prior to the filing of the bill, had any part of it been referred to as relied upon by plaintiff during the taking of the proofs before him, so that defendant might have explained or answered it, as that voluminous record of more than five hundred printed pages related to a condition of affairs before the filing of the bill, and the proofs before the Master related to a condition of affairs since the filing of the bill, it was error for the Master to refer to any portion of that former record not specifically pointed out as relied upon by plaintiff, during the taking of the proofs before the Master, so that defendant might have explained or answered the same. All this was pointed out to the Master in our main brief before him, between pages 2 and 9 thereof; yet he undertakes to ignore our argument, to override the decision of the
575 Court to which we refer, to consider and quote from portions of the old record, which portions were never pointed out as relied upon by complainant during the taking of the proofs before the Master, so that defendant had no chance to explain or answer the same with evidence before the Master.

And, to support this unwarranted action, the Master refers to a part of what Street, a text-writer, says on the subject, while Street does not pretend to cite the authority of any Court to support his strange proposition, which is in conflict with justice and reason and with the decision of the Court in the case of Bell v. United States Stamping Co., 32 Fed. 550-551, and Foster's Federal Practice, vol. II, Sec. 313, to all of which we had specifically called the Master's attention.

VII.

That the Master erred in taking the "capacity" of the various factories of the defendant as a basis for determining the total output or "manufacture" of such factories and in referring to testimony in the record in the main case as to the "capacity" of the defendant's factories without the record of such testimony having been pointed out by complainant or its counsel on the hearings before the Master and without any notice being given to defendant that the record of such testimony would be relied upon on this accounting and without any opportunity being given to defendant to explain or correct any such testimony.

VIII.

That the Master erred in holding that the complainant is entitled to recover on this accounting any of the profits made by the defendant from the sale of any of its American Lady shoes since the filing of the bill in this case.

576 IX.

That the Master erred in holding that the defendant must account to the complainant for profits made from the sale of American Lady shoes in the absence of any evidence to show that since the filing of the bill of complaint in this case any of the defendant's

shoes were sold as and for the complainant's shoes or that any person had purchased defendant's shoes bearing the name American Lady believing them to be the complainant's American Girl shoes.

X.

That the Master erred in holding that the defendant must account to the complainant for profits made from the sale, since the filing of the bill in this case, of defendant's American Lady shoes which were not shown by any evidence in the case to have been sold by the defendant as and for the complainant's American Girl shoes.

XI.

That the Master erred in holding that the defendant must account to the complainant for profits made from the sale, since the filing of the bill in this case, of defendant's American Lady shoes which were "plainly marked on the sole of each shoe with the belt trademark of Hamilton, Brown Shoe Company bearing upon said belt trade-mark the name Hamilton, Brown Shoe Company and in the center of said belt trade-mark the name American Lady." (See stipulations of June 4, 1910, and January 11, 1911.)

XII.

That the Master has erred in a matter of law in ruling that defendant must pay to the complainant profits made by de-
577 fendant in the sale of defendant's American Lady shoes sold since the filing of the bill and marked as stipulated in this case, because the Master has ignored the following rules (hereinafter tabulated as "*a*," "*b*" and "*c*"), applicable to cases of unfair trade as distinguished from cases of strict trade-mark, and established by the decisions of the Federal Courts in the United States, notably by the decisions of the U. S. Supreme Court and of the U. S. Circuit Court of Appeals of this and other circuits, namely:

(*a*) That to apply the same rule to a case in which the plaintiff is found to have a trade-mark in or exclusive right to a particular name or mark as is applied to a case where plaintiff is found to have no exclusive right to and no trade-mark in the name in question (precisely what the Master has done in the case at bar), to paraphrase the language of the U. S. Supreme Court in the "Ruberoid" case (Standard Paint Co. v. Trinidad Asphalt Co., decided April 10, 1911) is "to give to the name American Girl the full effect of a trade-mark, while denying its validity as such."

Yet the Master attempts to justify his position by stating that the decision of the U. S. Supreme Court of May 15, 1911, in the case of Jacobs v. Beecham was a ruling upon the question of unfair trade, in which there was no question of trade-mark involved (see Master's report, p. 29), when, as a matter of fact, as appears from that decision, that was a clear case of a trade-mark or trade-name, pure and simple, (as in the case of McLean v. Fleming, 96 U. S. 245), and in which the U. S. Supreme Court distinctly held that the name Beecham as applied to pills was a name to which the complainant

had the exclusive right, that name meaning plaintiff's pills and the pills of no one else, and expressly distinguishing that case
578 from Saxlehner v. Wagner, 216 U. S. 375, in which latter case, as in the case at bar, the Court held that the plaintiff had no trade-mark in and no exclusive right to the name there in question.

(*b*) That in cases of unfair trade as distinguished from cases of a trade-mark or trade-name, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and in such a case, where the defendant uses a name similar to that used by the plaintiff, the plaintiff not having a trade-mark in such name, and therefore no exclusive right thereto, the defendant may use such name providing he do so (as in connection with -is own name) in such a way as not to amount to a fraud on the public. See the recent decisions of the U. S. Supreme Court in Standard Paint Co. v. Trinidad Asphalt Co., decided April 10, 1911, affirming U. S. Court of Appeals for this Circuit in same case reported in 163 Fed. 977; Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 673, 674, affirming U. S. Court of Appeals for Seventh Circuit in Illinois Watch Co. v. Elgin Co., 94 Fed 667; Rubber Co. v. Rubber Co., 128 U. S. 598; Merriam Co. v. Ogilvie Co., 170 Fed. 167.

(*c*). In cases of unfair trade, the essence of the wrong consisting in actual fraud, in the sale of the goods of defendant as and for the goods of the plaintiff, and Courts of Equity not existing as instruments for the punishment of simple torts but merely to give the complainants, ex æquo et bono, what is clearly theirs and nothing more (Livingston v. Woodsworth, 15 Howard 559, 560; Hennessy v. Loewe Co., 103 Fed. 96; Merriam Co. v. Ogilvie Co., 170 Fed. 169), the complainant can recover neither profits nor damages where, as in the case at bar, the evidence before the Master fails to disclose that during the period covered by the accounting a
579 single person had purchased the goods marketed by the defendant supposing them to be the product of the complainant, or that the complainant had lost a single customer by the defendant's conduct. See principle underlying the authorities supra and Baker v. Baker, decided by the Circuit Court of Appeals for the Second Circuit, 115 Fed. 297, 299. Also article in Harvard Law Review for June, 1907, No. 8 of vol. XX, pages 620 to 633, reproduced in our brief before the Master, and all of which were cited to the Master.

Notwithstanding this, the Master disregards the settled rules of law established by the decisions of the Federal Courts of the United States, and deliberately applies to the facts in this case a rule of law and none other which can only be applicable to a case in which the Court has found that the plaintiff is entitled to a trade-mark in and the exclusive right to the name in question.

XIII.

That the Master erred, as a matter of law, in failing to apprehend and apply to the case at bar the following rule fixed by the modern Federal decisions:

The reason for the difference in the rule, fixed by the Federal Decisions, as to the recovery of defendant's profits in a case of trade-mark or trade-name and a case of alleged unfair trade.

The rule in equity is that the Master is not to try to punish the defendant, but to ascertain, from the proofs before him, what profits the defendant has made by reason of the infringement. It is only the profits made by reason of the infringement that a complainant is entitled to recover from the defendant (see our main brief
580 before the Master, p. 47, and cases there cited). In the case of a trade-mark or trade-name, to which the complainant has been found to have the exclusive right, it is immaterial whether or not the defendant has used his own name in association with the goods marked with the trade-mark or trade-name of the complainant—whether or not in the sale of the defendant's goods the goods have been accompanied with matter clearly indicating that they emanate from the complainant, because, as pointed out by the Supreme Court in the case of Jacobs v. Beecham, 221 U. S. 263, 272, in such a case the trade-mark or trade-name means complainant's goods and nothing else. In such a case there is a presumption that the goods marked with the plaintiff's trade-mark or trade-name were sold as and for the goods of the plaintiff.

But in a case where the plaintiff has no exclusive right to the name in question and the name which the complainant seeks to protect has merely acquired a secondary significance (as in the Elgin Watch case, 179 U. S., 665, the case of Dyer Quarry Co. v. Schuylkill Stone Co., 185 Fed. 557, which exhaustively discuss this question, and the decision in the case at bar) "as the essence of the wrong" (in such a case) "consists in the sale of the goods of one manufacturer or vendor for those of another," to use the language of the Supreme Court in 179 U. S. 674, no presumption arises from the mere use by the defendant of such a name, or a similar name, but it must affirmatively appear from the proofs before the Master that defendant has used the name in question "in such a way as to amount to a fraud on the public" (to again use the exact language of the U. S. Supreme Court in Elgin Watch Case at page 674 of 179 U. S.).

And, therefore, defendant has made no profits, by reason of
581 the alleged infringement, in a case of unfair trade, merely by using the name complained of (which is not a trade-mark or trade name to which the complainant has the exclusive right), unless it appear that in selling his goods marked with such name the goods have not been accompanied by other matter clearly indicating that the goods are the goods of the defendant.

This is the modern rule established by the Federal decisions, notably the Elgin Watch Case, supra, and the able and exhaustive decision of Judge Bradford in Dyer Quarry Co. vs. Schuylkill Stone Co., 185 Fed. 557.

This is the rule recognized by the majority of the Court of Appeals in the case at bar (see 165 Fed. 418). Yet on this accounting, with no proof that since the filing of the bill defendant has sold any shoes that were not accompanied with other matter, such as cartons for each pair of shoes, bearing defendant's name and the word

"Makers" on every such carton, and in the absence of an iota of proof that since the filing of the bill defendant has sold any of its American Lady shoes as and for complainant's American Girl shoes, or that any purchaser or customer was deceived, since the filing of the bill, in buying any of defendant's American Lady shoes sold by defendant since the filing of the bill as plaintiff's American Girl shoes, the Master awards the plaintiff all the profits made by defendant on its American Lady shoes sold since the filing of the bill except only such shoes as were marked on the shoes themselves not only with the name American Lady and the name Hamilton, Brown Shoe Company but also with the word "Makers."

It is precisely because the Federal law applicable to cases of alleged unfair trade is as we have stated it above, and as laid
582 down in Elgin Watch Case in 179 U. S. 674, and as stated in Judge Bradford's opinion in 185 Fed. 557, and in the numerous cases cited in our briefs before the Master, that, in cases of unfair trade, on the question of accounting, where, as in the case at bar, there was no proof of actual deception or actual fraud in respect to any of the goods sold by defendant and accounted for before the Master, that the U. S. Court of Appeals says, in Baker v. Baker, 115 Fed. 299, as follows:

"That injunction gave the full measure of relief to which the complainant, under the circumstances of the case, was entitled, except such a recovery for profits and damages as he might be found entitled to. The evidence upon the accounting failed to disclose that the complainant was entitled to any recovery of profits, or any except nominal damages, by reason of the defendant's conduct. It failed to disclose that a single person had purchased goods marketed by the defendant, supposing them to be the product of the complainant, or that the complainant had lost a single customer by the defendant's conduct."

Speaking of the above rule thus laid down by the U. S. Circuit Court of Appeals in Baker v. Baker, supra, which is in harmony with the principle underlying cases of unfair trade, as shown by the Supreme Court decisions, notably Elgin Watch Case, supra, the authors of the article in the Harvard Law Review, which we reproduced at pages 14-32 of our rebuttal brief before the Master, say (see pp. 24 and 25 of said rebuttal brief before the Master):

"Whatever general language in the earlier federal cases there can be found against the rule favoring the defendants, must be considered as superseded by Baker v. Baker, 115 Fed. 297."

583 XIV.

That the Master erred, as a matter of law, in failing to recognize and apply the following rules of law to the facts in the case at bar:

Names Which Have Acquired a Secondary Significance.

In cases where the Court finds that a name is not a trade-mark or trade-name and is incapable of exclusive appropriation by the complainant, though the Court may find that the name has acquired a

secondary significance, nevertheless in such a case the defendant may use that name, or a similar name on the same class of goods, when in the sale of defendant's goods they are accompanied with other matter clearly indicating that the goods emanate from the defendant.

In such a case, while the defendant may use the name he must do so in such a way as not to commit a fraud, and the law is satisfied if, in the sale of his goods, the goods are accompanied with other matter clearly indicating that the goods are the goods of the defendant. The law on this subject is clearly stated by the Supreme Court in the case of Elgin National Watch Co. v. Illinois Watch Company, pp. 673-674 of 179 U. S., as follows:

"But it is contended that the name 'Elgin' had acquired a *secondary signification* in connection with its use by appellant, and should not, for that reason, be considered or treated as merely a geographical name. It is undoubtedly true that where such a *secondary signification* has been acquired, its use in that sense will be protected by restraining the use of the word by others *in such a way as to amount to a fraud on the public, and on those to whose employment of it the special meaning has become attached.*

584 "In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those, and other, goods; and protection is accorded against unfair dealing, whether there be a technical trade-mark or not. *The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another.*" (Italics ours.)

A full and complete discussion of the Federal decisions which support the above rule is found in Judge Bradford's opinion in the case of John T. Dyer Quarry Co. v. Schuylkill Stone Co., 185 Fed. 557, where all the leading cases on this question of a name not being a trade-mark or trade-name but yet having acquired a secondary significance are discussed.

And these principles are fully, clearly and definitely applied by the U. S. Circuit Court of Appeals for this Circuit in the Trinidad Asphalt Case, 163 Fed. 983, where the Court refers to the "established rule that unfair trade competition cannot arise from the mere use of words belonging to the public" (as in the case at bar), "accompanied by a fair and truthful statement of the ownership and place of manufacture." (See foot of page 982 of 163 Fed.) This becomes more interesting and important when we find that in that very case the U. S. Court of Appeals for this Circuit in discussing the Camel's Hair Belting Case (Reddaway v. Banham), which case seems to have been thoroughly misunderstood by the Master, points out at page 983 of 163 Fed. that the House of Lords held in that case that the defendant would clearly distinguish his belting from that of the plaintiff, though both were marked "Camel's Hair," when defendant associated its name, prominently and con-

585 spicuously, with its goods. All this was clearly pointed out to the Master at page 67 of our main brief before him: and in our rebuttal brief before the Master, at page 8, we pointed out

to him that this Trinidad case had been affirmed by the U. S. Supreme Court on April 10, 1911, and this same doctrine and rule again affirmed by the U. S. Supreme Court. At the same time we supplied the Master with a copy of that decision of the Supreme Court affirming the decision of our U. S. Circuit Court of Appeals for this Circuit.

XV.

That the Master erred in the following matter found and stated by him at page 49 of his report:

"Neither am I at liberty to weigh against each other the decisions of the Court of Appeals in the Trinidad Case, which was decided on August 11, 1908, (163 Fed. 977, recently affirmed by the United States Supreme Court), and the decision by the same court in the case at bar, rendered three months later (165 Fed. 413).

"In the Trinidad Case, the Court of Appeals found that the defendant had not been guilty of unfair competition and consequently refused to order an accounting. Three months later in the case at bar, the same court found that this defendant had been guilty of unfair competition, and ordered an account to be taken. The cause having been sent to me to take the account, I cannot disobey the order of the Court by reason of any interpretation I may be urged to place upon the decision in the Trinidad Case.

" 'When, by an interlocutory decree on the merits, it was adjudged that a defendant was chargeable with unfair competition in simulating the dress of complainant's goods, and a reference was
586 directed to take an account of profits recoverable, the question of defendant's liability is concluded and cannot be reopened before the Master.' De Long Hook & Eye Co. v. Francis Hook & Eye Fastener Co., 159 Fed. Rep. 292."

The quotation given by the Master from the De Long Hook & Eye Co. Case is the second head note or syllabus of that case found at page 292 of 159 Fed., which, in an essential respect, fails to give the precise point decided by the Court. What the Court actually did decide is thus set out in the opinion of the Court, taken from page 293 of 159 Fed.:

"The defendant, conceding that it was properly enjoined from imitating the cards of the complainant, insists that as such cards (Exhibits 4 and 5) were not on the market, and were not actually used or sold, at the time the complainant succeeded to the business of its predecessor, there can be no recovery for gains and profits. The proofs show that the exhibit cards containing hooks and eyes had been manufactured and sold by the complainant in its business and were extensively known to the purchasing public, but that in the year 1898 the complainant modified the cards by pasting a narrow label on its face between the rows of hooks and eyes. (For statement of facts, see 139 Fed. 146.) Such modification, however, did not in my estimation give the defendant the right to imitate the earlier cards. The claim of the defendant that because the complainant modified its cards in the manner stated, and ceased to use or distribute the earlier cards, there could be no unfair competition,

is not tenable, since such issues were heretofore decided adversely to the defendant in this action.

"The interlocutory decree, which, as to Exhibits 4 and 5, was affirmed by the Circuit Court of Appeals, provided that the
587 complainant was entitled to the profits made by the defendant *by reason of the fraudulent manufacture and sale of its carded hooks and eyes.* Such adjudication was upon the merits, and cannot now be reopened for the purpose of allowing defendant to prove that the cards in question had been intentionally abandoned by the complainant." (Italics ours.)

It thus appears that in that case the U. S. Court of Appeals had specifically held that certain Exhibits 4 and 5 were fraudulent, and also by its decree expressly provided that the complainant was entitled to the profits made by the defendant "by reason of the fraudulent manufacture and sale of the carded hook and eye." In that case the Master found that there had been fraud in those sales. In that case the defendant sought to have the Master hold that what the Court had specifically decreed to be an infringement was not an infringement.

In the case at bar the Court of Appeals has not held that the mere use by the defendant of the name "American Lady" for shoes is a fraud, and has expressly held that defendant may use that name as applied to shoes, when accompanied by other matter clearly indicating that the shoes are defendant's shoes. Furthermore, the decree in the case at bar specifically directs that the accounting before the Master "be limited to shoes sold by the defendant since the filing of the bill in this case and which were marked with the name 'The American Lady' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company." (See decision in case at bar.)

588 XVI.

That the Master erred in awarding complainant any profits made by defendant in the sale of defendant's American Lady shoes since the date of filing the bill in this case, the Master applying to the facts in this case the same rule of law as to the recovery of profits that may be applied to the case of a strict trade-mark or trade-name in which a complainant has been found to have the exclusive right, whereas the Court of Appeals in the case at bar, by its majority opinion, which is the law of this case, has expressly found (see 165 Fed. 415) that "the name The American Girl, as applied to shoes, is not the subject of a valid trade-mark."

XVII.

That the Master erred, both in law and in fact, in finding that since the filing of this bill in this case defendant has sold any shoes to which it applied the name American Lady, which shoes were not accompanied with other matter clearly indicating that such shoes were of defendant's manufacture, and therefore not of complainant's.

XVIII.

That the Master erred in finding, as a matter of law, that defendant must account to complainant, under the terms of the interlocutory decree in this case which was entered by the Circuit Court in accordance with its understanding of the mandate of the Court of Appeals, for shoes sold by defendant marked with the name American Lady, notwithstanding the fact that every pair of said shoes so marked and sold by defendant were sold in cartons upon which cartons were clearly marked, in prominent letters, the name Hamilton,
589 Brown Shoe Co. and the word "Makers," the shoes thus being, as to each sale made by the defendant, "accompanied with other matter" (matter other than the name American Lady) "clearly indicating that such shoes are" (were) "of its own manufacture, and therefore not of complainant's," within the meaning of the mandate of the Court of Appeals and the interlocutory decree entered by the Circuit Court.

XIX.

That the Master erred in finding, as a matter of law, that defendant must account to complainant, under the terms of the mandate of the Court of Appeals and the interlocutory decree entered by the Circuit Court, for shoes sold by defendant which were marked on the shoes themselves with the name American Lady and also with the name of defendant company, and every pair of which shoes as sold by defendant were sold in a carton on which carton was plainly, prominently and clearly printed or marked the name of the defendant company and the word "Makers."

XX.

That the Master erred as a matter of law in his interpretation of the interlocutory decree in this case in finding that the defendant must pay to the complainant defendant's profits on all the shoes sold by defendant since the filing of the bill and marked with the name American Lady, and which have been accounted for in this case, the Master excepting only such shoes as were marked on the shoes themselves not only with the name of the defendant company but also with the word "Makers."

590 XXI.

That the Master erred in awarding to the complainant any more than mere nominal profits in this case—not exceeding one dollar.

XXII.

That the Master erred in holding, as a matter of law, that a rule applicable to a case of a strict trade-mark or trade-name applies to the facts in the case at bar, i. e.: That is is immaterial that in the sale of defendant's shoes marked with the name American Lady said shoes, in every case accounted for, were accompanied with matter,

such as defendant's name on the shoes themselves or defendant's name and the word "Makers" on the cartons in which every said pair of shoes were sold, clearly indicating that such shoes emanated from or were made by the defendant. In the case of a strict trade-mark or trade-name, in which the complainant is held to have the exclusive right, as was the case in Jacobs v. Beecham, 221 U. S. 263, the Master's statement to the contrary notwithstanding (see page 29 of the Master's report), as the defendant has no right to use the name or mark at all, fraud is presumed in the use by the defendant of complainant's trade-mark or trade-name, and it is immaterial whether or not in the sale of defendant's goods marked with complainant's trade-mark or trade-name defendant's goods are accompanied with defendant's name. This is because the complainant has a trade-mark in the name and therefore the right to exclude others from using that name in any way on the same class of goods. On the other hand, where the complainant has no exclusive right to the name in question as a trade-mark (as is the case here and so distinctly
591 held by the Court of Appeals in this case, see 165 Fed. 415), where the complainant cannot prevent the defendant from using the name in question, it not being capable of appropriation as a trade-mark, the defendant may use the name or a similar name on the same goods, when accompanied by other matter clearly indicating that the goods are of defendant's manufacture. Indeed, in the latter case, of which the case at bar is an example, the defendant's name on all the goods or on all the packages in which the goods are sold shows the absence of fraud on the defendant's part and not only indicates that they are defendant's goods and not plaintiff's but shows a persistent effort on defendant's part to call the attention of the public to its own goods. In the case of a strict trade-mark or trade-name, the defendant's goods infringe, where the defendant uses a similar mark or name, because an exclusive right has been invaded, whether or not defendant's name appears on the goods; but where the name adopted by the plaintiff "is not the subject of a valid trade-mark" (see 165 Fed. 415), then the use by defendant of a similar name on the same class of goods, when "accompanied by other matter clearly indicating that such shoes are of its own manufacture" is not to use the name unlawfully but shows "a persistent effort on defendant's part to call the attention of the public to its own manufactured goods," to use the language of the U. S. Supreme Court in Howe Scale Co. v. Wyckoff, 198 U. S. 139.

The Master refuses to see this distinction and expressly states, contrary to the facts (see page 29 of his report), that in the case of Jacobs v. Beecham, 221 U. S. 263, "there was no question of trade-mark involved," and then proceeds to apply the rule applicable only to cases of a strict trade-mark or trade-name to the case at bar.
592 The case of Jacobs v. Beecham, supra, was decided by the U. S. Supreme Court on May 15, 1911; it was strictly a trade-mark or trade-name case. Under the facts in that case the Supreme Court held that the name Beecham as applied to pills denoted origin and ownership and that complainant had the exclusive right thereto.

Against the defendant's contention that complainant had no trade-mark in the name applied to pills and that defendant had not infringed because though it had used the name Beecham as applied to pills, it had also used its own name on the packages containing the pills, the Supreme Court expressly distinguished from the case of Saxlehner v. Wagner, 216 U. S. 375, in which latter case the Supreme Court held that complainant had no exclusive right to the name Hunyadi and that defendant could use that name for bitter water when it put its own name on the package containing the water it sold, and, after pointing out that the name Beecham was "in the highest degree individual and means the producer as much as the product" and that "to call pills Beecham's pills is to call them plaintiff's pills," held that it was no defense that defendant also put its own name on its packages of pills. The same Court in Saxlehner v. Wagner, 216 U. S. 375, and Scale Co. v. Wyckoff, 198 U. S. 139, in which latter cases, as in the case at bar, the Court held that complainant had no trade-mark and exclusive right to the name, held that when defendant's name accompanied defendant's goods, as sold by defendant, that fact was so material that there was no liability on defendant's part to the complainant. This clear legal distinction the Master refuses to see and goes so far as to state with respect to this proposition, at page 29 of his report, as follows:

593 "If the latest decision of the Supreme Court of the United States seems to tend otherwise, that is a question for the Court to pass upon. I do not think it is within the jurisdiction of the Master to decide.

"The latest ruling upon this question of unfair trade is Jacobs Appt. vs. Beecham, decided by the Supreme Court of the United States on the 15th day of May ult. There was no question of trade-mark involved. Mr. Justice Holmes, in stating the case, says: (Italics ours.)

" 'The defendant's use of the name is said to be saved from being unfair by the statement underneath *that he made the pills.*'

"In dealing with this point the Court said:

" 'The statement that the defendant makes them does not save the fraud. That is not what the public would notice or is intended to notice, and, if it did, its natural interpretation would be that the defendant had bought the original business out and was carrying it on.'

"Supreme Court Reporter for June 15, 1911. Vol. 31, No. 12, p. 556."

In these remarks the Master shows clearly that he is in error. In his report he does not hesitate to decide a point of law, but in deciding that point of law against the defendant he refuses to follow apt and controlling decisions of the U. S. Supreme Court, on the ground that if the Supreme Court has decided otherwise, the matter is not within the jurisdiction of the master but a question for the Court to decide. A strange attitude for the Master to take, when he then not only incorrectly states the nature of said Beecham case before the Supreme Court but proceeds to decide the pure questions

of law here at issue against the defendant, contrary to the decisions of the U. S. Supreme Court.

594 XXIII.

That the Master erred in finding that the defendant has been guilty of unfair competition in trade with the complainant since the date of the filing of the bill of complaint in this case—January 29, 1906.

XXIV.

This being a case in the Federal Court and the decisions of the Federal Courts controlling, whatever the law may be in England and in some of the States, it is the law under the decisions of the Federal Courts of the United States, notably the decisions of the U. S. Supreme Court, that where the complainant is found not to be entitled to a trade-mark or trade-name in the mark in question and not entitled to the exclusive use of that mark or name as applied to a particular class of goods, and the defendant uses a similar name or mark in connection with the same class of goods but accompanied with other matter, such as defendant's name, clearly indicating that the goods in question emanate from the defendant and therefore do not emanate from the complainant, should it appear (it does not so appear in the case at bar) that the retailer sold the defendant's goods as and for the complainant's goods, such a fraud, if it be a fraud, is not a fraud for which the defendant, in the case stated, is responsible.

Proctor & Gamble Co. v. Globe Co., 92 Fed. 362;
Coats v. Merrick Thread Co., 149 U. S. 573.

The above proposition is supported by the authorities above cited, yet the Master tells us, at page 29 of his report, that even if the decisions of the Supreme Court seem to tend otherwise than as
595 he decides, nevertheless that is a question for the Court to pass upon and is not within the jurisdiction of the Master; and he does not hesitate to hold otherwise than as ruled by the Supreme Court in cases of unfair competition in the cases cited above.

Whatever the law may be in England and in some of the States, the weight of well-considered Federal decisions is in favor of the proposition that the essence of the wrong in cases of unfair competition consists in the sale of goods of one manufacturer or vendor for those of another; and that complainant cannot recover any profits made by the defendant in the sale of defendant's goods, where it is a case of alleged unfair competition and not a case of a strict trade-mark or trade-name, unless the defendant shows in respect to the several sales made by the defendant of defendant's goods that the purchaser in each case bought the defendant's goods as and for the goods of the complainant. Nevertheless, the Master in this case has undertaken to decide and has decided the above proposition of law contrary to the rule above stated against the defendant in this case.

Notwithstanding the very clear terms of the stipulation made and entered into in this case on June 4, 1910, and the exhibits attached thereto, as well as the terms of the stipulation of January 11, 1911, by which it is stipulated exactly how all of defendant's American Lady shoes covered by this accounting were marked and how the cartons containing each pair of shoes were marked, and notwithstanding the fact that under said stipulations and exhibits it affirmatively appears that since the filing of the bill (January 29, 1906) defendant never sold a pair of its American Lady shoes which were

596 "not accompanied with other matter" (such as defendant's name and the word "Makers") "clearly indicating that such shoes were of its own manufacture," and notwithstanding the fact that complainant utterly failed to show in regard to a single pair of said shoes sold by the defendant since the filing of the bill that they were sold, to the deception of the purchaser, as and for the shoes of the complainant, nevertheless and contrary to the weight of authorities in Federal Courts, the Master has decided as a matter of law that in view of the terms of the decree in this case and of the majority opinion of the Court of Appeals in this case the defendant must pay to the complainant all the profits that the Master has found the defendant made in the sale of its American Lady shoes marked in the manner stated in and exhibited by said stipulations and the exhibits attached to and referred to therein, excepting only such American Lady shoes as have been sold by the defendant since the date of the filing of the bill which were marked on the shoes themselves not only with the name Hamilton, Brown Shoe Co. but also with the word "Makers." In this we contend that the Master has erred:

(*a*) In point of fact, in holding that any of the American Lady shoes accounted for by the defendant and referred to in said stipulations of June 4, 1910, and January 11, 1911, were "not accompanied with other matter clearly indicating that such shoes are" of defendant's manufacture, "and therefore not of complainant's."

(*b*) In point of law, in holding that the said shoes are shoes the profits from the sale of which this defendant should be obliged to account to the complainant under the terms of the mandate of the Court of Appeals in this case and under the interlocutory decree which was entered by the Circuit Court in accordance with its understanding of the said mandate.

597 XXV.

That the Master erred in refusing to accord to the solemn, formal, written stipulation entered into by the parties on January 11, 1911, its full force and effect, and in refusing to enforce that stipulation and in speculating as to what was in the minds of complainant's counsel in entering into that stipulation, and in giving to that stipulation a meaning not warranted by its language, not contended for in briefs by complainant's counsel, and which is wholly groundless, the Master arbitrarily and without warrant going directly contrary to the plain terms and meaning of the solemn stipulation of January 11, 1911.

XXVI.

That the Master erred in holding that the defendant should be allowed in diminution of profits only the proportion of its advertising expense which the proportion of the product of the American Lady factory bore to the "capacity" of the several factories of the defendant.

XXVII.

That the Master erred in holding that the defendant is not entitled to an allowance in diminution of profits made by it from the sale of American Lady shoes since the filing of the bill of complaint in this case, of the proportion of the amount expended by it on account of "advertising" during such period and which had reference exclusively to the American Lady shoes as clearly appears from the stipulation of January 11, 1911.

598 XXVIII.

That the Master erred in holding that the defendant was not entitled to an allowance in diminution of profits made by it from the sale of American Lady shoes since the filing of the bill of complaint in this case, of one-half of the proportion of the amount expended by it on account of "advertising" during such period which "referred exclusively to the American Lady shoes and the American Gentlemen shoes, each of which (American Lady shoes and American Gentlemen shoes) was given equal prominence in said 'advertising,'" as clearly appears from the stipulation of January 11, 1911.

XXIX.

That the Master erred in holding that the defendant is entitled to be allowed in diminution of profits made by it from the sale of American Lady shoes since the filing of the bill of complaint in this case, only the proportion of the amount expended by it on account of "advertising" which the total sales of American Lady shoes bore to the total sales made by the defendant during that period, as clearly appears from the stipulation of January 11, 1911.

XXX.

That the Master erred in holding that the defendant is not entitled to an allowance in diminution of profits made by it from the sale of American Lady shoes since the filing of the bill of complaint in this case, of interest on that proportion of the amount of money it had invested in its business over and above borrowed moneys, which was at all times during said period devoted exclusively to the
599 American Lady line of shoes, as clearly appears from the stipulation of January 11, 1911.

XXXI.

That the Master erred in holding that the defendant is not entitled to an allowance in diminution of profits made by it from

American Lady shoes sold by it since the filing of the bill of complaint in this cause of the proportion of the amount expended by it during said period and listed in the schedules filed before the Master under the heading "Taxes" which its total sales of American Lady shoes bore to its total sales of all shoes, and in holding that the items of $14,220.70 and $10,974.99 listed under the heading "Taxes" referred to at page 88 of his report, or any part thereof, cannot be allowed in diminution of profits made by defendant from American Lady shoes sold during said period.

XXXII.

That the Master erred in holding that the defendant is not entitled to an allowance in diminution of profits made by it from American Lady shoes sold by it since the filing of the bill of complainant in this cause of the proportion of the amount expended by it during said period and listed in the schedules filed before the Master under the heading "Insurance" which its total sales of American Lady shoes bore to its total sales of all shoes, and in holding that the items of $6,352.22 and $4,933.02 listed under the heading "Insurance," referred to at page 88 of his report, or any part thereof, cannot be allowed in diminution of profits made by defendant from American Lady shoes sold during said period.

600

XXXIII.

That the Master erred in holding that the defendant is not entitled to an allowance in diminution of profits made by it from American Lady shoes sold by it since the filing of the bill of complaint in this cause of the proportion of the amount expended by it during said period and listed in the schedules filed before the Master under the heading "Depreciation of Real Estate," which its total sales of American Lady shoes bore to its total sales of all shoes, and in holding that the items of $17,087.64 and $12,508.06 listed under the heading "Depreciation of Real Estate," referred to at page 88 of his report, or any part thereof, cannot be allowed in diminution of profits made by defendant from American Lady shoes sold by it during said period.

XXXIV.

That the Master erred in holding that the defendant is not entitled to an allowance in diminution of profits made by it from American Lady shoes sold by it since the filing of the bill of complaint in this cause of the proportion of the amount expended by it during said period and listed in the schedules filed before the Master under the heading "Advance Boston House" which its total sales of American Lady shoes bore to its total sales of all shoes, and in holding that the items of $13,403.19 and $10,271.69 listed under the heading "Advance Boston House" referred to at page 89 of his report, or any part thereof, cannot be allowed in diminution of profits made by defendant from American Lady shoes sold by it during said period.

601 XXXV.

That the Master erred in rejecting the two items "Advance Boston House, $73,772.03" and "Allowance to Boston, $25,768.78" from the expense of doing business by the defendant and in diminution of defendant's profits and in refusing to allow said items as proper charges by the defendant to be included in the expense of doing business and in diminution of profits.

XXXVI.

That the Master erred in that he ignored the rule laid down by the Federal Courts, particularly the Circuit Court of Appeals for the Second Circuit in deciding the case of G. & C. Merriam v. Ogilvie, 170 Fed. 167, 169, and by other Federal Courts and the Supreme Court in cases therein cited, as applicable to cases of alleged unfair trade, in which the defendant has not availed itself of a trade-mark of the complainant, "because both this Court and the Circuit Court have expressly found that there was no trade-mark" in the name American Girl, and in which the wrong, if any, consisted in dressing up its product unlawfully, and that, "therefore, there is no concrete thing which belongs to the" complainant "the value of which can be substantially determined."

XXXVII.

That the Master erred in misconstruing and attaching undue importance to certain provisional rulings made by his Honor, Judge Dyer, District Judge, holding the Circuit Court, at an early stage in the proceedings before the Master, the facts in regard to those provisional rulings of his Honor Judge Dyer being briefly as follows:

602 The hearings before the Master began January 31, 1910. When the first witness was called before the Master on behalf of the complainant, this witness being Mr. Warren F. McElroy, and when Mr. McElroy was being examined before the Master, and, to-wit, on February 17, 1910, when complainant sought to compel the defendant to account for all shoes marked with the name American Lady, notwithstanding that it appeared that every pair of said shoes *were* sold by the defendant in a carton each of which was marked with the defendant's name and with the word "Makers," after the Master had ruled that shoes so marked and sold by the defendant since the filing of the bill had to be accounted for, at the request of defendant's counsel the Master adjourned the hearing to permit defendant to have the Court stop that inquiry, should the Court see fit to do so. Thereafter, to-wit, on February 21, 1910, defendant filed and presented to the Court (Judge Dyer presiding) a petition or motion to the above effect, and Judge Dyer, after hearing that petition or motion, denied the same, the learned Judge resolving any doubt in the matter, at that stage, against the defendant. Immediately afterwards and before the Master went on with the accounting, defendant's counsel petitioned the Circuit Court (Judge

Dyer presiding) to re-hear said motion before the full bench of the Circuit Court, asking that Judge Dyer have a Circuit Judge sit with him to re-hear the said petition or motion; but this Judge Dyer saw fit to refuse.

But what does all this amount to? As above stated, the said motions or petitions were made at the very outset of the accounting, when the first witness was on the stand before the Master, and before the proofs before the Master were closed. The Court evi-
dently did not wish at that stage to foreclose any inquiry
603 before the Master and at most merely decided, by that pro-
visional ruling, (wrongly, as we think) that the Master might allow evidence at that stage to show the number of American Lady shoes which the defendant had sold since the filing of the bill, no matter how they were otherwise marked or accompanied by other matter, leaving it for the complainant to supplement such evidence, if the complainant could do so, to the effect that in the sale of such shoes so marked defendant had committed actual fraud. So far as the Court then knew, before the closing of the proofs before the Master complainant might be able to show, notwithstanding the marking on the defendant's shoes and notwithstanding the fact that every pair of defendant's shoes was sold in a carton plainly bearing upon the same the name Hamilton, Brown Shoe Company and the word "Makers," that purchasers of defendant's American Lady shoes had purchased the same supposing them to be the product of the complainant, thus possibly coming within the requirement laid down by the Federal Courts and especially by the Circuit Court of Appeals for the Second Circuit in Baker v. Baker, 115 Fed. 299. But the proofs were closed before the Master without an iota of proof on the part of the complainant that any of the American Lady shoes sold by the defendant, marked as aforesaid, were ever sold to the deception of the purchaser, or that a single person had purchased any of defendant's said American Lady shoes supposing them to be the product of the complainant, or that the complainant had lost a single customer by reason of the sale by the defendant of its American Lady shoes marked and sold as aforesaid.

Therefore, the provisional ruling of Judge Dyer does not fore-
close the Master or this Court from holding after all the
604 proofs are in on this accounting, and as we contend the
Master and this Court should hold, that under the Federal decisions the rule laid down by the Circuit Court of Appeals for the Second Circuit in Baker v. Baker, 115 Fed. 299, the complainant is not entitled to recover either damages or profits from this defendant on this accounting.

The foregoing statement, we submit, clearly shows that the Master erred in attaching undue importance to the said provisional rulings of the Circuit Court in this case, made at an early stage in this accounting; and that while said provisional rulings of his Honor, Judge Dyer, were made, he did not hold, contrary to the rulings of the Federal Courts in similar cases, notably Baker v. Baker, 115 Fed. 29, that the complainant is entitled to recover profits or damages in the case at bar in respect to American Lady

shoes sold by the defendant since the filing of the bill and which shoes were plainly marked or accompanied with the name of the defendant company, in the absence of the complainant affirmatively showing on the accounting that purchasers of defendant's said shoes purchased said shoes believing them to be the product of the complainant, or in the absence of the complainant affirmatively showing by the proofs before the Master that complainant had lost customers by the sale of defendant's said shoes marked as aforesaid and accompanied with matter clearly indicating that such shoes were manufactured by or emanated from the defendant and did not emanate from or were not manufactured by the complainant.

605 XXXVIII.

The So-Called "Minden" Shoe.

That the Master erred in the following respect, as a matter of law:

Subject to the objections of defendant's counsel of record the complainant's counsel offered in evidence a pair of shoes which were not at all and did not pretend to be American Lady shoes, which had been sold by the Hamilton, Brown Shoe Co. and which had been manufactured for the Hamilton, Brown Shoe Co., under its directions, by some concern in the east. That pair of shoes was not marked in any way, as to the shoes themselves or as to the carton which contained them, as American Lady shoes and were never sold as a pair of American Lady shoes by the defendant. But the carton which contained that pair of shoes, said shoes being referred to by the Master as the "Minden" shoe, did bear upon it the name Hamilton, Brown Shoe Company with the word "Makers." The complainant's counsel contended that as the Hamilton, Brown Shoe Co. did not actually make in its own factory this "Minden" shoe, although said shoe was specially made for the Hamilton, Brown Shoe Co. by an agent of the Hamilton, Brown Shoe Co., therefore it followed that the name Hamilton, Brown Shoe Co. together with the word "Makers" on shoe cartons did not necessarily mean that the shoes contained in the cartons were made by the Hamilton, Brown Shoe Co.

The Master not only admitted this evidence subject to our objection but concluded from the evidence concerning this so-called "Minden" shoe that the name Hamilton, Brown Shoe Co. associated with the word "Makers" on the cartons containing defendant's

American Lady shoes do not indicate that the American
606 Lady shoes sold by the defendant were made by Hamilton.

Brown Shoe Co. This, we submit, involves a non sequitur, especially in view of the fact that by the stipulations made before the Master and dated respectively June 4, 1910, and January 11, 1911, it is particularly stipulated that every pair of American Lady shoes sold by the defendant since the filing of the bill were shoes actually made by the defendant.

Furthermore, as pointed out in our main brief before the Master, beginning at page 57 thereof, the Courts are not concerned in these

cases as to whether or not as a matter of fact the articles sold by the defendant is an article actually made by the defendant, or by someone for the defendant; it is sufficient that in contemplation of law, in cases of alleged unfair competition in trade, that the name of the defendant on the article itself or on the package containing the article, whether or not it was associated with the word "Makers," clearly indicates (see decree in case at bar) that the article in question emanates from the defendant and, therefore, does not emanate from the complainant, because, as repeatedly pointed out by the Courts in these cases of alleged unfair competition in business, the gravamen of the action consists in the selling of the goods of the defendant as and for the goods of the complainant, to the deception of the purchaser. It seems that the Master refuses to see this very clear legal distinction which the law makes, and therefore he erred not only in allowing the evidence as to the so-called Minden shoe but in the conclusions which he reached as a result of that evidence. As pointed out to the Master at page 58 of our main brief before him, and which includes specific reference to the cases of Menendez v. Holt, 128 U. S. 520; Godillot v. Hazard et al., 44 N. Y. Sup. 427; Price & Steuart Trade Mark Case, p. 128
607 and leading cases there cited; and Insurance Oil Tank Co. v. Scott, 33 La. Ann. 946; and also Price & Steuart Trade Mark cases, p. 486, it is utterly immaterial whether goods sold under a particular name and bearing the name of the individual or concern selling them are in fact actually made by him or not. Furthermore, as the evidence before the Master shows and as the stipulations above referred to specify, it is proved and stipulated in this case that every pair of American Lady shoes sold by the defendant since the filing of the bill was actually made by the Hamilton, Brown Shoe Co. The important point is that every pair of American Lady shoes sold by the defendant and accounted for before the Master *were* sold in a carton and that either the carton containing every pair of said American Lady shoes or the shoes themselves were "accompar ied" with matter clearly "indicating" that the said shoes emanated from or were manufactured by the defendant and did not emanate from and were not manufactured by the complainant.

Therefore, we except to the Master's report, in respect to what he says concerning the so-called Minden shoe, on the following grounds:

(*a*) That the evidence in the record before the Master in respect to the so-called Minden shoe was irrelevant and immaterial and that he erred in allowing any such evidence in the case;

(*b*) That notwithstanding the evidence in regard to the so-called Minden shoe, nevertheless the name Hamilton Brown Shoe Co. and the word "Makers" on every carton of American Lady shoes sold by defendant since the filing of the bill was clearly matter accompanying (see decree in case at bar) the sale of defendant's
608 American Lady shoes in every instance which plainly "indicated," in accordance with the facts stipulated in this record, that said shoes were manufactured by Hamilton, Brown Shoe Co.

and therefore were not manufactured by, or did not emanate from, The Wolf Brothers & Co., complainant, within the meaning of the interlocutory decree in this case.

As to the Allowance to the Master.

We ask to be heard in the matter of any further allowance to the Master. The record shows and the fact is that liberal fees have already been allowed and paid to the Master on this accounting by the parties to this action. Over and above the fees already allowed and paid to the Master, amounting in the aggregate to a considerable sum, the stenographer's and typewriter's charges for taking down the testimony before the Master and reducing it to typewritten form, have been paid. Though the transcript of the record before the Master covers many pages of typewritten matter, after the larger portion of the testimony had been taken before the Master stipulations were made between counsel covering many of the things testified about before the Master, for the very purpose of simplifying the record before the Master, with the result that practically all the questions of fact in this case are covered by stipulations which are, or should be, found in the Master's record.

All these matters will be better understood after the Court has read the Master's report and read and considered our exceptions and briefs in support thereof, and heard the arguments of counsel on the exceptions to the Master's report.

609 & 610 Therefore, we ask, under the circumstances, that the Court make no further allowance to the Master for fees or charges until it has heard or considered these exceptions to the Master's report.

In this case the defendant has followed the practice approved by the Circuit Court in the well-considered case of Bliss v. Anaconda Copper Mining Co., 156 Fed. 309, 313, and filed its exceptions to the Master's report, before the Master, after the Master had supplied complainant's and defendant's counsel with a copy of his report but before the Master had actually filed his report with the Clerk of this Court; and defendant's counsel will ask complainant to stipulate, or ask the Court to make an order, that these objections and exceptions filed before the Master shall stand as the exceptions to the Master's report without the necessity of re-filing exceptions to the Master's report after the Master's report has been filed with the Clerk of the Court, as provided in said case of Bliss v. Anaconda Copper Mining Co., 156 Fed. 313.

H. S. PRIEST,
PAUL BAKEWELL,
LUKE E. HART,
Solicitors for Defendant, Hamilton, Brown Shoe Co.

611 *Order Allowing Defendant's Exceptions Filed Before Master to Stand as Exceptions to Master's Report under Equity Rule* 83:

It appearing to the Court that the defendant herein, Hamilton, Brown Shoe Company, did file exceptions to the report of the Master before said Master, Henry H. Denison, Esq., after a copy of the Master's report had been submitted to said defendant and before the said Master's report was filed in this court. Therefore, on application of defendant's solicitor, it is ordered that defendant's said exceptions filed as above stated before said Master, a copy of which said exceptions *are* also on file with the Clerk of this Court, may stand as defendant's exceptions to the said Master's report under Equity Rule 83.

ELMER B. ADAMS, *Judge.*

St. Louis, Mo., October 7, 1911.

(*Order that Complainant Pay Master Further Sum of* $500.00.)

On motion of Henry H. Denison, Esq., it is ordered that the complainant pay to Henry H. Denison, Special Master herein, the further sum of Five Hundred ($500.00) Dollars, said sum to be on account of Master's fees for services rendered in this case to be credited to the complainant and taxed as costs on this accounting, subject to the final order that may be made in this case in respect to the allowance of the Master's fees.

DAVID P. DYER, *Judge.*

October 19th, 1911.

Exceptions of the Complainant to the Report of the Master, Filed Oct. 21, 1911.

Complainant excepts to the report of Henry H. Denison, Master, filed herein on October 4, 1911, on the following grounds:

1. Because the Master in computing the profits due the complainant on the shoes marked "American Lady" only (Master's report, page 102) allowed in diminution of such profits the sum of $34,616.31 on account of advertising; and because the Master overruled the exceptions which the complainant filed before him to his report on this ground.

612 2. Because the Master in computing the profits due the complainant on shoes marked in addition to the word "American Lady" with the words "Hamilton, Brown Shoe Company" (Master's report, page 102), allowed in diminution of such profits the sum of $36,931.62 on account of advertising; and because the Master overruled the exceptions which the complainant filed before him to his report on this ground.

3. Because, although the Master found from the evidence that

the profits made by the defendant by the sale of shoes having upon them the word "Makers" in addition to the words "American Lady," and "Hamilton, Brown Shoe Company," amounted to the sum of $132,740.77 (Master's report, pages 102, 105), the Master found that the complainant was not entitled to recover said profits; and because the Master overruled the exceptions which the complainant filed before him to his report on this ground.

4. Because, although the Master found from the evidence that the profits made by the defendant by the sale of shoes having upon them the word "Makers" in addition to the words "American Lady," and "Hamilton, Brown Shoe Company," amounted to the sum of $152,507.51 (Master's report, pages 102, 105), the Master in computing the profits on shoes so marked allowed in diminution of such profits the sum of $19,766.74 (Master's report, page 103), and said Master did not find that the complainant was entitled to recover said sum of $152,507.51 as the said profits on said shoes, but found that the complainant was not entitled to recover any of the profits on said shoes; and because the Master overruled the exceptions which the complainant filed before him to his report on this ground.

5. Because the Master sustained the objections of counsel for the defendant to the introduction of evidence offered by the complainant relative to "Minden" shoes and cartons enclosing said shoes (Master's record, pp. 548 to 554, inclusive, and pp. 555 to 563, inclusive; and Master's report, pages 42-43); and because the Master overruled the exceptions which the complainant filed before him to his report on this ground.

LAWRENCE MAXWELL,
SIMEON M. JOHNSON,
PERCY WERNER,
Solicitors for Complainant.

(*Receipt of Master to Wolf Brothers & Co. Filed Oct.* 23, 1911.)

613 Received of Wolf Brothers & Company, Complainant in the above action, Five Hundred Dollars ($500.00) on account of Master' fees, pursuant to order of court entered on the 19th day of October, 1911.

HENRY H. DENISON,
Special Master.

Defendant's Additional Exception to Master's Report. Filed by Leave of Court Nov. 1, 1911.

Now comes Hamilton, Brown Shoe Company, defendant in the above-entitled cause, by leave of Court first had and obtained, and files this its additional exception to the Master's report, which said Master's report was filed in this Court heretofore, to-wit, October 4, 1911.

Defendant states that the proofs before the Master on this accounting were concluded on March 7, 1911; that thereupon and,

to-wit, on said March 7, 1911, the Master decided that he did not care to have any oral arguments presented to him either by the solicitors and counsel for complainant or by the solicitors and counsel for defendant; that thereupon and, to-wit, on the said 7th day of March, 1911, as appears from the transcript of the record before the Master in this cause, the Master ordered that briefs be filed before him by counsel for complainant and counsel for defendant, that thereupon and in pursuance of the order of the Master as to how the argument on behalf of the complainant and defendant, respectively, should be presented to him, namely, by printed briefs, the entire argument of this cause before the Master, after the proofs before the Master had been taken, was presented to the Master both by counsel for complainant and counsel for defendant on printed briefs, exact copies of which briefs, as specified in the affidavit hereto attached, are filed herewith as exhibits. Thus we have presented to this Court in the form of printed briefs of the complainant and defendant all the arguments, and the only arguments, which were presented to the Master in this cause after the proofs before the Master on this accounting had been taken and in advance of the Master making his report.

Now, in view of the premises, defendant, by leave of Court first had and obtained as aforesaid, files the following additional exception to the Master's report as filed in this cause by the Master on October 4, 1911:

XXXIX.

That the Master erred in stating in his said report (at page 76 thereof):

614 (*a*) That counsel differed radically in their views as to the meaning of the stipulation of January 11, 1911, found in the record before the Master;

(*b*) That counsel for complainant contended that if any charge for advertising should be allowed it should only be the pro rata of the entire overhead advertising properly chargeable to the American Lady shoe, when, as a matter of fact, in the said argument before the Master on printed briefs complainant's counsel took no such position.

And that the Master also erred in stating (at page 76 of his report):

(*c*) That counsel for defendant maintained or contended that the purpose and intent of the stipulation was that 40% of all the advertising of the entire business of the defendant is to be charged against the profits of the American Lady shoe alone;

(*d*) That the defendant contended that the expense of the 40% of the advertising shall be charged exclusively against the American Lady shoe; and

(*e*) That the counsel for the defendant took the position that the objection and intention of the stipulation was that 40% of all the advertising for the entire business of the defendant, for the purposes of this controversy, should be charged as an expense upon the American Lady shoe alone, when, as a matter of fact, defendant's counsel in their said argument before the Master (said argument

having been presented to the Master on printed briefs alone) made no such contention.

In the above respects defendant excepts to the Master's report on the ground that as to all of them the Master has erred, as a matter of fact, in respect to the contentions of counsel in their arguments before him, the contentions of counsel for complainant and counsel for defendant, since the evidence before the Master was closed on March 7, 1911, being the contentions as found in the printed briefs filed before the Master by counsel for complainant and counsel for defendant, and it appearing from the said briefs filed as exhibits with these exceptions that the Master erred in the respects pointed out herein.

H. S. PRIEST,
PAUL BAKEWELL, &
LUKE E. HART,
Solicitors for Hamilton, Brown Shoe Co., Defendant.

615 UNITED STATES OF AMERICA,
State of Missouri, City of St. Louis, ss:

Paul Bakewell, being duly sworn, on his oath states: I am the solicitor for the defendant, Hamilton, Brown Shoe Company, and one of the counsel for said defendant, Hamilton, Brown Shoe Company, in this cause in equity pending in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, being equity cause No. 5262, entitled The Wolf Brothers & Company vs. Hamilton, Brown Shoe Company; and in the above case I have represented the same defendant in the accounting before Henry H. Denison, Esq., Master;

Heretofore, to-wit, on March 7, 1911, proofs on the accounting before said Master, Henry H. Denison, Esq., were concluded by both parties. At the session then held, to-wit, the session of March 7, 1911, as appears from typewritten page 598 of the transcript before the Master, there were present before said Henry H. Denison, Esq., Master, Messrs. Percy Werner and Simeon M. Johnson, Counsel for complainant, and Hon. H. S. Priest, Luke E. Hart, Esq., and affiant, as counsel for Defendant.

After all the proofs were closed on said 7th day of March, 1911, the Master was asked whether or not he cared to have the case submitted to him in connection with oral argument on behalf of counsel for complainant and counsel for defendant, and the said Master, Henry H. Denison, Esq., then and there stated that he did not care to have any oral argument made before him on the submission of this cause to him as Master. Then, as appears from pages 625 and 626 of the typewritten record of the proceedings before the Master, after suggestions had been made to the Master in respect to submitting the issues on the accounting to him on printed briefs filed on behalf of the complainant and the defendant, the Master made the following order in respect to the briefs, as appears from page 626 of the typewritten record of the proceedings before the Master.

"The MASTER: I will direct that on March 28, the first briefs shall be filed; that on April 18 an answer shall be filed" (by which the

Master meant that answering briefs should be filed), "and that if either counsel desired to make a reply to the answer which is due to be filed on April 18, they may have until the 2nd day of May in which to do so."

616 Affiant further states that after that time and from and after the said date, to-wit, March 7, 1911, when it was decided by the Master that no oral argument should be made before him by counsel for either party, on submission to him of the issues on the accounting, so far as affiant is informed and believes, and so far as affiant knows, no oral argument whatsoever was made before the Master either by counsel for complainant or counsel for defendant, but that briefs were prepared by counsel for complainant and counsel for defendant and copies of said briefs were served upon the Master and the opposing counsel, and that those briefs constituted, so far as affiant knows, the only argument made on behalf of complainant or defendant before the Master from the time the proofs were closed before the master, to-wit, on March 7, 1911.

Affiant further states that attached hereto and marked "Exhibit Complainant's First Brief Before the Master," "Exhibit Complainant's Second Brief Before the Master" and "Exhibit Complainant's Third Brief Before the Master" are true and correct copies of briefs served upon defendant's counsel by complainant's counsel as the briefs filed by the complainant's counsel before the Master on this accounting, and that no other briefs except the three briefs last named were ever filed by complainant before the Master on this accounting since the said 7th day of March, 1911, of which the defendant's counsel has had any notice.

Affiant further states that attached hereto and marked "Exhibit Defendant's First Brief Before the Master," "Exhibit Defendant's Second Brief Before the Master," and "Exhibit Defendant's Third Brief Before the Master," are the three briefs, and the only briefs, which defendant filed bfore the Master on this accounting from and after the said 7th day of March, 1911, and that said three briefs last named constitute all the argument that was made before the Master on this accounting between the 7th day of March, 1911, and the submission by the Master to the defendant's counsel of a copy of the Master's report.

Affiant further states that defendant's counsel made no oral argument before the Master between the date at which the proofs were closed before the Master, to-wit, March 7, 1911, and the filing of the Master's report herein.

Affiant further states that so far as he has any knowledge or information no oral argument was made before the Master either by counsel for complainant or counsel for defendant from the time the proofs were closed before the Master, to-wit, the 7th day of March,

617 1911, up to the time at which the Master prepared and submitted to counsel copies of his report as the same is found between pages 1 and 105 of the printed report of the Master filed in this cause.

PAUL BAKEWELL.

Sworn to and subscribed before me, this 31st day of October, 1911. My term expires February 5, 1913.

[SEAL.] GEORGE BAKEWELL,
Notary Public.

EXHIBIT COMPLAINANT'S FIRST BRIEF BEFORE THE MASTER.
(Seal.) George Bakewell, Notary Public.

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 5262. In Equity.

THE WOLF BROTHERS & CO., Complainant,
vs.
HAMILTON, BROWN SHOE CO., Defendant.

Brief on Hearing Before Special Master, Hon. H. H. Denison.

Brief for Complainant.

The Decree.

So far as relates to the matter of the accounting, the decree of the court in this case reads as follows, viz:

"4. This case is referred to Hon. H. H. Denison, as Master, upon the evidence already taken in this case and the exhibits in evidence in this case, and such further evidence as may be offered before the Master by the parties to this action, to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case and which were marked with the name 'The American Lady' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton, Brown Shoe Company."

The form of this decree, counsel for defendant informed the Master at an early stage of this hearing, was the form prepared
618 and submitted by himself. (See Record, p. 2*b*.) Whoever prepared it, it became on adoption and entry the decree of the court, and the court's understanding of that decree, if there be any ambiguity, must be looked to to determine its meaning. Judge Dyer, who entered the decree, on the application made by defendant to stay the hearing, said:

"The court held, as I understood it and now understand it, that the defendant company could make the shoe and use the words 'American Lady,' as distinguished from the words 'American Girl,' used by complainant, provided it was shown from the shoe thus made that it was the manufacture of the Hamilton, Brown Shoe Company." (See Rec., p. 107*c*.)

In accordance with this understanding, the Circuit Court ruled that the fact that the shoes were packed in cartons marked "Hamilton, Brown Shoe Company, Makers," or that the shoes had impressed on them the name "Hamilton, Brown Shoe Company," did not clearly indicate that they were of the manufacture of the defendant, and, therefore, the profits on these shoes would have to be accounted for.

Judge Priest, who was added to counsel for the defendant during the progress of this hearing, at the first session which he attended, rising fresh from a reading of this decree, with delightful perspicacity and refreshing candor, thus interpreted it (see Record, p. 437), viz:

"The order, it seems to me, is quite explicit and narrows very much the investigation before the Master; shoes made and not bearing certain insignia *of* any marks that would indicate the origin of their manufacture."

Read, therefore, in the light of the foregoing and in the light of the opinion of the United States Circuit Court of Appeals in this case (165 Fed. 413), the decree can only have one meaning, and that is that by reason of the unfair practices conclusively found by that court to have been indulged in by defendant, a shoe marked "American Lady" means a shoe made by the complainant in this case, unless that term is accompanied by some insignia or mark on the shoe clearly indicating—not that it was sold by the defendant, not indicating merely that it emanated from the defendant, but that it was of the manufacture of the defendant. The decree directs the accounting of both damages and profits "limited to shoes sold by the defendant since the filing of the bill," i. e., January 29, 1906, and not so marked. The directions to the Master are, therefore, we think, clear and unmistakable.

619 The Marking of American Lady Shoes.

Remembering, then, that the significance of the words "American Lady" on a shoe, unaccompanied by any other marking, is that the shoe is manufactured by the complainant, we have first to direct our attention to the proof of the marking of American Lady shoes sold by the defendant after the date in question, and decide which, if any, are to be excluded from the accounting by reason of accompanying marks clearly indicating that the shoes were manufactured by the defendant.

We find these shoes to fall into four classes, viz: first, those marked simply "American Lady," without other accompanying matter; second, those marked "American Lady" accompanied by the name "Hamilton, Brown Shoe Company," used in connection with the belt and buckle trade-mark; third, those marked "American Lady" and accompanied by the corporate name and trade-mark and the further word "makers" on the top band of one of each pair of shoes; and, fourth, those marked "American Lady," and accompanied with the name "Hamilton, Brown Shoe Company," and the further word "Makers" impressed on the sole of each shoe.

What Shoes Are to be Considered in Taking the Account of Profits.

Of the four classes above-mentioned there can be no question, in view of what has heretofore been said, that the profits on the first two classes, to-wit, the shoes marked simply "American Lady" and those marked simply "American Lady," accompanied by the name "Hamilton, Brown Shoe Company," must be accounted for under the decree. Not only is this clear from the interpretation of the decree given by the court, above referred to, which simply confirmed the interpretation which the Master had theretofore placed upon it, but the proof introduced shows that the defendant was both the jobber of shoes manufactured by others, and the manufacturer and distributor of its own product (Record, p. 37), and that its name and trade-mark, "Hamilton, Brown Shoe Company" in belt and buckle were used on both the shoes which it jobbed of the manufacture of others, and the shoes which it distributed of its own product, thus giving to the name and trade-mark, when used with more, the significance of jobbers or distributors. (See Master's ruling, p. 70, p. 96, p. 100.)

The only real serious question to be considered and decided, in relation to what shoes are to be embraced in the accounting, is whether a shoe branded "American Lady," and also having impressed on the sole of one or both of a pair of shoes,
620 or on the top facing of one of the shoes the defendant's name, with or without the conventional belt and buckle trade-mark, and with the word "Makers" added, clearly indicates that such shoes were of the manufacture of defendant. We concede that Judge Dyer, in his interpretation of the opinion of the United States Circuit Court in the opinion delivered and heretofore referred to, seems to so decide, and the Master expressed the same opinion at an early stage of the hearing (Record, p. 79.) Counsel for complainant desire to avoid even the ap-earance of being disingenuous, but, while admitting that there is considerable doubt in the proposition as to whether merely attaching the word "Makers" is sufficient to show that the particular shoes to which this word is attached are of the manufacture of the defendant, there seem to be certain cogent reasons why this word so used should not be given such significance. These we will briefly state.

Mr. McElroy testifies that at one time they used the term "shoemakers" and changed "it" to "Makers." So that it is obvious that the word "Makers," is imply used with the general signification of "Shoe Makers." (See Record, p. 54.)

Again, the fact that defendant used as a brand for one of their styles of shoes the term "Own Make" (Rec., p. 563), shows that they knew of an unmistakably clear way of indicating in almost as brief a way as by the word "Makers" that the shoes were of their manufacture. We are frank to say, however, that when on March 9, 1910, defendant commenced to brand the word "Makers" on the soles of their American Lady shoes, and in connection with their belt and buckle trade-mark and name (see Rec., pp. 535 and 537), that they adopted this manner of branding the shoes in an effort to comply with the terms of the decree. Whether it be in

fact a full compliance with the terms of the decree, we think is open to question, but we have saved our exception to the ruling of the Master on this point, and understand that in accordance therewith the shoes marked with the defendant's name, and the word "Makers," are to be excluded from the accounting (Rec., p. 547).

What to be Considered in Reduction of Profits.

Having decided what classes of American Lady shoes are to be embraced in the accounting, and inasmuch as defendant's profits, factory and jobbing, on all such shoes are in evidence, the next question to be considered is whether the expense of advertising, or any proportion thereof, should be considered in diminution of the profits allowed complainant. In this connection, it will be noted that the proof shows that defendant manufactured
621 shoes in seven different factories: in the American Lady with the capacity *for* 7,000 pairs per day; American Gentleman, of 7,000 pairs per day; Union, of 10,000 pairs per day; Columbia, 6,000 pairs per day; Rugby, 2,000 pairs per day; Security, 4,000 pairs per day, and Sunlight, 20,000 per day (see old Rec., p. 453), besides doing a large general jobbing business. Their total sale in 1906 being in excess of $11,000,000 (old Record, p. 453). An inspection of the catalogues will show that, aside from the particular line of "American Lady" shoes, defendant manufactured and jobbed several hundred other styles or brands of shoes. Under these circumstances, and considering the special kind of business defendant was conducting, where the popularity of one particular style of shoe must have redounded to the benefit of their entire trade, we do not believe that any attempt to apportion the expense of advertising and allowing a particuler proportion of such expense to go in reduction of the profits on American Lady shoes should be indulged, especially where defendant's own books show that its expense for advertising was treated as a general or overhead charge. To allow the defendant on this accounting in diminution of its profits a large proportion of its advertising expense would be to allow defendant to derive an advantage from its own wrong and to reduce the profits by an expense which, the greater it was, the greater was the resulting damage to complainant. The proof in the old Record shows that after the bill in this case was filed, and up to May 1, 1907, defendant expended in advertising "The American Lady" brand of shoes nearly $110,000 (old Rec., p. 454), and the new Record shows $165,673.06 spent in 1907 and 1908, and $246,570.53 in 1908 and 1909 (see Kribben's Report). Having expended these amounts deliberately after full notice that an accounting might be required, a court of equity will hardly allow credit for such expense incurred in the direct attempt to smother and destroy complainant's business, and especially where such expense went, directly or indirectly, to build up the defendant's general business.

In societe Anon vs. Western Distilling Co., 46 Fed 921, Judge Thayer says:

"When an unlawful business is carried on in connection with the defendant's regular business, and the same agencies are employed in doing that which is lawful and that which is unlawful, no rule of law of which I am aware requires any deduction for expenses in estimating the profits of the unlawful business" (p. 922).

622 See, also, Providence Rubber Co. vs. Goodyear, 9 Wall. (76 U. S.) 788-804, where the court holds: "Where the conduct of the defendants has not been such as to commend them to the favor of a court of equity, every doubt and difficulty should be resolved against them."

What is said by Judge Thayer of course applies equally to all the items of strictly general or overhead charges, not taken into account by the witness, and accountant Mr. Kribben.

It should be borne in mind that we have no such question here as was involved in Westinghouse Elec. & Mfg. Co. vs. Wagner Elec. & Mfg. Co., 173 Fed. 361 (in which the report of the Master in this case was under review). There one who in good faith believed he was not invading any right of the patentee was held to be chargeable only with the profits actually realized from the use of patented device used as a part of a machine, and it was held the burden was on the plaintiff to separate the profits arising therefrom by reliable and tangible evidence. But here we have a case where the entire profits on each American Lady shoe not properly branded has to be accounted for, and the only question is whether certain general items of expense more or less applicable to the entire business shall be looked to in reduction of these profits,—profits, too, made by a wrong-[doer] on sales made after full notice that he might be held to account for such profits. Under these circumstances the rule should be that where a wrongdoer so mingles the items of expense that those strictly and exclusively incurred in the selling of the particular article, the profits on the sales of which are to be accounted for, are indistinguishable from the general expenses of running the entire business, all such items are to be neglected rather than apportioned—especially where the wrongdoer, upon whom the burden should lie, can himself offer no "reliable and tangible" evidence upon which such apportionment could be made.

In this connection we desire to say that eliminating the peculiar question involved in the Westinghouse case above referred to, as to profits on an entire machine only a minor part of which involved the use of the patent in question, and that infringement in ignorance, and in good faith, and we see no reason why the dissenting opinion of Sanborn, J., in that case does not become the law of this case as to the accounting feature. In that case Sanborn, J., says "the evidence not only fails to disclose to my mind any error or mistake in the findings of the Master, but compels my assent to his conclusion," and then goes on to lay down the rule

623 for "compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property to his own advantage." We note, too, that the learned counsel for the defendant in this case (Mr. Bakewell) appeared for complainant in that case and contended for

this rule, the very rule for which we now contend, so that it seems vain before the present Master, already so familiar with the question, and with such counsel in opposition (whose very exhaustive brief in the Westinghouse case we have read with great profit, and take pleasure in referring to here) to cite further authorities.

Profits.

We refer the Master to the tabulated statements, prepared by Mr. Kribben, and the stipulation bringing the figures down to March 9, 1910, showing the profits (excluding advertising) on the American Lady shoes sold by defendant to which we contend complainant is entitled under the decree. (See Rec., pp. 496-516, and pp. 580-585.) The Master will, of course, remember that the "jobbing profit" was found after all of the ordinary expenses of selling were cared for out of the "store discount." Interest on the profits found from the end of each of the respective periods for which they are ascertained, in our opinion, should be allowed.

Date to Which Accounting Must Run.

The decree sets no limitation to which the accounting shall extend. The accounting must, therefore, extend down to the time when the decree was complied with by defendant, i. e., down to March 9th, 1910, according to the interpretation placed upon the decree by the Circuit Court and the Master.

See Provident Rubber Co. vs. Goodyear, 9 Wall. (76 U. S.) 788-704; 19 L. Ed., 566.

Damages.

The decree in this case directs the Master to report both damages and profits. Complainant has not attempted to introduce any specific proof as to the amount of its damages, for the very obvious reason that they are practically incapable of exact computation. This is far from admitting that complainant is not entitled to a substantial allowance for damages. The Court of Appeals having decided that the unfair competition with which defendant stands convicted was of an aggravated nature, amounting to direct piracy or spoliation, punitive damages may and should be allowed. The amount
624 to be allowed for damages is discretionary with the Master, and may be allowed in the absence of specific proof.

Pike vs. Doyle, 19 La. Ann. 362;

Thompson vs. Winchester, 19 Peck. (36 Mass.) 214 (31 Am. Dec. 135);

Conrad vs. Jos. Uhrig Brewing Co., 8 Mo. App., 277.

As said by Bakewell, J., in the last case cited, a case of unfair trade:

"As to the damages, the facts present a case of fraud on plaintiff and violation of his rights for which the action lies without proof

of specific damages; and the jury having found for plaintiff he is entitled to such damages as the jury, on the whole evidence, should be satisfied he had sustained. And the damage was not confined to the loss of such actual sales as could be specifically shown to be lost, but the jury might make such inference as to the loss and injury sustained by plaintiff as they might think warranted by the whole evidence in the case." Citing Marsh vs. Billings, 7 Cush. 322.

We respectfully submit that the Master should make a report of damages and profits in accordance with the order of reference and the rules of law submitted in this brief.

Respectfully submitted,

LAWRENCE MAXWELL,
SIMEON M. JOHNSON,
PERCY WERNER,
Solicitors for Complainant.

625 EXHIBIT, COMPLAINANT'S SECOND BRIEF BEFORE THE MASTER.

(Seal) George Bakewell, Notary Public.

In the Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri.

No. 5262.

THE WOLF BROTHERS & CO., Complainant,
vs.
HAMILTON, BROWN SHOE CO., Defendant.

On Accounting Before Henry H. Denison, Esq., Special Master.

Complainant's Answer to Defendant's Brief and Argument.

Lawrence Maxwell, Simeon M. Johnson, Percy Werner, Solicitors for Complainant.

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Page.
The Master has before him for his consideration on this accounting all the evidence already taken in the case, including all exhibits 1
Defendant did not act in good faith, but fraudulently, and is chargeable with wilful, intentional and unfair competition from the commencement of the action. Therefore complainant entitled to full recovery on this accounting..... 8
Defendant intended that its "American Lady" shoe should be palmed off upon purchasers, as and for "The American Girl" shoe of complainant..... 14

Defendant must so clearly distinguish its "American Lady" shoes—by marks or matter thereon, as to enable a purchaser of average intelligence on inspecting the shoes, to know that such shoes are not of the manufacture of the complainant.
Marking cartons not a compliance with the court's decree.... 15
The terms "American Girl" and "American Lady," have the same secondary signification, and had come to be recognized in the trade as meaning that such shoes were those of complainant. All shoes sold by defendant marked "American Lady," unaccompanied with such distinguishing marks or matter on the shoes as to clearly indicate that such shoes
627 were of the manufacture of defendant, must be presumed to have been sold because the public believed them to be complainant's shoes, and complainant is entitled to the profits made on said sales.... 20
The defendant intentionally used a deceptive trade name, having fraudulently and designedly appropriated it, with full knowledge that shoes so marked were to be purchased by consumers under the belief that such shoes were shoes of complainant, and defendant so intended; hence all such shoes were sold as and for complainant's shoes, and defendant must be held to account for the profits thereon.... 23
Impressing upon some of "The American Lady" shoes the name "Hamilton, Brown Shoe Company," is not a sufficient indication that such company is the maker or manufacturer of the shoes.... 27
The defendant must account for all such shoes so sold, or which may be so sold.... 31
In ascertaining the amount of the profits arising from the sale of goods upon which a trade name has been wrongfully used, the same rules of law govern and are applied to cases of unfair competition merely, as to cases of infringement of a technical trade mark.... 32

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Complainant's Answer to Defendant's Brief and Argument.

The Master Has Before Him for His Consideration on this Accounting all the Evidence Already Taken in the Case, Including all Exhibits.

What is before the master in the way of evidence for his consideration on this account?

At the outset defendant's counsel makes the somewhat astonishing contention that the master on this accounting can only consider the opinion of the United States Circuit Court of Ap-
629 peals in this case, the decree, the testimony taken before him on this accounting and the exhibits offered in evidence before him and the stipulation made between the parties, and that he cannot consider "any part of the former record other than the opinion of the United States Circuit Court of Appeals and the interlocutary decree entered in pursuance of that opinion and of the equity rule 80, or of any exhibit in said former record, unless the complainant or defendant in taking its proof before the master on the accounting has specifically and formally brought certain proofs of that former record or certain exhibits in that former record to his attention and offered the same in evidence as part or parts in said former record relied on."

We say that this contention is somewhat astonishing, in view of the fact that the order of reference in this case (of which again we take occasion to remind the master, defendant's counsel claimed the authorship; master's record, p. 2B) expressly and specifically provides that "this case is referred to H. H. Denison, Esq., as master, upon evidence already taken in this case and the exhibits in evidence in this case, and such further evidence as may be offered." Moreover, a reference to the record made up before the master shows that the master and counsel for both the complainant and defendant understood that all of the old record and all of the old exhibits were before the master.

On page 61 we find the following:

The MASTER: This order requires that I pass upon this matter with the testimony which has already been taken in the trial of the cause and such other testimony as may be taken before me, and I have been unable to get a copy of the record. The clerk of the court could not furnish me with one and I have not had an opportunity to examine this record. I shall have to do so and I see very clearly that I shall have to examine this record of testimony introduced in the hearing before the court with regard to this very matter you are asking me to pass upon now."

630 On page 89 we find the master says: "In trying to arrive at the meaning of the court in the decree on which the case was sent to me, I came to the conclusion (and it seemed to me unavoidable) that the court took no cognizance whatever with regard to the cartons that were offered in evidence, but that the decision of the court was based upon the distinction between the shoes which had stamped upon them somewhere 'Hamilton, Brown Shoe Company, makers' and those which did not have the addition of the word 'makers' on the shoes. Some of the exhibits of shoes were so stamped; some were not."

On pages 95-96 we find the following:

The MASTER: "I was endeavoring in expressing myself upon this question to satisfy myself with regard to the meaning of the decree of the court which sent the matter to me to determine, and from an examination of the exhibits already filed in the court, I find

that some of the exhibits have the name of the 'Hamilton Brown Shoe Company, makers,' stamped upon the silk facing of the inside."

Furthermore, whilst defendant's counsel made elaborate objections to the opinion rendered by the master from which the above excerpts are taken, they nowhere in the remotest manner intimated that the master had no authority to consider the evidence in the old record and the old exhibits, but on the contrary, counsel for defendant themselves consider the same as before the master.

Thus, on pages 91 and 92 we find the following:

Mr. BAKEWELL: "Counsel for defendant respectfully submits that a careful examination of the carton in the court and introduced in evidence before the final hearing, will show that many of them, if not all of them, do bear upon them the word 'maker'; and defendant's counsel again repeats his objection, and calls the master's attention to the fact that a careful examination of the record in connection with the introduction in evidence of those ex-
631 hibits will show the master that it does not appear from the evidence in this case," etc.

There were other references in the hearing before the master to the original record.

At page 33 the master states "I want to examine the record of the Court of Appeals."

At page 65, a discussion arose about the exhibits offered in the proofs upon the original hearing. It was claimed that the Circuit Court of Appeals saw them, and the wish was expressed that the master see them, thereupon the master said:

"They belong to the hearing before me."

Opposing counsel made certain statements as to such exhibits, the master then stated:

"The record will show that."

At pages 78-79 the following appears from the master:

"In addition to the authorities which I have undertaken to examine in regard to the matter, the court has directed me to proceed upon the testimony already taken in the main case," etc.

"In view of that order I have examined the exhibits which were filed in the main case, etc. But I also find in examining these exhibits that there are some, etc."

At page 84 our adversaries treat the original record as in the case in taking exceptions and refer to it as follows:

"In regard to exhibits of defendant's shoes introduced in evidence by the complainant before the final hearing in the case, a careful examination of the record in connection with the introduction in evidence of those shoes put in evidence by the complainant will show that those shoes all related," etc.

632 At pages 95-96 the master states that he has made an examination of the original exhibits already filed in court, and announces what he has found upon them.

At page 438 defendant's counsel says:

"Now, in view of that condition of the testimony, the Court of Appeals reversed this case."

And prefaced the above with a statement of what that testimony shows.

In view of the decree and order of reference in this case, the actions of the master, parties and counsel in treating the original record as actually in the case by repeated reference thereto and rulings thereon, it ought not to be necessary to discuss any further the question as to what is before the master. However, we proceed to consider the question upon principle and authority.

It is manifestly not necessary in the present case to refer to Equity Rule 80.

The order of reference was as follows:

"This case is referred to Hon. H. H. Denison, as master, upon the evidence already taken in this case and the exhibits in evidence in this case and such further evidence as may be offered before the master by the parties to this action, to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case and which were marked with the name 'The American Lady,' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton, Brown Shoe Company."

This order does not recite that such evidence in the record as the parties in interest should respectively introduce, may
633 be used before the master, but that the case is referred,

"Upon the evidence already taken in this case, and the exhibits in evidence in this case and such further evidence as may be offered before the master by the parties to this action."

The further evidence which may be offered does not and cannot mean evidence already taken in the case, yet such is the meaning contended for by the defendants under the remarkable argument set out in their brief.

"However, the master is, under Rule 77, given such complete power to regulate the proceedings in a reference, that he is clearly authorized to take cognizance of proof already in the record if he sees fit to do so, though it is not brought before him by the parties."

Street Fed. Equity Prac. Sec. 1434.

But suppose, upon the order as made, the complainant had seen fit to offer no further evidence, or the order had been silent thereon, and had not permitted the parties to supplement what was in the record, with additional proofs. Would it not be the height of folly to claim that the evidence already in the record and taken in the case, could not be considered without being re-offered? The master by the order of reference was ordered to make his report upon the evidence already taken in the case, unless the parties saw fit to offer further evidence. In other words, the evidence already in the record might furnish, at the option of the parties, the necessary information to the master upon all the points in the case. The court has ordered the report to be made from that evidence already taken in the case and the master cannot ignore such order.

"If the evidence already in the record appears to furnish the necessary information upon all the points embraced in the reference, the court may order the report to be made from that evidence."
Street Fed. Equity Prac. Sec. 1434.

634 And so in the present case the court determined that the evidence already in the record furnished some information upon the points in the case, and sufficient information upon which to call for the judgment of the master thereon, unless supplemented by further evidence which the parties were not compelled to offer, but were given the privilege so to do; and the court ordered the master to make his report either upon such record alone or upon that record and the supplemental proof.

The case of Bell vs. The U. S. Stamping Co., 36 Fed. 549, does not support the contention of opposing counsel. In that case an examiner took the testimony who had no power to rule on the propriety of a question or the relevancy of an answer. In the present case all the testimony was submitted to a court which had full power to pass upon all exceptions thereto, and which doubtless considered the same and made such testimony the basis of its opinion in the case and of the decree entered. In the Bell case the master failed to make a finding upon a point made by certain testimony which was never brought before him or explained, but was merely referred to in argument. An exception to the master's report for so failing to find upon the above point made by such testimony, was overruled, but in that case we know that the order of reference was not specific in its nature as here and did not direct the master to render his report upon the evidence already taken in the case. Had such a special order been made to the master, he would not and could not have ignored such testimony. So, by following defendant's argument we are led to this reductio ad absurdum, that, although the order or reference directs that the master must make his report upon the evidence already taken in the case, yet the master cannot make his report upon such evidence already taken in the case, and unless that evidence is re-offered he can only make his report upon other evidence offered by the parties and not already taken in the case.

635 Defendant did not act in good faith, but fraudulently, and is chargeable with wilful, intentional, and unfair competition from the commencement of the action. Therefore complainant entitled to full recovery on this accounting.

The whole argument of defendant's counsel as to the complainant's right to an accounting for the profits made by the defendant, proceeds upon the assumption and theory that the defendant's conduct since the filing of the bill has been innocent, or free from wrongful intent. In other words, they contend for the application of the rule of law, that an account of profits will not be taken where the wrongful use of a trade mark or a trade name has been merely accidental, or without any actual wrongful intent to defraud a plaintiff or to deceive the public. We quote as applicable to the

defendant's situation, the language of the Supreme Judicial Court of Massachusetts in Regis vs. Jaynes & Co., 191 Mass. 245-248:

"The general principle that one who has shown that he is entitled to the exclusive use of a trade-mark may in equity recover from an infringer against whom he obtains an injunction the amount of the profits arising from the sale of goods upon which the trade-mark has been wrongfully used, is not denied by the defendants and is abundantly sustained by authority. *And the same rule is applied to cases of unfair competition merely, as well as to cases of the infringement of a trade-mark properly so-called.* Fairbank-Co. vs. Windsor, 118 Fed. Rep. 96; S. C. overruled as to some points, 124 Fed. Rep. 200. Walter Baker Co. vs. Slack, 130 Fed. Rep. 514. Williams vs. Mitchell, 106 Fed. Rep. 168; S. C. 45 C. C. A. 265. Lewis vs. Goodwin, 36 Ch. D. 1. Equity in such case holds the infringer as trustee for the benefit of the rightful owner to
636 the extent of the profits realized from the unlawful or wrongful business. Paul, Trade-marks, Sec. 323, and cases cited. And see Tilghman vs. Proctor, 125 U. S. 136, 148; Root vs. Railway Co., 105 U. S. 189, 214, 215." (Italics are ours.)

"But we do not think that the defendants are protected by this principle against the taking of the account here in question. The account is ordered to be taken only since the filing of the original bill, upon the charge made in the supplemental bill that during the litigation the defendants have persisted in their infringement. It cannot be said that this conduct on their part was in ignorance of the plaintiff's rights; they were at least put upon inquiry, and must be charged with knowledge of what they would have learned upon reasonable inquiry. Nor can it be said that their conduct since the filing of the bill was innocent or free from wrongful intent within the meaning of the rule which has been stated. They chose, after full notice and warning to persist in violating plaintiffs' rights. If the facts as they afterwards were proved could have been made manifest to the court when the bill was filed, an injunction must have issued then. It does not lie in the defendants' mouths to say that conduct on their part which afterwards was proved to have been wrongful, and as to which they had either full knowledge, or the means of obtaining full knowledge of the facts, was either lawful or innocent."

Having reference to the opinion of the Circuit Court of Appeals in the within action, Wolf Bros. vs. Hamilton, Brown Shoe Company, 165 Fed. 413, we find that the court said:

"Had it only imitated complainant in one respect it might well be said that it was innocently done and without knowledge of the previous adoption by the complainant; but the several acts of complainant being followed so closely in imitation by defendant is persuasive, if not conclusive evidence that it was done with knowledge that it was imitating complainant. Actions of a similar character
637 were held to overcome protestations of innocence and good faith in Fairbanks vs. Bill Co., 77 Fed. 869; National Biscuit Co. vs. Baker, 95 Fed. 135; Hanson vs. Seigel-Cooper Co., 106 Fed. 690."

We thus find that the Circuit Court of Appeals held that the complainant was entitled to an accounting against the defendant because the defendant had not acted in good faith, but fraudulently, and the defendants were in effect held chargeable with wilful, intentional and unfair competition from the commencement of the within action.

We are told (defendant's Brief, pp. 13-14) that "the difficulties involved in ascertaining the profits or damages under the circumstances of this case, are almost insoluble," but the Circuit Court of Appeals could not have so thought because that court ordered this accounting. In other words, they held that there was a "concrete thing" which belonged to the complainant, the value of which could be substantially determined in the action.

That court had before it the very cartons so specifically and frequently described in defendant's brief. That is to say, cartons which bore upon them the name Hamilton, Brown Shoe Company with the word "Makers." Yet, notwithstanding, it ordered an accounting. As we read the opinion of the Circuit Court of Appeals, the plaintiff was held entitled to a decree enjoining the defendant from using the name "The American Lady," as applied to its shoes for women when not accompanied with other matter clearly indicating that such shoes were of its own manufacture and therefore not of complainant's.

We insist that by this decree, was meant that the accompanying matter clearly indicating that such shoes of defendant were of its own manufacture, must be on the shoes. The court held that the defendant, although theretofore packing its shoes in the
638 very cartons above referred to, had not plainly distinguished its shoes from those of its competitors and said in legal effect that wherever the name "The American Lady" was used, it must be accompanied with the other matter clearly indicating that such shoes were of the manufacture of defendant and not of complainant.

What reason can exist for not marking the shoes just as the cartons are marked, save the intent and purpose to deceive, which deception would naturally follow if the shoes were branded "American Lady" and not accompanied with the other matter held necessary to distinguish such shoes from those of complainant. No distinguishing matter or thing, or words clearly indicating that such shoes were of defendant's manufacture and not of the complainant's, appeared anywhere on the shoes complained of, either on the soles thereof, or on the inside lining.

Our contention, therefore, is that such shoes so marked with the words "American Lady," alone, were not accompanied with any other matter on the shoes clearly indicating that such shoes were of the manufacture of the Hamilton, Brown Shoe Company; and that the defendant must, therefore, account to the complainant for all the profits made on such shoes; but the defendant insists that although the word "Makers" nowhere appears on the shoes, nor any other words clearly indicating that the Hamilton, Brown Shoe Company is the maker thereof, it sufficiently complies with the mandate of the Circuit Court of Appeals when it encases the shoes in the cartons hereinbefore described.

The question is, what interpretation shall be given to the opinion of the Circuit Court of Appeals, and the decree entered in accordance therewith? What is the common sense of the question? Assume a fair-minded, honest competitor against whom was
639 rendered this very decree. Take it that he wanted in good faith to comply with the terms thereof. What would he naturally do in order to clearly indicate that his shoes were of his own manufacture and therefore not of complainant's? He would, of course, indicate such fact on his shoes and do so on the most prominent place thereon. The profits which the defendant is to be held to account for, are profits to be derived from the sale of shoes. The shoes, therefore, are of all importance, the cartons of relatively none. Therefore, that which is of all importance, the shoes, should be so branded and labeled, that the purchaser of average intelligence of such shoes, may not be deceived. We find not a mark on the shoes, not a word in any way indicating that the Hamilton, Brown Shoe Company is the maker of them. On the contrary they studiously avoid communicating such information to the purchaser, but put in small type on the carton, which never reaches or may never reach the consumer, the word "Makers." (See the exhibits offered in evidence.)

A dealer could not commit a fraud upon a purchaser, if the distinguishing marks showing that the "American Lady" shoe was manufactured by the Hamilton, Brown Shoe Co. were placed upon the shoes. The cartons are no part of the shoes, are frail and destructible and the shoes are readily removed therefrom;—in fact must be so removed in order that they may be tried on and a sale effected of them. The easiest possible way is open for a dealer to commit the inhibited fraud upon the intending purchaser of "American Girl" shoes, by selling and delivering to him "American Lady" shoes without cartons. Such fraud can never be prevented, if defendants are only compelled to put the word "Makers" upon their cartons, or relieved from any duty of putting such word upon the shoes, and are held not to account for the shoes upon which such words do not appear.

640 The defendant contends that it should not be held to account for any shoes packed in cartons hereinbefore described, because the Circuit Court of Appeals limited the scope of the account to matters in which the defendant had suffered by reason of the use of the phrases "With the character of the woman" or "A shoe as good as its name."

But when it is recalled to mind, that these phrases were never used by the defendant upon any cartons (see stipulation June 4-10, Master's Record, pages 467-468 and Exhibit B attached thereto) or with any matter accompanying the shoes themselves, but were used simply in catalogue and magazine advertising, it is clear that the court did not intend to restrict the accounting for profits as to plaintiff's shoes, to matter which never accompanied the shoes, but did intend that the accounting should include shoes as sold in the manner theretofore followed by defendant, and which manner or way of selling the shoes, was certainly one that did not clearly indicate

that the shoes were of defendant's manufacture and therefore not of complainant's.

The Circuit Court of Appeals had certainly before it evidence which it considered sufficient to conclusively prove that the defendant had been vending its "American Lady" shoes without the proper accompanying matter. The evidence which it had before it, was, as before stated, the cartons which are now so confidently claimed by defendant to constitute the proper accompanying matter, but with that evidence before them, the Circuit Court of Appeals still held that the complainant herein was entitled to this accounting and therefore held in legal effect, that the marking upon the defendant's shoes, which was not discontinued, and prevailed from the time of the commencement of this action up to the beginning of the hearing before the master, did not properly distinguish the defendant's shoes from that of the complainant's. If this be not so, we would like to be advised for what shoes was the accounting to be had.

641 The whole contention of the defendant seems to be that complainant is only entitled to an accounting of the profits on the shoes sold, and to damages which it may have sustained by reason of the use of certain phrases already set forth herein and appearing in the opinion of the Circuit Court of Appeals. We believe that the Circuit Court of Appeals intended by its decree, to announce a rule that whenever the name "American Lady" was used, no matter where, whether on shoe, carton or in advertisement, there must accompany such use the clear indication and announcement that such shoes were of the defendant's manufacture and therefore not of complainant's.

Defendant Intended that its "American Lady" Shoe Should be Palmed Off upon Purchasers as and for "The American Girl" Shoe of Complainant.

We are cited to a number of cases where the court did not interfere because it found that the defendant therein did not so conduct its business, as to palm off its goods as those of complainant; but the Circuit Court of Appeals found in its opinion (165 Fed. 413) that the defendant was guilty of illegitimate competition in trade and did palm off its goods as those of complainant, that the words "American Lady" were so similar to "American Girl" "as to cause confusion, and the evidence fully disclosed such to have been the result" and that such result was designed and intentional.

In the case of Howe Scale Co. vs. The Wycoff, 198 U. S. 139, 140, cited in defendant's brief (p. 19) it appears that the defendant used with its name the word "Manufacturers" abbreviated thus "Mfrs." and relief was denied the complainant in that case because the defendant had never sold its typewriters without so accompanying the same with such words.

642 Defendant Must so Clearly Distinguish Its "American Lady" Shoes, by Marks or Matter Thereon, as to Enable a Purchaser of Average Intelligence on Inspecting the Shoes to Know That Such Shoes Are Not of the Manufacture of Complainant—Marking Cartons Not a Compliance With the Court's decree.

It is mere dogmatic assertion to say that when cartons accompany shoes, marked as hereinbefore set out, that such cartons in and of themselves are matter accompanying the shoes clearly indicating that such shoes are of defendant's manufacture and not of complainant's. That is the very matter in issue.

In Herring Safe Co. vs. Halls, 208 U. S. 554, 559, the court said:

"The principle of the duty to explain is recognized in The Howe Scale Co. vs. Wyckoff, 198 U. S. 118 * * * The name of a person or a town may have become so associated with a particular product, that the mere attaching of that name to a similar product without more, would have all the effect of a falsehood. * * * An absolute prohibition against using the name would carry trademarks too far. Therefore the rights of the two parties have been reconciled, *by allowing the use, providing an explanation is attached.* * * * *Of course the explanation must accompany the use, so as to give the antidote with bane.*" (Italics ours.)

And speaking of the decree the court said (*Ibid.*, p. 560):

"It should forbid the use of the name Hall, either *alone* or in combination, in corporate name, *on safes, or in advertisements*, unless accompanied by information that the defendant is not the original Halls Safe and Lock Company or its successor, or as the case
643 may be, that *the article is not* the product of the last named company or its successors." (Italics ours.)

It must be supposed that the decree of the Circuit Court was intended to reach the fraud of respondent wherever it had theretofore been practiced, whether on the shoes themselves, the cartons, advertising, or catalogues. The remedy given must be adequate to suppress the evil whether continuing or threatened. Any relief would be futile, which would limit the restraint of respondent solely to cartons and grant complainant no relief as to markings on shoes. If the defendant company has not so clearly distinguished the thing itself, i. e., its "American Lady" shoe, by marks or matter thereon sufficient to enable one (a purchaser of average intelligence), on inspecting the shoe to know that such shoe is not of the manufacture of complainant, but is of the manufacture of the defendant, then it should be compelled so to do, and held accountable for the profits on all shoes sold, where it has not done so.

It is no answer to say, "it is true we admit we have not so distinguished the shoe, but we have so distinguished the carton, hence we need not account."

It must be remembered also that the Circuit Court of Appeals found (165 Federal, 413, 415):

"That the words 'The American Girl,' and 'The American Lady' are so similar as to cause confusion, and the evidence fully discloses such to have been the result."

Hence for all practical purposes, whenever the respondent uses

the term "The American Lady" on its shoes, it has the same effect as if it used complainant's actual trade name "The American Girl." It confuses the purchaser of average intelligence, so that he is led to believe that the shoe so marked is "The American Girl" shoe. Therefore some clear differentiation, or marking upon the shoe
644 itself is all essential.

In Scriven vs. Morris, 154 Fed. 914 (affirmed by C. C. A. 1908, 158 Fed. 1020), where there was an alleged unfair competition as to "men's drawers," the court carefully examined the boxes, or packages, in which the goods were sold to the trade, as well the drawers themselves (154 Fed. 916) and held that the defendants were not chargeable with unfair competition in making and selling similar drawers, where the markings of the goods and packages were such as to negative any intention to deceive the purchasers as to origin of the goods (165 Fed. 915).

It is equally clear, that had the court found the goods contained no markings by which the purchaser was prevented from being deceived, while the packages did contain such markings, it would have granted an injunction.

In the same case it will be found that the garments were plainly marked to show their origin. (165 Fed. 914, Par. 2 of Syllabus).

In Singer Mfg. Co. vs. June Mfg. Co., 163 U. S. 169, it appeared that:

"The defendant advertised its machines extensively and also issued many circulars concerning them and furnished with their machines a printed warranty * * * All the circulars offered in evidence contained substantially the statement that the machines referred to in them were manufactured by the June Manufacturing Company."

It will be observed that the warranty furnished with the machines must have been given in the name of the June Mfg. Company, the real manufacturer, while that fact was actually stated in the circulars. The machines manufactured, however, had a plate thereon which in its size, shape, material and place of position, as well as the words upon it, were in imitation of the Singer plate, and there were other similarities in the machines.

645 It will also be seen that the circulars and warranty which accompanied the infringing machines, did not deceive the public as to who was the manufacturers thereof, and may be likened to the cartons in the present case, which are said to accompany and contain the respondent's "American Lady" shoes. Hence, the argument must have been made that as the June Company stated the facts in its warranty and circulars to each purchaser, no purchaser could be deceived as to the origin and manufacture of the machines no matter what marks appeared thereon. Yet notwithstanding, the court held that (163 U. S. 169, 200):

"Where another avails himself of this public dedication to make the machine, he can do so in all forms with the fullest liberty, by referring to it in advertisements, and by other means, subject, however, to the condition that the name must be so used, as not to deprive others of their rights, or to deceive the public, and therefore that name must be accompanied with such indications that the

thing manufactured, is the work of one making it, as will unmistakably inform the public of that fact." (Italics ours.)

The cause was remanded after reversing the decree below with directions to enter a decree, the terms of which are so like the decree ordered by the Circuit Court of Appeals in the instant case, that we copy the second portion thereof in full:

"Second: Also perpetually enjoining the defendant from marking upon sewing machines or upon any plate or device connected therewith or attached thereto, the word "Singer" or words or letters equivalent thereto, without clearly and unmistakably specifying in connection therewith that such machines are the product of the defendant or other manufacturer, and therefore not the product of the Singer Manufacturing Company and the decree so to be entered must contain a direction for an accounting by the defendant as to any profits which may have been realized by it because of the wrongful acts it committed."

646 If the contention of our adversaries is sound, then the Supreme Court in the Singer case should not have directed the June Company to clearly and unmistakably specify upon a plate and device upon the machines, that such machines were of the product of the June Company and (therefore) not of the product of the Singer Company, but should have held as sufficient either the statements in the warranty and circulars of the June Company that they were the manufacturers of such machines holding no further duty (enjoined upon them), or permitted that company in some other manner than by affixation directly upon the machines to announce that the June Company were the manufacturers thereof; as for instance on the crates in which the machines were packed.

We ask again what reason can be given for not marking the shoes except to deceive? Why the insistence that the shoes themselves need bear no distinguishing marks, but such marks need only appear upon the carton? If the designed purpose of the complainant was not to deceive, why, after the commencement of the suit, was the name of the Hamilton, Brown Shoe Company put upon the soles of the shoes, as appears from the testimony and stipulation before the master (type written record, pp. 474, B), and this practice continued until December 10, 1903. And then afterwards from December 10, 1906, until December 11, 1908, left off the soles of the shoes, so that there appeared there n only the words "American Lady" and nothing else. (Type written record, p. 473.) This action in leaving the name off the shoes, as appears from the testimony of John T. Johnston (type written record, 361 Q. 432 A.), was the result of the suggestion of the same traveling salesmen who caused the original name to be selected, and such name was left off the shoes as we conceive because those salesmen had found that Wolf Bros. & Company, the complainants, also left their name off their shoes, and in the

647 absence of the name, the words "American Lady" and "American Girl" were so similar as to deceive, mislead and confuse purchasers, and this result was intended. In other words, to paraphrase the language of the Circuit Court of Appeals in the present case, 165 Fed. Rep. 413:

"But we cannot believe that at the time the defendant left its own

name off the shoe, it did not know that complainant had also done so, as it appears that the salesmen who were assembled by defendant and recommended and suggested that such name be left off the shoe, had been traveling the territory in which complainant's "American Girl" shoe had been sold and extensively advertised as such. * * * We cannot think this took place without the knowledge that it was following complainant in this regard."

The Terms "American Girl," and "American Lady," Have the Same Secondary Signification, and Had Come to Be Recognized in the Trade as Meaning That Such Shoes Were Those of Complainant. All Shoes Sold by Defendant Marked "American Lady," Unaccompanied with Such Distinguishing Marks or Matter on the Shoes as to Clearly Indicate That Such Shoes Were of the Manufacture of Defendant, Must Be Presumed to Have Been Sold Because the Public Believed Them to Be Complainant's Shoes, and Complainant is Entitled to the Profits Made on Said Sales.

The accounting in this case was granted against the defendant, because it had not acted in good faith, but had acted fraudu-
648 lently. The Circuit Court of Appeals held that (165 Fed. Rep. 413):

"While the term 'American Girl,' as applied by complainant and its predecessor, was not subject to exclusive appropriation by them, it had nevertheless by their long continued use of it, come to have a secondary meaning indicative of the origin and manufacture of the shoes to which it was applied and had come to be recognized in the trade as meaning that such shoes were those of the complainant and of its predecessors. * * * While others were entitled to use the same, or any similar term, because of its being common property, they could do so only on condition that they accompanied it with such distinguishing marks, or matter that it was not being used with its secondary signification; that is, as pointing to the complainant as the manufacturer of the goods to which it was applied."

The words "American Girl," and the deceptive and confusing imitation thereof "American Lady," have equally the secondary signification above described. All shoes so marked must be, therefore, necessarily presumed to be sold because having that secondary signification, the public believed them to be complainant's, hence, complainant must be entitled to the profits of the sale thereof. The Circuit Court of Appeals held that deception necessarily resulted from the acts and conduct of the defendant in using the words "American Lady," as applied to its shoes, and all prospective sales of defendant's shoes so marked were enjoined. Therefore, when sales of shoes so marked are proved to have been actually made, the prima facie presumption must also attach that those shoes sold under a name, which indicated to the public that the shoes were those of complainant, were bought by the public under the same belief.

The fact that in this particular case an accounting was ordered,

we claim does not raise the presumption that the court con-
649 sidered that unfair competition had actually resulted which required such accounting. And we have proved on this accounting before the master actual sales of shoes. so marked by the defendant, as to indicate to the purchaser that the shoes were those of complainant. Hence, as hereinbefore stated, the presumption must necessarily be, that they were sold as and for complainant's. By using the words "American Lady" on its shoes, the defendant represented to the public that the goods sold by it were those manufactured and produced by the complainant, thus palming off its goods for those of a different manufacturer, i. e., those of complainant, to the injury of the complainant. And the defendant made such representation by selling under, practically, our name.

If defendant had placed upon its shoes "Wolf Bros. & Co., Makers," and sales of such shoes were proved, we cannot believe it would be necessary to show that a single person had purchased such shoes under the belief that the Wolf Bros. & Co. were the makers thereof, but the complainant would be hel dentitled to an accounting. Now, the marking of defendant's shoes as "American Lady" shoes has just the same result as if the marking were as above. For, in the language of the Circuit Court of Appeals, such words had a secondary signification and had come to be recognized in the trade as meaning that the shoes were complainant's.

The burden of proof, it seems to us is entirely upon the defendant to show that shoes sold under a name which meant at all times to the public, that the shoes were of the manufacture of the complainant, were not sold as and for the goods of the complainant. If the words "American Lady" meant to the public at all times, when unaccompanied with other matter, that the goods were those of complainant, then the defendant must account for all shoes so sold; for the
650 very name itself conclusively leads the purchaser to believe that such shoes are complainant's shoes, and he purchases the same as and for complainant's shoes. We contend that the rule of law is this, that where we have shown, as in the present case, that all of defendant's shoes are impressed with a deceptive trade name, it must be assumed that the purchasers of the defendant's shoes have purchased the shoes under the belief that the trade name was that of the party whose trade name has been imitated, and that therefore the party whose trade name has been imitated, has been deprived of the sale of such shoes. (See 103 Me. 334).

It is not true, as contended by the defendant, that the complainant is not entitled to the exclusive use of the name, the "American Girl." It is entitled to the exclusive use of that name standing alone. In other words to the exclusive use thereof as against any colorable imitation, when such name is not accompanied by other matter clearly indicating that shoes so marked are those of the actual manufacturer and therefore not of complainant's.

The defendant intentionally used a deceptive trade name, having fraudulently and designedly appropriated it, with full knowledge that shoes so marked were to be purchased by consumers under the belief that such shoes were shoes of complainant, and defendant so intended; hence all such shoes were sold as and for complainant's shoes, and defendant must be held to account for the profits thereon.

The principle is this, that sales under a trade name condemned as involving unfair competition or under like unauthorized
651 names or marks, must be accounted for. It is no answer to this argument to claim that all of the defendant's "American Lady" shoes sold since the filing of this bill, were sold at wholesale to persons who knew that they were shoes of the defendant. The sales to such persons contemplated the natural and usual effect thereof, that is, that such shoes were in the end to be sold to the consumer and would be purchased by such consumer under the belief induced by the secondary signification of the deceptive trade name, that such shoes were those of complainant's and defendant so intended; that was the very purpose of its putting the name, "American Lady," on the shoes. Hence, all of such shoes were sold as and for the complainant's. And therefore we insist that this defendant deceptively, put it in the power of all retailers to palm off the defendant's "American Lady" shoes on customers as and for complainant's "American Girl" shoes, and must be held to account for all shoes sold, so marked with such deceptive trade name. It is useless for the defendant to cite a multitude of authorities where an accounting was denied, because the trade name as used by defendant was not a deceptive trade name, and was not fraudulently or designedly appropriated. In fact cases where the alleged infringing mark was held not to be such as would deceive an ordinary purchaser. But an accounting has never been denied where it is found that a defendant has used a really deceptive trade name, one which has a secondary signification which unexplained, means the goods of another. Hence, in all such cases the infringing defendant has been compelled to account for the profits made on all goods sold with such deceptive trade name, and a complainant has not been compelled to show under such circumstances, that each and every sale of such shoes, was made as and for the shoes of the complainant. This is the distinction between goods sold innocently without deceit and fraud, and goods sold as in the instant case after the
652 institution of the injunction suit which gave the defendant full notice and put it upon inquiry as to all the facts in the case. The defendant was not only guilty at the inception of the suit of fraudulent, deceitful and injurious conduct, but never ceased for one instant after the suit was commenced to get the benefit of its continued fraud, deception and wrong doing. Nor did defendant cease its wrong doing after the date of the opinion announced by the Circuit Court of Appeals on November 17, 1908. It continued to mark about 90 per cent. of its shoes, with the words "American Lady" alone, from November 17, 1908, to December 11, 1908. Thereafter until March 9, 1910, long after the entry of the

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decree herein, which was on November 15, 1909, it marked 80 per cent. of the shoes in question, with the words, "American Lady" accompanying the same, with no other words that the name "Hamilton, Brown Shoe Co.," entirely failing to indicate that such shoes were of defendant's manufacture, and therefore not of complainant's.

To re-quote the language of our original brief in the Circuit Court of Appeals:

"The bill in the instant case was filed January, 1906, notwithstanding, the defendant continued to do many of the wrongful acts charged in the bill. Seeking to make 'hay while the sun shone,' defendant, after the bill was filed, and up to May 1, 1907, expended in advertising 'American Lady' brand almost $110,000 (R. p. 454), expending this amount in 16 months as against $150,000 expended in the five years prior to the filing of the bill, an average of $82,000 a year after litigation begun as against $30,000 a year prior thereto. The immense sales and corresponding profits of defendant were therefore mainly made after suit begun, and when it was charged thereby with full notice that it would be called to account for its wrong doing.

Having thus proceeded deliberately after notice, a court of equity will not hold that the injured party should not have monetary redress for the injury which he has sustained."

653 In this same connection we again refer to the citation hereinbefore made from Regis vs. Jaynes & Co., 191 Mass. 240-248. The fraud in the instant case is clearly shown. The actual deception is presumed from the sale of defendant's shoes under a name which unaccompanied by proper explanatory matter (all such sales being so made), indicated that such shoes were complainant's shoes and not defendant's.

It was for the defendant to show that such purchasers did not buy the shoes under such belief or deception. We cannot conceive that the Circuit Court of Appeals meant to say that the burden of proof should be reversed and that the complainant should be compelled to show actual fraud in regard to sales of defendant's shoes, when it is admitted such shoes were sold under a deceptive trade name which induced the purchaser necessarily to believe that defendant's shoes were complainant's shoes. By showing such sales, complainant has clearly established fraud and deception. It would be a travesty on justice to compel the complainant to show particular instances of fraud and deception, when every sale of defendant's "American Lady" shoes unaccompanied by explanatory matter on the shoes meant, as we construe the language of the Circuit Court of Appeals, a deceitful sale, made fraudulently, wilfully and knowingly, and made under a trade name, which that court said indicated to the purchaser that the shoes were complainant's shoes. If the principle here contended for be true, there remains nothing of the argument of the defendant that it is essential that all sales of "American Lady" shoes, be shown to have been made, or purchases thereof entered into, under the belief by the purchaser that such shoes were of the product of the complainant, for such situation

is fully shown to arise by virtue of the acts and conduct of the defendant coupled with the presumption which attaches from fraud and wrong doing in the use of the deceptive trade name.
654 One which unaccompanied with explanatory words had at all times a secondary signification indicating that the shoes to which it was applied were complainant's shoes and not defendant's. Thus the labored and tedious argument that all those shoes must have been sold as and for complainant's shoes amounts to nothing; for all of defendant's "American Lady" shoes bore that deceptive trade name, and it must be necessarily assumed that every sale of the defendant's shoes so impressed with that deceptive trade name, deprived the complainant of that sale, until the contrary is shown. See Lynn Shoe Co. vs. Auburn Shoe Co., 103 Me. 334, where we find the following:

(See also defendant's Brief, p. 52):

"In the absence of such evidence it should not be assumed that every sale by the defendant of shoes *not impressed with the deceptive trade mark,* deprived the complainant of a sale." (Italics ours.)

If the above be true, the converse of the proposition must also be true in law and common sense, viz., that every sale by defendant of shoes impressed with a deceptive trade name deprived the complainant of a sale.

Impressing upon Some of "The American Lady" Shoes, the Name "Hamilton, Brown Shoe Company," is not a Sufficient Indication that Such Company is the Maker or Manufacturer of the Shoes.

We have already hereinbefore discussed the use by defendant of its name and the word "makers" upon its carton and it is not necessary to repeat the argument. The defendant urges that impressing upon some of the "American Lady" shoes the name "Hamilton, Brown Shoe Company" is a sufficient indication that such company is the maker of the shoe. It appeared in evidence at this
655 hearing, that the Hamilton, Brown Shoe Company, both manufactures and jobs shoes, and it is a known fact, that jobbers are more numerous than manufacturers. The presence, therefore, of the name "Hamilton, Brown Shoe Company" on the soles of some "American Lady" shoes, is ambiguous, and coupled with the testimony that such company sells shoes of other manufacturers, stamping the soles of the shoes of such other manufacturers precisely in the same manner as it stamps "American Lady" shoes, shows clearly that no purchaser of "American Lady" shoes could know that the defendant was the manufacturer of such shoes, and the complainant was not. The Circuit Court of Appeals held that the use by the defendant of the name "American Lady" alone was deceptive and created confusion. The corporate name Hamilton, Brown Shoe Company, is likewise deceptive and confusing and the two coupled together are doubly deceptive and confusing. Thus the purchaser is led to believe, that as a jobber, the Hamilton, Brown Shoe Company has come rightfully into the possession as vendors to retail dealers, of the "American Girl" shoe manufactured by the

complainant; and purchases the shoe believing it to be the complainant's "American Girl" shoe, when he could not have done so, had defendant clearly indicated by appropriate words stamped upon each of the soles of such shoes that "such shoes were of its own manufacture, and therefore not of complainant's."

As the master directed by the court, is to consider the evidence already taken, a reference thereto will clearly show that the catalogues of the defendant go to retail purchasers (old Record Blue, pp. 454, 217, 461, 246, 463-464, 254), and that its cataolgues are also addressed to such purchasers.

We trust that the master will not feel frightened at the minatory words contained in defendant's brief.

It is plain that the defendant has no right to use the words "American Lady" alone because those words are virtually
656 the same as "American Girl," having a secondary signification indicating that shoes so marked are those of the complainant. There must be also borne in mind a fact which seems to have been overlooked, that is, had it been the intention of the defendant to clearly indicate that "American Lady" shoes were shoes of its own manufacture and not of complainant's, it would have stamped upon the shoes not only that it manufactured such shoes, but the place of such manufacture, namely, St. Louis, U. S. A. The absence of such place of manufacture is significant evidence of an intention to deceive. It is true that this is not a case involving a technical trade mark, but involving unfair competition; but this unfair competition arises from the mere use by the defendant of the words "American Lady" when not accompanied with the explanatory words as required by the decree of the Circuit Court of Appeals.

In the famous case of Reddway vs. Banham, L. R. App. Cases, 1896, 199, it was in effect held that:

"By long use the name Campbell's Hair Belting had come to signify plaintiff's goods."

And so in the instant case, by long use the name "American Girl" and therefore any colorable imitation or simulation or imitation thereof, such as "American Lady," has come to signify complainant's shoes; and no sale of shoes under such name can be made without clearly distinguishing such shoes from the shoes of the complainant. In the above cited case, Lord Morris said in respect to distinguishing such articles:

"That, to my mind, is obviously done when the respondents put prominently and in a conspicuous *place on the article* the statement that it is was Campbell's Hair Belting manufactured by themselves." (Italics ours.)

The defendant struggles to avoid the consequence of its wilful and intentional failure to put in a conspicuous place
657 on the articles it manufactures, namely the shoes, the statement that they are manufactured by the Hamilton, Brown Shoe Company. It should pay the penalty of such failure; and no labored argument that it has placed upon a carton its own name, and the word "Makers" can avoid the consequence of its failure to place like words upon the shoes. The very fact, as hereinbefore

urged, that it marks the carton and purposely fails to mark the shoes, is more than significant. Such actions must have necessarily led the Circuit Court of Appeals when it had such cartons, as well as the shoes, before it, to decree the accounting ordered in this case.

Attention is directed by defendant to cases where the placing upon an article of a manufacturer's name indicated that such manufacturer produced the article, but in none of the cases cited was such manufacturer also a jobber vending the products and manufactures of other persons. Occupying such a dual situation, the defendant in this case does not clearly indicate even when it attaches its own name to the shoes, that it is the manufacturer of such shoes and its insistence that it shall not be required to put upon the shoes the word "Manufacturers" is strong evidence that it aims at deception by so refusing. There is no proof whatever in the Record, either taken originally, or offered before the master, that the cartons of the defendant reach the purchaser gratis with each pair of sheis. Courts will take judicial notice of things commonly known in every day life and it must be known of all, that shoes are taken out of the cartons, tried on, and in fact purchased, before the carton is shown or delivered to the purchaser of the shoe, if such carton is delivered at all, and therefore the carton can play no part whatever in the sale of a shoe. What is sold is the shoe and not the carton, and it is incumbent upon the defendant to show that such carton reaches the purchasers prior to sales of the shoes, and that the purchasers
658 are by such cartons clearly advised that the shoes they purchase are defendant's shoes and not complainant's. It is in the Record that in the Shoe Mart, which is the largest purchaser at retail of the shoes from the defendant (original Record Blue, pages 451-452), no such cartons are ever used, and while we understood that the evidence offered does prove a custom at St. Louis in large stores as to cartons, disregarding such evidence, it is also in the Record that the thousands of defendant's shoes sold to retail purcasers by the Shoe Mart are never sold in the original cartons (type written Record, 127, 129).

The Defendant Must Account for all Such Shoes so Sold, or which May be Sold.

The master has before him the cartons of the defendant, and while we understood that under the decree, the master should disregard and has disregarded the cartons as having no bearing upon the present inquiry, still an inspection of such cartons will show that the medallion and defendant's name with the word "Makers" are so inconspicuously placed thereon, as to afford no purchaser any reasonable opportunity of knowing who manufactured such shoes or where they were manufactured.

We may ask, if the remarkable argument of the defendant's counsel can be sustained, why were defendants enjoined at all by the Circuit Court of Appeals, if all its acts (other than in its use of inhibited phrases), were innocent, and did not constitute unfair competition. It was not the use of such phrases alone which constituted

unfair competition, it was among other acts the stamping upon shoes without clear explanatory matter, the name "American Lady" so as to deceive purchasers. It was this stamping of the shoes having no connection so far as the shoe itself was concerned with
659 the use of inhibited phrases, that led the Circuit Court of Appeals to decree an accounting for shoes so stamped and sold.

We dismiss as unworthy of reply, any claim that the complainant in this action was only entitled to nominal damages. Had such been the opinion of the Circuit Court of Appeals they would not have decreed any accounting, at all.

In Ascertaining the Amount of the Profits Arising from the Sale of Goods Upon Which a Trade Name Has Been Wrongfully Used, the Same Rules of Law Govern and are Applied to Cases of Unfair Competition Merely, as to Cases of Infringement of a Technical Trade Mark.

Finally, we again draw attention to the case of Regis vs. Jaynes & Co., 191 Mass. 245, already cited herein. We quote from pages 246, 247, 251, as follows:

"The general principle that one who has shown that he is entitled to the exclusive use of a trade mark may in equity recover from an infringer against whom he obtains an injunction the amount of the profits arising from the sale of goods upon which the trade mark has been wrongfully used, is not denied by the defendants, and is abundantly sustained by authority. *And the same rule is applied to cases of unfair competition merely, as well as to cases of the infringement of a trade mark properly so called.* Fairbank Co. vs. Windsor, 118 Fed. Rep. 96; S. C. overruled as to some points, 124 Fed Rep. 200. Walter Baker Co. vs. Slack, 130 Fed. Rep. 514. Williams vs. Mitchell, 106 Fed. Rep. 168; S. C. 45 C. C. A. 265. Lewis vs. Goodwin, 36 Ch. D. 1. Equity in such case holds the infringer as trustee for the benefit of the rightful owner to the extent of the profits realized from the unlawful or wrongful business. Paul, Trade-Marks, Sec. 326, and cases cited. And see Tilgh-
660 man vs. Proctor, 125 U. S. 136, 148; Root vs. Railway Co., 105 U. S. 189, 214, 215."

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"The first and second exceptions are the master's ruling that the defendants were liable to account for all profits made by them on all sales of 'Rexall' goods made since the filing of the original bill, without regard to whether the 'Rexall' tablets were sold as and for the goods of the plaintiff's or not, and that it was immaterial and the defendants were not entitled to show whether any actual deception or mistake had occurred or not. We cannot sustain those exceptions. In taking an account of the profits the defendants should be charged with the entire profit made upon sales of the tablets under the guise of the infringing trade mark. All these sales were wrongfully made, and the defendants must be held

to account for the profits made upon all of them. Saxlehner vs. Eisner & Mendelson Co., 138 Fed. Rep. 22. Fairbank Co. vs. Windsor, 124 Fed. Rep. 200, and in 118 Fed. Rep. 96. Sawyer vs. Kellogg, 9 Fed. Rep. 601. Benkert vs. Feder, 34 Fed. Rep. 534. Avery vs. Meikle, 85 Ky. 435. El Modello Cigar Mfg. Co. vs. Gato, 25 Fla. 886. Graham vs. Plate, 40 Cal. 593. Lever vs. Goodwin, 36 Ch. D. 1. Edelsten vs. Edelsten, 1 DeG., J. & S. 185. It may be that in Avery vs. Meikle, ubi supra, the decision, as suggested by the defendants, should have been for the defendant; but we think that it correctly lays down the rule of damages."

"But the counsel for the defendants argues that only those profits are to be accounted for, which actually are shown to be due to the assistance derived from the plaintiff's trade mark. So far as this doctrine finds support in the decisions relied on, it seems to us to rest upon a confusion between damages and profits. It will appear by reference to the cases which already have been cited that in England in such cases a plaintiff is ordinarily required to elect between damages and profits, while it has been said in many
661 cases in this country that equity, having once obtained jurisdiction, will, where it has granted an injunction, give both damages and profits, so far as this is necessary to secure full compensation. But in this case the order of reference was limited to an account of profits, no damages being allowed; and no question as to the assessment of damages comes before us.

"The defendants further contend that the rule which has been adopted in patent cases should be applied here. This rule has been stated by Field, J., of the Supreme Court of the United States:

"When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the court below: 'The patentee,' he says, 'must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.' Garretson vs. Clark, 111 U. S. 120, 121. Dobson vs. Hartford Carpet Co., 114 U. S. 439. Keystone Mfg. Co. vs. Adams, 151 U. S. 319. Elgin Wind Power & Pump Co. vs. Nichols, 105 Fed. Rep. 780. Kansas City Hay Press Co. vs. DeVol, 127 Fed. Rep. 363. Mosher vs. Joyce, 51 Fed. Rep. 441. Roemer vs. Simon, 31 Fed. Rep. 41. Tuttle vs. Gaylord, 28 Fed. Rep. 97.' But it seems to us that where, as here, a small article is sold with unlawful imitation of a trade mark, it is rather to be treated as an undivided whole, and that as against the wrongdoer it must be
662 taken to be a sale brought about by means of the unlawful trade mark. The decisions cited in the former parts of

this opinion go to the full length here stated. If any analogy from patent cases is to be adopted, we ought rather to follow the rule that where the infringing machine or device derives its entire commercial value from the patented feature or improvement, then the patentee is entitled to the entire profits realized from its sale. Grosby Steam Gage & Valve Co. vs. Consolidated Safety Valve Co., 141 U. S. 441, 454. Hurlburt vs. Schillinger, 130 U. S. 456, 471, 472. Manufacturing Co. vs. Cowing, 105 U. S. 253."

See also Shoe Co. vs. Shoe Co., 100 Me. 461 at 479, where the court said:

"The rule which now prevails in the equity courts respecting the wrongdoer's accountability for the profits and damages resulting from his unlawful acts, requires the master not only to take an account of all profits made by the defendant, but also to make an inquiry in regard to all damages sustained by the plaintiff on account of the defendant's wrongful acts, and since it cannot be ascertained with any reasonable certainty how much of the profit is due to the trade mark, and how much to the intrinsic value of the commodity, the whole will be awarded to the plaintiff. *It is equally well settled that the profits recoverable in equity for unfair competition are governed by the same rule, as in cases of infringement of trade marks*, and are not limited to such as accrue from sales, in which it is shown that the customer is actually deceived, but include all made on the goods sold in the simulated dress or package, and in violation of the rights of the original proprietor." (Italics ours.)

The entire argument which defendant's counsel makes in the case was practically made before the master and before his honor, Judge Dyer, Circuit Judge, and the main authorities cited in the brief were cited on the aforesaid occasions, and a reference to
663 the application made on behalf of the defendant for a reconsideration of the question determined by the master and by the Circuit Court, which required the master to go on and take account of the profits of shoes marked "American Lady" with the name "Hamilton, Brown Shoe Company" and in cartons bearing the name "Hamilton, Brown Shoe Company, makers" thereon (see Rec., p. 107 A. A.) will show that counsel for defendant said: "The probable and almost necessary result will be that the master will report and recommend a judgment for a large amount against defendant for shoes sold since the filing of the bill and marked as above stated; and if this court should adhere to its ruling made on February 28, 1910, in overruling the part of defendant's motion hereinbefore referred to, this court would then confirm the master's report with the probably inevitable result that a judgment of this court would be rendered against this defendant for profits made on these shoes marked as hereinbefore stated, since the filing of the bill in this case, amounting to a very large sum of money." (See Rec., p. 107 D. D.)

We do not believe that any reason, argument or authority has been brought forward in this brief of defendant which will lead or incline the master to change the very clear and lucid opinion ex-

pressed at an early stage of this hearing, but we do say, with all due respect to the master, that even if the master were inclined to change his mind, defendant's counsel having appealed from that ruling, to the Circuit Court, and having called out the opinion of the Circuit Court confirming and upholding the decision of the master, the master cannot now do otherwise than regard the opinion of the Circuit Court as just as binding upon him as if he himself had certified the question up for determination by the court and for instructions to govern him. In other words the opinion of Judge Dyer is just as binding on the master as express instructions to him would be, had he called for and obtained them.

664 We therefore submit that the master has before him all the record of the proofs taken originally, as well as the evidence taken before him and that we are certainly entitled to an accounting in this action for all the profits on all sales of "American Lady" shoes made by the defendants since the filing of the bill, which did not contain upon the shoes themselves the word "Makers," together with the name Hamilton, Brown Shoe Company, not however, foregoing our claim to an accounting for the profits on the sales made of all shoes of the defendant (now in evidence) however such shoes were marked.

We have made no attempt to indicate what the precise amount of the finding of the master should be as to profits, the Kribben schedules are so clear that we have felt that a reference to them alone was all that was necessary.

LAWRENCE MAXWELL,
PERCY WERNER,
SIMEON M. JOHNSON,
Solicitors for Complainant.

665 EXHIBIT COMPLAINANT'S THIRD BRIEF BEFORE THE MASTER.
(Seal.) George Bakewell, Notary Public.

In the Circuit Court of the United States, Eastern District of Missouri.

In Equity. No. 5262.

THE WOLF BROTHERS & Co., Complainant,
vs.
HAMILTON, BROWN SHOE Co., Defendant.

Complainant's Rebuttal Brief.

Lawrence Maxwell, Simeon M. Johnson, Percy Werner, Attorneys for Complainant.

666 In the Circuit Court of the United States, Eastern District of Missouri.

In Equity. No. 5262.

THE WOLF BROTHERS & CO., Complainant,
vs.
HAMILTON, BROWN SHOE CO., Defendant.

Complainant's Rebuttal Brief.

In what is termed the defendant's reply brief on the accounting (pp. 8-9) we are given a very elaborate statement comprising some 24 items of certain figures and data relative to the "American Lady" shoes.

In view of the rulings of Judge Dyer upon the application of oppoing counsel and of the Master's independent judgment upon the same matters, as well as his proper desire to follow the course indicated by the ruling aforesaid, there can be no doubt but that there should be included in the finding made by him as against the defendant, all of the profits made on Items 17, 18 and 19 of defendant's expert statement as set forth in its brief. These items are followed by items 22, 23 and 24 of the same statement
667 purporting to give the actual profit on the shoes described in the earlier named items and as tabulated, for the several periods beginning January 29, 1906, and ending March 9, 1910, amount to $88,693.77, as profit made by defendant on shoes marked on the sole on each shoe with the belt trade mark, with the name "Hamilton, Brown Shoe Co." thereon and the name "American Lady" in the center of the belt, with possibly other marks, but not in any case with the word "Makers;" and to the further sum of $53,118.20 as the profits made by the defendant during the same period on shoes marked only on the sole with such belt trade mark with the name "Hamilton, Brown Shoe Co." and the name "American Lady." These two items aggregate $141,811.97. To this amount should be added the sum of $103,862.46, the conceded profit during the period aforesaid on all the shoes of defendant marked only with the name "American Lady." By so doing we get the sum of $245,674.43 as the profits on the several kinds of shoes above set out. The defendant virtually concedes that if the Master adheres to former rulings, there should be found due on this accounting from the defendant to the complainant the above named sum. It seeks, however, to have the Master exclude from his further consideration all sums expended for advertising the "American Lady" shoes, as well as the interest on capital claimed to have been devoted exclusively to the "American Lady" line of shoes. These various matters as to advertising and interest, are set out in items 7 to 12, inclusive of the expert's statement contained in defendant's reply brief.

Interest on Capital.

It seems to us a complete answer to defendant's contention on this behalf as to interest on capital,—that under the various stipulations and calculations appearing in the type-written record of the proceedings before the Master it is conceded that the de-
668 fendant did not itself in its own bookkeeping or calculations as to cost of shoes, consider interest a proper item. The interest item in all of the expert's calculations in such stipulations refers simply to interest on borrowed money. Had the defendant considered interest as such, a proper item to include in the cost of shoes, it would have had a bookkeeping entry to show that interest was credited to a proper bookkeeping item as interest on capital and would have charged in another proper item against the cost of manufacture, the self-same item. It is true that by so doing, the actual profits, or results, of defendant's business so far as "American Lady" shoes were concerned, would not have been one whit affected. The result of such bookkeeping would have been simply to have taken out of one pocket, or fund, a certain amount, to put by the same method of bookkeeping the exact amount so taken, into another fund.

It is practically admitted in defendant's reply brief to the accounting that interest on capital stock cannot be allowed the defendant in any way (p. 18, Defendant's Reply Brief); and that it is only where property represented by such stock is used in conducting the infringing business, or where defendant clearly proves what portion of the value of that property is so used, that any apportionment of interest can be made. Such being the law, there can be no question but what the defendant has had from year to year under the several items, depreciation of real estate and buildings, the full measure of and allowance for, the value of the property used in producing the "American Lady" shoes. From year to year, this item of depreciation, or the value of the use in legal effect, is charged off, so that eventually the entire value of the plant devoted to the manufacture of such shoes, is charged against the production of the shoe and considered in reducing the profits.

To give the defendant the value of the use of this plant each
669 year through this item of depreciation, and then to give him interest on this same value by way of allowance for the use of the same capital devoted to the same business as represented by the same buildings, is to give the defendant double, or twice, the same allowance. It is inconceivable that the expert accountants in charge of the books of the defendant and its bookkeeping, would be so remiss as to omit from the items which go to make up the cost of these "American Lady" shoes, any proper deduction for the value of the property as represented by the capital stock used in conducting that portion of its business.

We therefore confidently claim that the defendant should have no allowance for interest, it having had such allowance by virtue of the item of depreciation contained in the calculations for the years of the accounting. There should, therefore, be added to the sum of $245,674.43 the sums extended in item 11 of the state-

ment of defendant's expert as interest. These items total $81,184.92 which added to the sum of $245,674.43 make a total of $326,859.35, to be accounted for by the defendant to the complaint as a portion of the profits made on "American Lady" shoes. Of course this sum does not include the item of advertising, which we shall now proceed to consider.

Advertising Expense.

The item of advertising has been divided by the defendant into Items 8 and 9 of the statement of its expert and is classified as 20 per cent. of the advertising which had reference exclusively to the "American Lady" shoes and a like 20 per cent. of the advertising which had reference exclusively to both "American Lady" shoes and "American Gentleman" shoes. It must be borne in mind that it is distinctly stipulated at page 586 of the typewritten record, that 50 per centum of all the advertising of "American Lady" shoes (which we have seen was 40 per cent. of all the advertising of all the shoes manufactured by the defendant company), had thereon the words "With the Character of the Woman."

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This method of advertising was held to be so fraudulent, deceptive and illegal that defendants were perpetually enjoined from continuing the same. So under no consideration could the defendant get an allowance for a deceptive, fraudulent and illegal advertisement. In addition, the method of so advertising "American Lady" shoes, irrespective of the use of the phrase "With the Character of the Woman," was to exploit the "American Lady" shoe, with the name "Hamilton, Brown Shoe Company" as part of the advertisement, but nowhere does it appear that such advertisement contained the information that the Hamilton, Brown Shoe Company were the manufacturers of the shoes. If our contention be correct that the defendant is compelled to account for the profits of shoes marked "American Lady" with the name "Hamilton, Brown Shoe Company" unaccompanied with any indication that such company were the makers of "American Lady" shoes, then by like reasoning the defendant should not be allowed for any money expended in advertising, in like manner its "American Lady" shoes. The reason is simple and clear, such a method of advertising was illegal, improper and led all purchasers to believe that shoes so advertised were the shoes of complainant and not those of the defendant. To permit the defendant to deduct from its profits as a proper item of expense, such advertising, would be to set a premium on dishonesty, deception and fraud. Advertising of the kind and nature as the above, has never been allowed a defendant, particularly when the effect of an injunction as granted, was to declare that from the time of the commencement of the suit the defendant had full notice that it could not expend lawfully, its money in such a method of advertising.

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We therefore claim that Items 8 and 9 as contained in the statement of defendant's expert as to the amounts expended for advertising, should not be deducted in any manner from the true sum which the defendant should account for as profits to the com-

plainant on the sale of "American Lady" shoes. These sums aggregate $331,278 and added to the sum of $326,859.35, as above stated, would make a total of $658,137.35 of profits which the defendant made on its sale of "American Lady" shoes.

To the above sum should be added interest on the profits for the several years and which were earned for such years on the sale of "American Lady" shoes. A wrong-doer like the defendant which is held to account on the theory of fraudulent and deceptive conduct, must be considered as the trustee of the complainant at the end of each year as to certain sums of complainant's money, which the defendant as such trustee holds for the complainant's benefit. Holding the sum for complainant's benefit, it is in duty bound to account for the sum to complainant and to account for that sum as of the date when it earned such profits, and failing to so account, but retaining the profits, it will be chargeable with the interest thereon for each of the years such sums were so retained. The average amount of such profits retained yearly would be for each several year, $162,000. The interest on such sums for each year for the time retained, would be $87,480, which added to the above amount of $658,137.35 would make a total of $745,617.35. Nor should any sympathy be wasted upon the defendant by reason of the magnitude of this amount. With full knowledge that it was acting without legal right or warrant, it attempted and succeeded in exploiting the sale of its "American Lady" shoes to the injury and detriment of the complainant. In other words, the effect of its action and conduct was legally to deprive the complainant of the benefit of such sales to the extent of the profits aforesaid.

672 If, however, the cost of the advertising was to be deducted from the profits on the shoes sold which complainant is entitled to recover, to-wit the shoes bearing the name "American Lady," unaccompanied by matter indicating that such shoes were of defendant's manufacture, then certainly it was incumbent on the defendant to show that such advertisement, the expense of which it seeks to deduct, related to these particular shoes, for the profits on the sales of which we are entitled, and not to shoes bearing "American Lady," which were accompanied by proper matter indicating that defendant was the manufacturer. Because defendant has attempted to separate the expense of advertising as between the different brands of shoes which it markets, and say that a certain percentage thereof applied exclusively to "American Lady" shoes, it is for them to go on, if they are entitled to any deduction for advertising, on account of shoes sold after the filing of the bill, which we deny, and show what proportion of the expense of advertising the "American Lady" shoe was applicable to those shoes for the profits on the sales of which we are entitled to recover. Inasmuch as they have not in any way attempted to show how much of the advertising expense was placed on "American Lady" shoes improperly sold, and how much on "American Lady" shoes properly sold (if any such there were), the Master ought not to take into account any of the expense of advertising whatsoever, but must assume, and ought to assume, that the advertising of the "American Lady" shoes, for which any allowance or deduction can be made from profits, relates

to such "American Lady" shoes as they were entitled to make and vend by reason of having placed thereon appropriate matter indicating that they were the manufacturer thereof, and not to "American Lady" shoes found to infringe on the rights of complainant, and the profits on the sales of which complainant is entitled to recover under the decree.

673 Defendant's Rebuttal Brief.

Having reference to the last, or rebuttal brief, of defendant, we must confess that we cannot appreciate the distinction defendant's counsel makes as to the rule of damages which he claims appertains to cases of technical Trade Marks and to cases of Unfair Trade Competition. In our former briefs we have endeavored to show that the present case assimilates one of so-called technical trade mark, because the words "American Lady" used in the manner as followed by complainant, were held by the Circuit Court of Appeals to be equivalent to a technical trade mark. In other words, that court decided that the defendant must account for all shoes so marked when not accompanied by words clearly indicating that such shoes were of its own manufacture and not those of the complainant's. Now, our contention is, that all the shoes in question as hereinbefore discussed, were marked precisely as condemned by the Circuit Court of Appeals; and that each purchaser believing such shoes so marked,—and having every reason so to believe,—were those of the complainant, purchased such shoes as and for this complainant's shoes. We say the presumption of law is such until shown otherwise. The claim of the defendant, however, is that the burden of proof is upon the complainant to show that a shoe which admittedly was sold under a name which meant to the public that it was complainant's shoe, was sold as complainant's shoe. We cannot believe that the principles of common sense can be so perverted. From the very nature of the case it is entirely practicable and it is the proper and natural thing to say that the extent to which the piracy upon the complainant's right was carried, embraced all shoes so sold under such deceptive marks, until the contrary is clearly shown. An equally absurd argument, it seems to us, is the claim that defendant, although admittedly dishonest in using a deceptive and fraudulent trade
674 name, cannot be held to account for the use of that trade name, unless it at the same time uses other deceptive and fraudulent phrases, or commits other and additional fraudulent acts. That is to say, that although admittedly guilty of flagrant fraud, the Circuit Court of Appeals said it should not account for any of those flagrant frauds when committed alone, but should only account for all the frauds when committed together. To give any further attention to this argument, it seems to us, would be mere waste of time.

What a Sufficient Showing to Entitle Complainant to an Award of Profits.

An examination of all the adjudicated cases which have been cited show the following principles to be established:

a. When one has established a trade or business in which he has used a particular device, symbol or name so that it has become known in trade as a designation of such person's goods, equity will protect him in the use thereof.

b. Such person has a right to complain when another adopts this symbol or manner of marking his goods so as to mislead the public into purchasing the same as and for the goods of complainant.

c. Complainant comes into a court of equity in such cases for the protection of his property rights,—the private action is given not for the benefit of the public, although that may be its incidental benefit, but because of the invasion by defendant of that which is the exclusive property of complainant.

Now we take it that the Court of Appeals in this case recognized and applied these principles, and has adjudicated conclusively all that it necessary to warrant the accounting of the profits which we seek to recover.

675 As Judge Severens said in Gage Dows Co. vs. Featherbone Corset Co., 83 Fed. 213 (quoted in the case of American Washboard Co. vs. Saginaw Mfg. Co., 103 Fed. 281, l. c. 286):

"The circumstances vary greatly but the underlying principle which is effective in the solution of such cases is that a party may not adopt a mark or symbol which has been employed by another manufacturer, and by long use and employment on the part of that other has come to be recognized by the public as denoting the origin of the manufacture, and thus impose upon the public by inducing them to believe that the goods which this new party thus offers are the goods of the original party. In other words it is a fundamental principle that a man cannot make use of a reputation which another manufacturer has acquired in a trade mark or trade name and by inducing the public to act upon a misapprehension as to the source of the origin deprive the other party of the good will and reputation which he has acquired, and to which he is entitled."

Of all this defendant in this case has been conclusively adjudged guilty,—and in addition of flagrant fraud, of incredible protestations of innocence, and of contemptuous response to a complaint "from a house relatively obscure" that its rights were being trampled upon. Not all this since the filing of the bill it may be (though we again call attention of the Master that it is admitted on the new record that fifty per cent. of the advertising matter for the expense of which defendant asks credit, and expended since the filing of the bill, contained the prohibited phrase "With the Character of the Woman")—but for five years prior to the filing of the bill, commencing with their first acts of aggression in January, 1901, and after complainant's letter of remonstrance under date of January 7, 1901 (old Rec., p. 210), defendant continued its piratic war upon complainant and carried it on relentlessly with all its prestige and capital,

676 down to the filing of the bill in this case. Thereafter even if defendant did nothing but continue to sell "American Lady" shoes without the accompanying matter decided by the Court of Appeals to be necessary to prevent invasion of complainant's rights, it was bound under the decree to answer to complainant for the profits on the shoes so sold. It was not necessary that it should con-

tinue the sum of all its perfidies. Indeed some of its simulations were found by the Court of Appeals to have been discontinued "upon the bringing of this suit."

Trinidad Asphalt Mfg. Co. vs. Standard Paint Co.

We are invited to consider the recent case of Trinidad Asphalt Mfg. Co. vs. The Standard Paint Co., affirmed by the U. S. Supreme Court, April 10, 1911, which counsel for defendant point to as "a conclusive affirmation of the correctness" of their position.

This case (163 Fed. 977) was decided by the Circuit Court of Appeals of the 8th Circuit on August 11, 1908, and affirmed by the Supreme Court on August 10, 1911. It has no bearing on any question before the Master in this case. It does not present any question of accounting but simply whether the plaintiff in that case had a cause of action against the defendant (1) for infringement of plaintiff's trade mark "Ruberoid" or (2) on account of unfair competition. The Circuit Court of Appeals and the Supreme Court both held that the word "Ruberoid" could not be appropriated as a trade mark, and both courts held upon the claim of unfair competition that there was none. The Supreme Court said: "We think the evidence supports the conclusion of the Circuit Court of Appeals." (See quotation page 9 of defendant's rebuttal brief.) It will serve no useful purpose to compare the evidence in the Trinidad case with the evidence in the case at bar. The same Circuit Court
677 of Appeals which examined the evidence in the Trinidad case and decided on August 11, 1908 (163 Fed. 977), that it did not show unfair competition, examined the evidence in the case at bar, and on November 17, 1908 (165 Fed. 413), held that in this case it did establish unfair competition. That decision has become final by embodiment in the decree of the Circuit Court, and the case is before the Master, not to determine whether plaintiff has a cause of action, but to ascertain and report the damages and profits to which the plaintiff is entitled upon a cause of action which has been finally adjudicated.

We are also treated in defendant's rebuttal brief to a reproduction of an entire article which appeared in the Harvard Law Review for June, 1907, Vol. 20, page 620.

We have always believed that the Supreme Judicial Court of Massachusetts stood next to the Supreme Court of the United States in the weight given to its decisions. We cannot believe that the decisions of so eminent a tribunal can be weakened or destroyed by any article in the Harvard Law Review. The principal complaint of the writers of that article against the decision in Regis against Jaynes, 191 Mass. 245, is, that the defendant was not allowed to show that the purchasers from it of the infringing goods, were not misled by such acts as those of the plaintiff; and the question propounded in the article was, "ought not the infringer to be allowed the benefit of this proof?"

Now, there is absolutely nothing in this case wherein any effort was made by the defendant to show that any of the goods fraudulently sold by it under the deceptive trade name, were bought by pur-

chasers with full knowledge that they were not the goods of the plaintiff. The rule that we are contending for as announced in Regis against Jaynes, supra, is that at least the burden of proof is upon the defendant to show that shoes so fraudulently sold under such deceptive mark, were not purchased under the belief that
678 such shoes were those of the complainant. The Circuit Court of Appeals held that shoes sold marked as defendant's "American Lady" shoes were marked, were not so distinguished as to indicate to the purchaser that they were those of defendant, but on the contrary were so marked as to lead the purchaser to believe that such shoes were those of complainant. No wrong whatever is therefore done to the defendant to compel it to show that such shoes so marked were not purchased under the belief by the purchaser that they were of the manufacture of complainant. The Regis-Jaynes case has been followed, as appears by the article in question, by courts of undoubted authority.

The co-called rule that a complainant must prove that each and every sale of an infringing product was made to a purchaser under a belief of that purchaser that the same was a purchase of complainant's product, can have no application save in the case of a sale made by an innocent vendor. But when it is shown that such sales are made by a dishonest vendor, one who makes fraudulent sales, one who makes sales under a deceptive trade name used for the purpose of leading the purchaser to believe that the product so labeled is the product of the plaintiff, that rule can have no application.

In reply to defendant's repeated suggestion as to the utter impracticability of ascertaining the extent the product of the defendant has been palmed off on the public as the product of the complainant in the piratic war in which defendant was engaged, we beg to call attention to the remark of Justice Blatchford in Garretson vs. Clark, 111 U. S. 120, which defendant's counsel quoted in his brief in the Westinghouse case, as follows:

"This is the infringer's refuge, and in so many cases renders fruitless the patentee's right to redress for an undoubted wrong.

In Docker vs. Somes, 2 Myl. & Keene, 674, Lord Chancellor
679 Brougham, when confronted with such defense in a case involving an accounting by a trustee, said:

"'When did a court of justice, whether administered according to the rules of equity or law, ever listen to a wrong-doer's argument to stay the arm of justice grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather, let me ask, when did any wrong-doer ever yet possess the hardihood to plead in aid of his escape from justice the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying "You had better not make the attempt, for you will find I have made the search very troublesome?" The answer is, "The Court will try.'"

We confidently submit that the defendant must account for the profits made on every pair of shoes marked with the name of "American Lady" alone, or with the name of "American Lady" coupled only with the name "Hamilton, Brown Shoe Company," and that

until they so stamp and label their "American Lady" shoes with words clearly indicating that they are the manufacturers of such shoes, and the place of such manufacture, they must be held to the fullest measure of accountability for all their wrong-doing.

Respectfully submitted,

LAWRENCE MAXWELL,
SIMEON M. JOHNSON,
PERCY WERNER,
Attorneys for Complainant.

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681 EXHIBIT DEFENDANT'S FIRST BRIEF BEFORE THE MASTER.

(Seal.) George Bakewell, Notary Public.

Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5262. In Equity.

THE WOLF BROTHERS & COMPANY, Complainant,
vs.
HAMILTON-BROWN SHOE COMPANY, Defendant.

On Accounting.

Before Henry H. Denison, Esq., Special Master.

Brief and Argument for Defendant.

Paul Bakewell and Luke E. Hart, Solicitors for Defendant.
Henry S. Priest of Counsel for Defendant.

Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5262. In Equity.

THE WOLF BROTHERS & COMPANY, Complainant,
vs.
HAMILTON-BROWN SHOE COMPANY, Defendant.

Brief on Behalf of Defendant on the Accounting.

This brief is somewhat long, due chiefly to the following causes: (1) The large amount at stake, on the strange, unsupported,

and, as we conceive, unsupportable position taken by complainant's counsel on the record before the Master.

(2) The rulings heretofore made on the record by the Master (all of which are subject to revision by the Master or by the Court), under and by virtue of which rulings the Master has permitted a range of inquiry entirely beyond the scope of the decision of the majority of the United States Circuit Court of Appeals in this case, and beyond the terms of the interlocutory decree (the Master's warrant), which interlocutory decree was entered in conformity with, and must be construed in the light of, the said majority opinion of the United States Court of Appeals.

(3) The fact that in this brief we have made a most careful analysis of all the decisions applicable to the facts in this case, pointing out the radical differences between the rules of law
682 applicable to an accounting where the case is one of a true or strict trade-mark and the rules of law applicable to an accounting where the case is merely one of alleged unfair competition in trade—the case at bar, as appears from the said majority opinion, which is the law of this case.

Although the record of proofs taken before the Master, apart from the separate written stipulations of June 4, 1910, and January 11, 1911, and the exhibits, amounts to approximately 627 typewritten pages, in view of said written stipulations and apart from the briefs of counsel, we believe there is nothing that need be considered except the said two written stipulations, such stipulations between counsel as appear as made in that record during the course of taking testimony before the Master, and the testimony of Miss Blome, J. H. Maize and W. F. Bloecher, which testimony appears between pages 113 and 161 of the typewritten record before the Master. Thus neither the Master nor the Court will have to wade through the numerous pages of testimony taken before the Master, because most of that testimony was taken before the said stipulations were made, and the said stipulations were made for the specific purpose of simplifying and clearing up the record and reducing the matters therein considered to simple, clean, clear and brief form.

Except for the purpose of simplifying the record, we made these stipulations under protest, reserving our objections, because we have firmly believed from the outset of this accounting, as the record shows, and as we still believe, that the inquiry before the Master exceeded its just and lawful bounds, and this we prove in the following brief.

What is Before the Master in the Way of Evidence for His Consideration on this Accounting?

The Master can only consider on this accounting the opinion of the United States Circuit Court of Appeals in this case, the decree, the testimony taken before him on this accounting, the exhibits offered in evidence before him and the stipulations made between the parties since the 15th day of November, 1909 (the date of the interlocutory decree). He cannot consider any part of the former

record, other than the opinion of the United States Circuit Court of Appeals and the interlocutory decree entered in pursuance of that opinion and of the equity rule 80, or any exhibit in said former record, unless the complainant or the defendant, in taking its proofs before the Master on the accounting, has specifically and formally brought certain parts of that former record or certain exhibits in that former record to his attention and offered the same in evidence as part or parts in said former record relied upon, so that the opposite side may have had an opportunity to know what part was
683 so brought into that hearing and relied upon, and thus had an opportunity to explain or rebut the same. Otherwise, no part of the former record can be referred to upon the argument before the Master, or used in support of the Master's report.

For the reasons stated, no part of the former record in this case and no exhibit in the former record can be considered by the Master on this accounting, unless the record before the Master show that such particular part of the former record or some particular exhibit in the former record was called specially to his attention by either party, so that the opposite side may have had an opportunity to know what part, if any, of the former record is relied upon, that he might have answered or explained it. Bell v. United States Stamping Co., 32 Fed. 550-551.

This rule of practice is reasonable and just. We are not trying the issues on this accounting in the dark. Both parties have had ample time to present the proofs relied upon by them, respectively, before the Master. All has been taken down before the Master, stenographically, and preserved in the form of a typewritten record, or deliberately fixed by stipulations between the parties.

The decree was entered on November 15, 1909. Complainant took from that time until February, 1911, to take its proofs before the Master, and then announced on the record before the Master that its proofs were closed, without pointing out a single part of the former record, or a single exhibit in the former record, upon which it relies on this accounting. Defendant, on the other hand, to meet the case made by the complainant on this accounting, found it necessary to take but little testimony, taking all of its proofs at the session held on March 7, 1911; and then the record of proofs before the Master on the accounting was finally closed and time fixed by the Master for the filing of briefs by both sides.

Furthermore, any proofs taken before the hearing in the Circuit Court and Court of Appeals and prior to the interlocutory decree, to have been competent, relevant or material to the issues made by the pleadings, of necessity had to relate to a condition of affairs as the same existed prior to the filing of the bill. Humane Bit Co. v. Barnett, 117 Fed. 316. The issue before the filing of the bill related to a case of alleged infringement committed prior to the filing of the bill. On the other hand, the issue on the accounting before the Master (the matter of damages or profits) is a different issue, and also, by the express terms of the decree, can only relate to matters occurring since (after) the filing of the bill.

Hence, as the Court points out in Bell v. United States Stamp-

ing Co., 32 Fed. 550-551, while the master may consider any
684 particular part of the former record, relevant or material to the issue before the Master on the accounting, when either party, in the course of the proofs before the Master, has pointed out such particular part of the record as a part relied upon by him, the Master cannot consider any part of such record which was not specifically so pointed out to him before the proofs were closed on the accounting. And neither party can afterwards, in argument before the Master, refer to or rely upon said former record, unless, in the course of his proofs before the Master he has specifically pointed out the part of the record, or the exhibit in the former record, so relied upon by him. The reason for this just rule is obvious and given by the Court in the last-named case, i. e., that the opposite party, before the close of the proofs on the accounting, might have had an opportunity to "answer or explain" such particular part or such particular exhibit in the former record.

It is not to be expected that on the argument on the accounting, when particular attention was not called to any particular part of the former record by either party on the proofs before the Master, either party may be met at the argument before the Master with all or any part of a former voluminous record, when he was not given notice, before the proofs were closed on the accounting, that any such part of the record was relied upon; especially is this true, when, as herein pointed out, the issues in the old record are materially different from the issues on the accounting and also related to a condition before the filing of the bill, while the issues on the accounting relate to matters subsequent to the filing of the bill.

The practice in courts of equity of the United States is governed by the equity rules established by the United States Supreme Court. The interlocutory decree in this case cannot, and does not, depart from those rules.

Equity rules 77 to 80 (see Desty's Federal Procedure, ninth edition, volume 3, pp. 1796-1799) govern the practice before the Master.

Equity rule 80 provides as follows:

"All affidavits, depositions and documents which have been previously made, read or used in the court, upon any proceeding in any cause or matter, may be used before the master."

The interlocutory decree in this case must be construed in the light of said equity rule 80. That rule, as we have said, has been
685 construed by the courts, and thus construed supports the views which we have herein expressed. In the case of Bell v. United States Stamping Co., 32 Fed. 550-551, the Court says:

"The testimony on which the exception in relation to profits from saving in cost of manufacture is founded does not appear to have been brought before the master in making up the case on the accounting, so that it could be answered or explained on the other side, but to have been referred to in argument and requests for finding upon the case made. Equity rule 80 provides that such testimony may be used before the master. This is understood to mean that it may be brought before him without being retaken, by calling his

attention to the parts relied upon in making up the case, when the opposite side may have opportunity to know what part is so brought into that hearing and relied upon. The master, therefore, had no basis for doing what this exception is for not doing. With this testimony before the master, the finding would still be that, notwithstanding the [*saying*], there were no actual profits to the defendant. It does not appear that the defendant was under any obligation to make other pans if these had not been made, or would have done so, nor is there anything else from which it is made to appear that this saving was a profit because it diminished a loss. There is no ground, as the case is understood, for sustaining this exception."

This is the rule of practice also laid down by the well-known authority, Foster's Federal Practice (fourth edition), Vol. 11, Sec. 313, p. 992, in these words:

"SEC. 313. Evidence before a Master—'All affidavits, depositions and documents which have been previously made, read or used in the court upon any proceedings in any cause or matter may be used before the master' (equity rule 80). These should, however, be regularly offered in evidence, so that the other party may have an opportunity to explain or rebut them. Otherwise they cannot be referred to upon the argument, or used in support of the report."

As we have said, the reason for this practice and this interpretation of equity rule 80 is obvious and essentially just.

Take the case at bar, for example: The record before the United States Court of Appeals consists of more than five hundred printed pages. The issues before that court related to a condition of affairs alleged to have existed prior to the filing of the bill, and the proofs relevant to that issue, of necessity, had to relate to the situation as it existed prior to the filing of the bill (Humane Bit Co. v. Barnett, 117 Fed. 316). The issues on that record, briefly stated, were:

686 (1) Did the plaintiff hold a valid trade-mark which defendant had infringed?

(2) Had the defendant done, before the filing of the bill, the sum of those various things (recited at p. 414 of 165 Fed.) which plaintiff claimed constituted unfair business competition?

The majority of the Court of Appeals held in the negative as to the first proposition and in the affirmative as to the second.

The relief sought in the main cause was an injunction, to which an accounting is a mere incident (Root v. Railway Co., 105 U. S. 189).

As pointed out elsewhere in this brief and as specifically found and stated by the majority opinion of the Court of Appeals (165 Fed. 417), several alleged simulations complained of by plaintiff were "discontinued by the defendant upon the bringing of the suit." Therefore, while the majority of the Court of Appeals ordered a limited injunction, on the principle of unfair business competition, against defendant doing the sum of those things which constituted unfair business competition (see p. 418 of 165 Fed.) and, as an incident to the equitable relief by way of injunction (Root v. Railway Co., 105 U. S. 189), ordered an accounting as to those things, which, of course, involved, of necessity, proof of actual fraud and

deception of purchasers as to each sale accounted for, the Circuit Court ordered that the accounting "should be limited to the time since the commencement of the suit."

Clearly, therefore, the decree, which conforms, as it must needs do, with equity rule 80 and the interpretation of that rule by the courts, while it permits a reference by the master to the record as the same existed before the opinion of the Court of Appeals, so far as the same may be relevant on the accounting to matter subsequent to the filing of the bill, requires: That before any part of that former record can be considered by the Master on this accounting, the particular part, or parts, of that former record, or any exhibit found or referred to therein, should, in connection with the taking of proofs before the Master, have been pointed out by the party relying on the same and "regularly offered in evidence, so that the other party may have had an opportunity to explain or rebut the same. Otherwise they cannot be referred to upon the argument, or used in support of the report." Foster's Federal Practice, fourth edition, Vol. 2, p. 992, Sec. 313.

687 We call this matter to the attention of the Master, not because we would be afraid of anything in the printed record before the Court of Appeals covering more than five hundred printed pages, nor of any exhibit properly before the Court in connection with that record and with respect to which we had been given a chance "to explain or rebut," but because, as we point out, he cannot be expected to wade through that record or consider any part of it under the circumstances, and because defendant is not to be taken by surprise by the complainant, should the complainant in its brief or argument handed in to the Master, after the proofs before the Master on this accounting have been closed, undertake to refer to any part of the record before the Court of Appeals or any exhibit offered in evidence in connection with making up that former record which we have had no chance "to explain or rebut." It would be most unfair and unjust to us for the Master to consider any such part of the former record or any such exhibit, under the circumstances. If the complainant make reference to any such part of the record or any such exhibit, not having specifically referred to the same in its proofs before the Master and not having formally offered the same in evidence, the defendant, as pointed out by the authorities to which we have referred, has had no opportunity either to explain or rebut any such reference to the prior record or any such exhibit on this accounting before the Master. Equity rule 80 has been thus interpreted by the courts and by the authorities for the very purpose of preventing any such unfair practice, the courts recognizing that the issue on the hearing before the interlocutory decree presents one state of facts and one issue, whereas the limited range of inquiry on the accounting (which is a mere incident of the injunctive relief), presents a very different issue and a very different state of facts. Particularly is this the situation in the case at bar; for in the case at bar the majority of the Court of Appeals (see page 418 of 165 Fed.) expressly limits the accounting to a period beginning with the filing of the bill, and the majority of the Court of Appeals expressly finds

(see pages 416-417 of 165 Fed.) that several of the things complained of in the bill, which were no doubt matters of inducement resulting in the majority of the Court granting an injunction in respect to alleged unfair competition, are things which the defendant did not do after the filing of the bill.

Therefore, if the complainant's counsel in their briefs or argument before the Master should undertake to refer to the previous record or to any exhibit therein, for the reasons stated and because the defendant has had no opportunity of explaining or rebutting
688 any such parts of the previous record, we respectfully submit that the Master must refuse to consider the same and that if he does so he will violate equity rule 80 as interpreted by the courts and the authorities. All defendant is contending for in this respect is frankness and justice. As the Master knows, and as the record before him shows, complainant began the taking of its proofs before the Master about January, 1910, and did not finish its proofs before the Master and announce complainant's proofs closed until February, 1911. In other words, complainant consumed one year in taking its proofs before the Master. All of these proofs were deliberately taken down before the Master by a stenographer and reduced to typwritten form and copies furnished to both sides between each session. Several and long intermissions were taken between the taking of proofs and the complainant and its counsel had ample time for due deliberation. Nevertheless, complainant deliberately announced its proofs closed before the Master in February, 1911, and during the taking of its proofs before the Master complainant failed utterly to specify or formally introduce in evidence any part of the record before the Court of Appeals prior to the decision of the Court of Appeals in this case. They also failed to refer to or introduce in evidence any exhibit which was before the Court of Appeals on the former record. This being the case, defendant was called upon to meet the proofs actually taken before the Master on this accounting and none other, and not to meet, explain or rebut any other proofs or anything found in the said former record—the record before the Court of Appeals. Therefore, we object to any reference by the complainant's counsel to any part of the former record or any exhibit therein, and respectfully submit that under the authorities nothing of the sort which was not specifically referred to and formally introduced in evidence before the Master can be considered by the Master in making up his report.

Complainant Entitled to No Recovery on This Accounting.

The position taken by us in our return to the Master found in the very beginning of the record before the Master, between pages 2 and 2*a*, which return was made Jan. 31, 1910, is fully borne out by the facts as developed by the record and by the facts embodied in the aforesaid stipulations. That position is sound in fact and in law, as we shall now proceed to show.

It clearly appears from the majority opinion of the Court of Appeals in this case (165 Fed. 413-418), as well as from the inter-

locutory decree entered by the Circuit Court in pursuance of
689 said opinion, that defendant was not enjoined from selling shoes marked with the name "American Lady," when said shoes were sold by the defendant in cartons marked with the name Hamilton-Brown Shoe Company, or "with other matter clearly indicating that such shoes are of its own manufacture and therefore not of complainant's." Nor was it intended by said opinion or decree that defendant should account and pay to the complainant profits made by the defendant since the filing of the bill in this case (January 29, 1905) on shoes sold by the defendant, when said shoes were plainly marked, either on the shoes themselves or on the cartons containing the shoes, and in which the shoes were sold to the defendant's customers, with "matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's." This is made entirely clear from the opinion of the Court itself, from the decisions therein cited, as well as from the terms of the decree, which latter must be interpreted in the light of the majority opinion of the Court of Appeals in this case. To hold otherwise is not only to do violence to the language of said majority opinion and the said decree, but to hold that the complainant has the exclusive right to the name "American Girl" as a trade-mark for shoes, and that the mere use of the name American Lady on shoes by defendant is an infringement of complainant's right—precisely what the majority of the Court of Appeals refused to hold. To so hold is to make the dissenting opinion—which precisely supports that position—the law of this case. On the contrary, when the majority opinion of the Court is read in the light of the dissenting opinion found at pages 418 and 419 or 165 Fed., it is then even more clearly made to appear that the decree only affects defendant in respect to shoes sold by defendant, which shoes, as sold by defendant and marked with the name American Lady, did not contain on the shoes themselves, or on the cartons in which each pair of shoes was sold, "matter clearly indicating that such shoes are of its own manufacture and therefore not of complainant's." For how else could the defendant (which is not prohibited from using the name American Lady "as applied to its shoes for women, when" * * * "accompanied with other matter clearly indicating that such shoes are of its own manufacture and therefore not of complainant's") clearly indicate that its shoes marked with the name American Lady are of its own manufacture—emanate from defendant—and are not "The American Girl" shoes made by or emanating from the plaintiff, than by marking, either on the shoes themselves or on
690 each carton in which defendant sold each pair of its American Lady shoes, plainly and prominently, the name of Hamilton-Brown Shoe Company. Not only does it appear that defendant did this as to all of its American Lady shoes sold since the filing of the bill, but it appears from the evidence taken before the Master by the complainant, as well as by the stipulation made in this case and dated June 4, 1910, and the exhibits attached thereto, that every pair of American Lady shoes sold by defendant since the filing of the bill was sold in a carton, on which the name Hamilton-Brown

Shoe Company appeared prominently associated with the word "Makers."

We concede at the outset that if the dissenting opinion of Judge Sanborn in this case (see 165 Fed. 418-419) were the law of this case (which it is not) and the decree entered were in harmony with that dissenting opinion instead of in harmony with the majority opinion, which latter opinion is the law of this case, then the defendant might possibly have to account to the complainant for the net profits which the defendant made since the date at which the bill was filed on all shoes sold by the defendant marked with the name American Lady, whether or not such shoes were marked, on the shoes themselves or on the cartons in which each pair of shoes were sold, with the name Hamilton-Brown Shoe Company, or in any way accompanied with any matter clearly indicating that such shoes emanated from the defendant and not from the complainant. We make this qualified concession, because, as a general rule, where a mark or name in question is sustained as a valid trade-mark and the defendant is held to have infringed such valid trade-mark (precisely what the dissenting opinion holds and precisely what the majority opinion does not hold), the law conclusively presumes at least constructive fraud in the sale of defendant's goods marked with a name or mark in simulation of the complainant's valid trade-mark, and therefore presumes conclusively that all defendant's goods so marked and sold were sold "as and for" the goods of the complainant.

A case which we deem peculiarly in point is the case of G. & C. Merrian Co. v. Ogilvie, decided by the Circuit Court of Appeals for the First Circuit, reported in 159 Fed. 639, and 170 Fed. 157. In the first of these decisions, as appears from the decision and head notes at pages 638 and 639 of 159 Fed., it was held:

"On the expiration of the copyright on the name 'Webster,' used in connection with dictionaries, the name became public property; though such name as applied to the dictionary published by
691 the owner of the copyright had acquired a secondary meaning, indicating a particular book published and sold by such owner. * * *.

"The M. Co.'s copyright on the name of 'Webster', as used in the title of dictionaries, having expired, O published dictionaries bearing that name, with the evident purpose of leading the public into supposing that they were buying Webster's Dictionary as improved by M. Important work of Noah Porter for M is prominently referred to in its title pages. O's title page reads, 'Being the authentic unabridged dictionary of Noah Webster, LL. D., * * * prepared under the direction of Noah Porter.' On the backs of some of his publications O printed 'The latest complete authentic Webster's Dictionary', the word 'authentic' being plainly borrowed from the backs of M's publications. Held, that though O printed his name on the back or cover and on the title page of his dictionaries, and used 'Imperial' and 'Universal' in the title, and not 'International', as used by M he was guilty of unfair competition."

Thus we find not only the head notes but also from the opinion that this was strictly a case of unfair competition as distinguished

from a trade-mark case, and that both the Circuit Court, in the original opinion in 149 Fed. 858, and the Circuit Court of Appeals, in its first opinion in this case (159 Fed. 638), held that there was no trade name in the word "Webster" as applied to dictionaries; and that the defendant had the right to use the name Webster as applied to dictionaries, providing the defendant was not guilty of unfair trade in selling its Webster dictionaries. Therefore, like the case at bar, the Webster dictionary case was a case in which both the Circuit Court and Court of Appeals held that the complainants had no trade-mark in the name.

When this case again came before the Circuit Court of Appeals for the First Circuit (170 Fed. 167), the question there discussed was on the matter of the accounting, and in that case, making the distinction between a strict trade-mark case and a case of unfair competition—the very distinction which we contend should be applied in the case at bar—the Court of Appeals for the First Circuit said, at page 169 of 170 Fed., as follows:

"The other ground of complaint of the Merriam Company is that the decree entered by the Circuit Court makes no provision for an accounting. We must first observe generally that it is doubtful whether any reference for an account of profits or damages would yield a return which would have a reasonable proportion to the cost thereof. The difficulties involved in ascertaining the profits
692 or damages under the circumstances of this case are almost insoluble. Under some circumstances, it has been held that the profits to be accounted for would be the entire profits of publication; but the Supreme Court has never had occasion to consider a rule so harsh as this, and, following the analogy of the practice established in suits for infringements of patents for inventions, we are led to the conclusion that it would never go to that extent. The rule there is, we think, fairly stated by Mr. Walker in the fourth edition of his work on Patents, at section 719, to the effect that in patent suits the profits recoverable are only such as are due to the infringing parts or features of the thing made and sold, and that the burden rests on the complainant to prove the due proportion allowable therefor. A similar rule seems to have been applied to infringements of patented designs for carpets in Dobson v. Carpet Company, 114 U. S. 439, 445, 5 Sup. Ct. 945, 29 L. Ed. 177, affirmed in Dobson v. Dornan, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63, and in subsequent cases.

"The cases where there has been no division of profits, but the whole profits have been allowed, are proper trade-mark cases, in which, the defendant having used a trade-mark proper, the presumption was that the goods would not have been sold without that use. This is what is referred to in Sebastian's Law of Trade-Marks (4th Ed., 1899), 228, 229, and in Browne on Trade-Marks (2nd Ed., 1885), and the same rule is applied in the ordinary cases of a trade-mark proper, like Atlantic Milling Co. v. Powland (C. C.), 27 Fed. 24, and Benkert v. Feder (C. C.), 34 Fed. 534; also in several cases stated in Hesseltine's Law of Trade-Marks (1906), 304, 305. The present case, however, does not fully take on that

feature. The substantial defense of Ogilvie did not consist in availing himself of a Merriam Company's trade-mark, because both this Court and the Circuit Court have expressly found that there was no trade-mark. It consisted in dressing up his publications unlawfully. Therefore, there is no concrete thing which belongs to the Merriam Company the value of which can be substantially determined in this connection."

So we say in the case at bar, as the majority opinion of the Court of Appeals expressly holds, that the name "The American Girl, applied to shoes, is not the subject of a valid trademark" (see page 415 of 165 Fed.); it clearly follows that the complainant is not entitled to recover any profits on shoes sold by the defendant since the filing of the bill, which shoes, or the cartons containing the same, bore upon them the name Hamilton-Brown Shoe Company; and that before complainant can recover any profits in regard to American Lady shoes sold by the defendant since the filing of the bill it must prove specific instances where defendant palmed off its shoes, to the deception of the purchaser, "as and for" the American Girl shoes of the complainant. For, to paraphrase the last sentence in our quotation from the Webster's Dictionary case, taken from page 169 of 170 Fed., "there is no concrete thing which belongs to The Wolf Brothers & Company the value of which can be substantially determined in this action."

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This is clearly shown by the decision of the Supreme Court in Saxlehner v. Neilson, 179 U. S. 42, especially when that case is contrasted with the majority opinion of the Court of Appeals in the case at bar. It is clear from the majority opinion in this case that it was not merely marking defendant's shoes with the name "American Lady," when said shoes as sold by defendant were sold in cartons plainly marked with the name Hamilton-Brown Shoe Co., and the word "Makers" which the Court desired to forbid or order defendant to account for. It was the sum of all these various things which the Court found defendant had done, before the filing of the bill, that led the majority of the Court to hold that defendant had been guilty of "unfair trade", and that sum consisted in these things:

That defendant, before the filing of the bill, had used the catch phrase "With the character of the woman" and "The shoe deserves its name" (165 Fed. 416) and the number 397; and had done these things plus the use of the name American Lady. Having shown this, then the majority opinion of the Court says, at page 416 of 165 Fed.:

"Had it only imitated complainant in one respect, it might well be said that it was innocently done and without knowledge of the previous adoption by the complainant; but the several acts of complainant being followed so closely in imitation by defendant is persuasive, if not conclusive, evidence that it was done with knowledge that it was imitating complainant. Actions of a similar character were held to overcome protestations of innocence and good faith in Fairbanks Co. v. Bell Co., 77 Fed. 869, 23 C. C. A. 554; National

Biscuit Co. v. Baker (C. C.), 95 Fed. 135; and Hansen v. Siegel-Cooper Co. (C. C.), 106 Fed. 690.

"That defendant's action in the several respects above enumerated was not taken without knowledge of complainant's rights we think is shown."

The very cases cited by the Court of Appeals in the above statement are cases where defendant simulated plaintiff's labels in several respects.

694 It was for these reasons and for these reasons alone that the majority of the Court of Appeals held that plaintiff was entitled to an injunction in the terms of the decree, and for an accounting in respect to such shoes only as could be found to have been sold by defendant, if any, in unlawful trade, under the circumstances detailed above, since the filing of the bill, and not merely for shoes sold by the defendant since the filing of the bill, which shoes were marked with the name American Lady, when they were "accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's." This is clear, not only from the majority opinion as a whole, but from what the Court says at page 418 of 165 Fed., in these words:

"Complainant is not guilty of such laches as to deprive it of an injunction; but we think an accounting should be limited to the time since the commencement of this suit.

"Complainant is entitled to a decree enjoining the defendant from using the name 'The American Lady', as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's and from using in connection with such name, as applied to its shoes for women, the numerals mentioned, or the catch phrase 'With the character of the woman', or any other phrase in simulation of the phrase 'A shoe as good as its name', and also to an accounting as before stated.

"The decree of the Circuit Court is reversed, with directions to enter a decree in accordance herewith."

This is also clear from what the majority opinion of the Court says at page 417 of 165 Fed., in these words:

"In some respects the markings upon the bottom of defendant's shoes and upon the cartons and boxes in which the shoes were placed were in simulation of those of complainant's; but, as the simulation in these respects was discontinued by defendant upon the bringing of this suit, we will not extend this opinion by pointing out the similarity."

Whatever marking those were we do not recall, and it is utterly immaterial here, since the accounting is limited to the date of filing the bill (January 29, 1906), and by the stipulation of June 4, 1910, it appears that no American Lady shoes were sold by defendant since January 29, 1905, that were not, at least, sold in cartons, each carton bearing plainly thereon the name Hamilton-Brown Shoe Company and also the word "Makers." And it is clear that the majority opinion contemplated no injunction and no account-

ing as to shoes so marked and sold. In other words, it is clear that the Court did not mean to hold and did not hold that there
695 was any fraud or any liability on the part of the defendant in this action in respect merely to shoes marked with the name American Lady, when said shoes were sold in cartons plainly marked with the name Hamilton-Brown Shoe Company and with the word "Makers". Had such been the complainant's naked case, it is clear, from what we have seen and from the entire opinion of the majority of the Court of Appeals, that the decree of the Court below dismissing the bill for want of equity would have been affirmed. That this was not complainant's naked case appears from the following, at page 414 of 155 Fed., in the opinion of the majority of the Court of Appeals:

"This action was brought by complainant, in which it charges the defendant with infringing its trade-mark, 'The American Girl' by the use of the name 'The American Lady' and the portrait of a young woman. It further charges the defendant with infringing the catch phrase 'A shoe as good as its name' by using the catch phrases 'The shoe deserves its name' and 'With the character of the woman'. It also charges the defendant with infringement by adopting its numeral numbers before mentioned for similar styles of shoes. It also charges defendant with unfair trade. Proofs were taken, and upon the hearing the Circuit Court dismissed complainant's bill, and the case is brought here on appeal."

Therefore, insofar as defendant acted innocently and within its rights, which it has done in the mere matter of selling shoes, since the filing of the bill, marked with the name American Lady and sold in cartons as above described and also described in the stipulation of June 4, 1910, it is neither enjoined by the terms of the decree nor made to account.

"That it is clear that the majority opinion of the Court of Appeals in this case did not intend to enjoin the defendant from selling shoes marked with the name American Lady when said shoes, on the shoes themselves or on the cartons in which the shoes were sold by defendant, were accompanied with matter such as would plainly indicate that the defendant's American Lady shoes emanated from or were made by the defendant and did not emanate from and were not made by the complainant; and that the majority of the Court did not intend that the defendant should account to the complainant for its American Lady shoes sold since the filing of the bill, when the said shoes, either on the shoes themselves or on the cartons in which the shoes were sold, were accompanied with matter which clearly "indicated" that the shoes emanated from or were made by the defendant, is clear from the following paragraph taken from pages 417 and 418 of 155 Fed., as well as from the decisions
(Howe Scale Co. v. Wyckoff, 198 U. S. 118; and Donnell
696 v. Herring-Hall-Marvin Safe Co., 208 U. S. 267), to which the majority opinion of the Court of Appeals specifically refers:

"Legitimate competition in trade is not only the right of every

person but to be commended when of public benefit. It is only when competition is deceptive that it is condemned by the law. While the term 'The American Girl', as applied by complainant and its predecessors, was not subject to exclusive appropriation by them, it had, nevertheless, by their long continued use of it, come to have a secondary meaning, indicative of the origin and manufacture of the shoes to which it was applied, and had come to be recognized in the trade as meaning that such shoes were those of the complainant and its predecessors. Whatever of goodwill and advantage resulted from this was the property of the complainant, and while others were entitled to use the same or any similar term because of its being common property, they could do so only on condition that they accompanied it with such distinguishing marks or matter as would plainly indicate that it was not being used with its secondary signification; that is, as pointing to the complainant as the manufacturer of the goods to which it was applied. Howe Scale Co. v. Wycoff, 198 U. S. 118; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267".

In the case of Howe Scale Co. v. Wyckoff the Supreme Court says, at pages 139 and 140 of 198 U. S.

"The name 'Remington-Sholes Company, is not identical with, or an imitation of 'Remington Standard Typewriter Company', or 'Remington Typewriter Company', or 'E. Remington and Sons'. Defendant's marks 'Rem-Sho', 'Remington-Sholes Co., Mfrs., Chicago', are not identical with, or an imitation of complainant's marks 'Remington'; Large Red Seal; 'Remington Standard Typewriter, manufactured by Wyckoff, Seamans and Benedict, Ilion, N. Y., U. S. A.'; 'Remington Standard Typewriter'.

"The use of two distinct surnames clearly differentiated the machines of defendant from those of complainant, and when defendant's cards, signs, catalogues, instructions to agents, etc., are considered, it seems to us that the record discloses, to use the language of Mr. Justice Field in the Goodyear case, a persistent effort on defendant's part 'to call the attention of the public to its own manufactured goods, and the places where they are to be had, and that it has no connection with the plaintiff'. Doubtless the Remingtons and Sholes, in using the name 'Remington-Sholes', desired to avail themselves of the general family reputation attached to the two names, but that does not in itself justify the assumption that their purpose was to confuse their machines with complain-
697 ant's; or that the use of the name was in itself calculated to deceive. Remington and Sholes were interested in the old company, and Remington continued as general manager of the new company. Neither of them was paid for the use of his name, and neither of them had parted with the right to that use. Having the right to that use, courts will not interfere where the only confusion, if any, results from a similarity of the names and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails.

"As observed by Mr. Justice Strong in the leading case of Canal Company v. Clark, 13 Wall. 311: 'Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth'. And by Mr. Justice Clifford, in McLean v. Fleming, 96 U. S. 245: 'A court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other.' And by Mr. Justice Jackson in Columbia Mills Company v. Alcorn, 150 U. S. 460: 'Even in the case of a valid trade-mark, the similarity of brands must be such as to mislead the ordinary observer.' And see Coats v. Merrick Thread Company, 149 U. S. 562; Liggett & Myers Tobacco Company v. Finzer, 128 U. S. 182."

In other words, the Supreme Court distinctly held in that case that while the defendant might possibly have been enjoined from using the name Remington alone on its typewriters, yet, as the defendant had never sold its typewriters without accompanying such typewriters with the name Remington-Sholes Company, so that in the sale of each one of its typewritters the defendant had clearly indicated that the same emanated from defendant and not from the complainant, the defendant was not guilty of unfair competition. It must be [notic-d] here also that in that case the defendant did not use the word "Makers" on its typewriters or in connection with the sale of its typewriters, but simply used the name of the defendant company, thus, in the opinion of the Supreme Court, clearly indicating that defendant's typewriters emanated from or were made by the defendant and did not emanate from and were not made by the complainant.

The majority opinion of the Court of Appeals in the present case, by thus referring to and adopting as authority the decision of the Supreme Court of the United States in the case of Howe Scale Co. v. Wyckoff, 198 U. S. 118, clearly shows what it
698 means in the paragraph which we have quoted above, and that it clearly did not mean to state that the Hamilton Brown Shoe Company had to account to the defendant for its American Lady shoes sold since the filing of the bill when said shoes, either on the shoes themselves or on the cartons in which the shoes were sold, were plainly marked with the name of Hamilton-Brown Shoe Co., thus clearly "indicating" that defendant's American Lady shoes so sold and marked emanated from or were made by Hamilton-Brown Shoe Co.

The other case cited by the majority opinion of the Court of Appeals in the case at bar in the paragraph which we have quoted above, namely, the case of Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, also reflects back on the language used by the majority opinion of the Court of Appeals, and shows exactly what it means and proves conclusively that the majority of the Court of Appeals in this case did not mean to hold that the defendant was enjoined from selling, or had to account to the complainant for, its shoes marked with the name American Lady, when said shoes themselves or the cartons in which the shoes were sold by defendant bore upon them the name of Hamilton-Brown Shoe Co., thus plainly

indicating that the shoes emanated from or were made by Hamilton-Brown Shoe Co. and did not emanate from and were not made by Wolf Brothers & Co. In that case the defendant in its course of conduct had indicated falsely that it was the successor of the original Hall Company and that its goods were the product of that company. The Supreme Court held that in this the defendant was at fault, but distinctly held that the defendant could not be enjoined from selling its goods when the same were accompanied simply by the name of the defendant company. In this connection the Supreme Court, in the Hall case (208 U. S. 255) expressly refers to the Howe Scale Company case in 198 U. S., the correct analysis of which and a quotation from which we have given above and also refers to the case of Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169. It is therefore interesting and important in this connection to ascertain what the Supreme Court did decide in the Singer case in 163 U. S. 169-204. In that case the complainant claimed, among other things, the exclusive right to the name Singer. The Supreme Court held that the complainant had no exclusive right to the name Singer as applied to sewing machines; but the Court did hold (see page 201 of 163 U. S.) that the defendant had been guilty of unfair competition in that it had used the name Singer in connection with its sewing machines "unaccompanied by anything to indicate that the machine was manufactured by the June Mfg. Company"
699 (the defendant) except the initials "J. M. Co." and the monogram "J. M. Mfg. Co.", and that it also simulated a form of name plate used by the complainant on its sewing machines. Nowhere on or in connection with the defendant's sewing machine had the defendant used its full name "June Manufacturing Company". At page 201 of 163 U. S., the Supreme Court comments on the fact that the initials "S. M. Co." were the initials of the Singer Sewing Machine Company (the complainant), and that there was sufficient similarity between the initials "J. M. Co." and the initials of the complainant company "S. M. Co.", in connection with the use of the name Singer for the name of the machine to constitute unfair competition, and the Supreme Court comments on the fact that the defendant company cunningly failed to use the full name of its company on or in connection with its sewing machines, i. e., that it did not use the name June Mfg. Co. in full on or in connection with its sewing machines. For these reasons the Supreme Court held that the defendant had been guilty of unfair competition in business and enjoined the defendant from using the initials J. M. Co. and from simulating a characteristic plate on the complainant's machine. At the same time, as the opinion of the Supreme Court shows the Supreme Court distinctly held that the defendant could use the name Singer as the name for its machine, providing it left off the deceptive initials "J. M. Co." and the deceptive plate on its machine, and plainly marked its machine with the full name of the defendant company, namely, June Mfg. Co., thus clearly indicating that the defendant's Singer machine emanated from or was made by the defendant and did not emanate from and was not made by the complainant.

Could language be plainer? The importance of this decision in the Singer case in 163 U. S. 1069 is that it is the leading case referred to by the Supreme Court in the case of Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267 (which latter is one of the two cases cited by the majority opinion of the Court of Appeals in the case at bar in the paragraph of the majority opinion quoted above), in which a rule is established which supports the proposition that the defendant in this case may use the name American Lady on its shoes, providing it do so by plainly indicating in connection with the sale of its shoes (as by marking on the shoes themselves or on the cartons containing the same) that the defendant's shoes are made by or emanate from the defendant and are not made by and do not emanate from the complainant. The Singer case (163 U. S. 201) clearly shows that, when it is a matter of using a name to which the complainant has no exclusive right, the defendant may use
700 that name when, in connection with the sale of defendant's goods, the goods themselves, or (in case of goods sold in packages or cartons) the package or carton itself clearly bears upon it the full name of the defendant—thus clearly indicating that the name of defendant's article is being used honestly and in fair competition, and that the defendant's goods either emanate from or are manufactured by the defendant and do not emanate from and are not manufactured by the complainant.

The terms of the decree, in respect to the injunction and account, are as follows:

"The defendant, Hamilton-Brown Shoe Company, its servants, agents, officers and employes, are perpetually enjoined from using the name 'The American Lady,' as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Brothers & Company, and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408 or 397, or the catch-phrase 'With the character of the woman' or any other phrase in simulation of the phrase 'A shoe as good as its name.'

"This case is referred to H. H. Denison, Esq., as Master, upon the evidence already taken in this case and the exhibits in evidence in this case, and such further evidence as may be offered before the Master by the parties to this action, to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits, since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case and which were marked with the name 'The American Lady' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company."

In cases of unfair competition, while the Court may sometimes grant an injunction in respect to circumstances which may not involve proof of actual fraud, it will never allow an accounting in such cases except for those things in respect to which actual fraud in the sales is clearly shown. Therefore, it clearly appears that the mere

selling of defendant's shoes marked "American Lady" in cartons marked Hamilton-Brown Shoe Company, and with the words "Makers" is not within the ambit of the decree in this case and was not in the contemplation of the majority opinion in this case.

701 We have some light on the question from the decision of the United States Supreme Court, in the case of Saxlehner v. Siegel-Cooper Company, Gies and Marquet, in 179 U. S. 42. In that case as the Court says:

"The bill charged the defendants generally with unlawfully selling bitter water under labels simulating Saxlehner's blue and red label and under the name Hunyadi."

The opinion in this case is brief and should be taken in connection with the preceding decisions of the same Court in the same volume, in the case of Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, holding that the name Hunyadi was not a trade name and that anyone could use it, as it was common property. Therefore, this case of Saxlehner v. Siegel-Cooper et al. is a clear case of unfair competition, since there was no exclusive right in the name Hunyadi and the only infringement consisted in using the name Hunyadi in connection with the simulation of the complainant's labels. In this last-named case of Saxlehner v. Siegel-Cooper et al., 179 U. S. 42, a strict case of unfair competition, the Supreme Court found:

(1) That the manufacturer, Siegel-Cooper Company, had acted in good faith, though it had, unwittingly, by selling bitter water which simulated both the name and the label of complainant, infringed complainant's rights.

(2) That the other defendants (retailers) had acted fraudulently in actually palming off the bitter water of Siegel-Cooper Company on a call for the bitter water of complainant.

(3) That under these circumstances, while the Siegel-Cooper Company would be enjoined, no accounting could be had against it because Siegel-Cooper Company had acted in good faith.

(4) It is also held that no account could be had against the two defendants (retailers) simply because their sales were so small as not to warrant the expense of an accounting.

But this decision of the U. S. Supreme Court clearly confirms the doctrine of all "unfair competition" cases, i. e., that no accounting can be had in such cases except in respect to instances of actual fraud in respect to particular sales—of actually palming off defendant's goods as and for the goods of the plaintiff.

In this case, while the dissenting opinion (see 165 Fed. 418, line 27) expressly holds that "The American Girl," as applied to shoes, "constitutes a valid trade-mark," the majority opinion (the law in this case) expressly holds (see 165 Fed. 417) that "the name

702 'The American Girl,' as applied to shoes, is not the subject of valid trade-mark." Now, where, as in this case, there is no question of a valid trade mark, but it is a case of unlawful competition in business, actual fraudulent intent or actual fraud in the acts of defendant are of the essence of the action, and countable relief, in the matter of accounting for damages or profits in such a case as this, is only granted on the accounting, as to such damages as plain-

tiff can show that he has suffered or such profits as defendant made, by complainant actually showing that in making particular sales the defendant caused its purchasers to believe that the goods which it sold were the goods of the plaintiff—thus palming off defendant's goods "as and for" the goods of the plaintiff. That this is the law and that in a case such as the one at bar, an "unfair competition in business" case as distinguished from the simple case of "a valid trade mark" (which latter the majority opinion, see 165 Fed. 415, says this case is not)—actual fraud is of the essence of the action as to recovery of damages or profits, we would refer to the following:

It is because the class of cases, known in this country as cases of "unfair competition," are essentially cases involving actual fraud as distinguished from cases of valid trade marks, in which latter cases actual fraud need not be shown, that in England these cases of unfair competition are called "passing off" cases, to distinguish them from strict trade mark cases, in which latter the element of actual fraud is not necessary in order to recover damages or profits. See Nims on Unfair Business Competition, page 29.*

In the majority opinion of the Court of Appeals in this case (165 Fed. 413), which is the law of this case, it is stated:

"While complainant is not entitled to relief upon the ground that the words 'The American Girl' * * * are valid trade marks, yet it is entitled to protection from their use by the defendant in a manner and under circumstances constituting unfair trade, the essence of the rule being that one person shall not, in the sale of his goods, so act as to lead the public to believe that they are the goods of another."

Therefore, it is the law of this case that the complainant's right to an accounting is measured by the extent to which the words "American Lady" have been used on shoes sold "by the defendant in a manner and under circumstances constituting unfair trade"; and, as clearly indicated in that opinion of the Court of Appeals, unfair trade consists in the sale of goods by one person as and for the goods of another person, or to use the language of the Court of Appeals in this very case:

703 "The essence of the rule being that one person shall not, in the sale of his goods, so act as to lead the public to believe that they are the goods of another."

In this statement of the law applicable to cases of unfair competition in trade (precisely this case) our Court of Appeals merely enunciates a rule of law applicable to such cases which rule has been applied by that Court upon numerous occasions, and which is undoubtedly the law upon this subject.

In the case of Kann v. Diamond Steel Co., 89 Fed. 706, the Circuit Court of Appeals for this circuit had under consideration another case of alleged unfair competition in trade, and in its opinion, written by Judge Sanborn, it states this rule as follows:

"The deceit, or probable deceit, of the ordinary purchaser to such an extent that he buys, or will probably buy, the property of one manufacturer or vender, in the belief that they are those of another, is a sine qua non of the maintenance of such a suit."

In Centaur Co. v. Marshall, 97 Fed. 785, the Circuit Court of Appeals for this circuit also had before it a case of alleged unfair competition in trade, and in its opinion, also written by Judge Sanborn, it again stated this rule, as follows (788):

"Every suit to restrain the simulation of the dress of merchandise is based on the fact that the defendant will thereby deceive the purchaser into buying his goods as those of the plaintiff, to the latter's damage. The deceit, or probable deceit, of the purchaser so that he buys or will probably buy, the articles of one manufacturer or vendor in the belief that they are those of another is a sine qua non of such a suit." * * * "it is only when the likeness deceives, or will probably deceive, the buyers into the purchase of the goods of one manufacturer or vendor as those of another, and only to the extent that it thus deceives, that any legal injury results, or that a court of equity may grant relief."

In holding that unfair competition was not made to appear in the case of Wrisley v. Iowa Soap Co., 122 Fed. 799, the Circuit Court of Appeals for this circuit again applied this rule and in its opinion, also written by Judge Sanborn, said:

"The acts of the defendant had no tendency to give the public the false impression that its product was the manufacture of the plaintiff or to mislead or deceive the ordinary purchaser into taking it for the plaintiff's manufacture."

704 We thus find that upon numerous occasions the Circuit Court of Appeals for this circuit has adopted and enforced this rule of law that the sine qua non of an action for unfair competition in trade consists in the deceit of the ordinary buyer into the purchase of the defendant's product believing it to be the product of the complainant, "the essence of the rule being that one person shall not, in the sale of his goods, so act as to lead the public to believe that they are the goods of another," and that it is "only to the extent that the defendant thus deceives that any legal injury results or that a court of equity may grant relief." Centaur Co. v. Marshall, 97 Fed. 785; Kann v. Diamond Steel Co., 89 Fed. 706; The Wolf Brothers & Co. v. Hamilton-Brown Shoe Co., 165 Fed. 413; Wrisley v. Iowa Soap Co., 122 Fed. 709. See also Lorillard v. Peper, 86 Fed. 960.

The above decisions of the Circuit Court of Appeals for this circuit are in harmony with the decisions of the Supreme Court, and of other U. S. Courts of Appeals in other circuits, and, as we see it, with the settled fundamental principles governing this class of cases.

In the leading case of Goodyear's Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, the Supreme Court said:

"Relief in such cases" (cases of unfair competition in business) "is granted only where the defendant by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacturer."

A careful analysis of the decided cases on the subject of unfair trade must convince anyone that there is a broad distinction between such cases and cases of infringement of a trade mark and infringement of a patent; and any one who fails to grasp this distinction

must fail in an attempt to determine the measure of relief on accounting in an unfair trade case.

In a suit brought for infringement of a patent the complainant is entitled to recover all profits made by the defendant from the sale of the infringing device, for the reason that the government grant of the letters patent confers upon the patentee a monopoly upon the device covered by the patent, and whenever a profit is made from the sale of that device that profit results from something that was granted by the government to, and belonging to, the patentee, and therefore the profits belonged to the patentee and he is entitled to re-
705 cover, on accounting, the whole amount of profits made by the infringer from the sale of the infringing device.

In suits brought for infringement of a trade mark proper, where the complainant has been held entitled to recover all profits made by the defendant from the sale of the goods of the same class bearing that trade mark, it has been where the Court believed the owner of a trade mark to be entitled to the exclusive right to the use of that trade mark upon goods of the same class; and in such cases the law presumes that when goods which bear that mark are sold the sale results from the fact that they do bear that trade mark and any profits made on such goods are conclusively presumed to belong to the owner of the trade mark, and he is entitled to recover the whole amount of such profits on accounting. In the case at bar, however, the majority opinion holds that there is no trade mark in the name "The American Girl."

On the other hand, in a suit founded upon unfair competition in trade no exclusive right is involved and the only thing which Courts will do in such cases is to restrain the defendant from selling his goods as and for the complainant's goods, and from adopting means which will probably result in such sales. Aside from this right to free and fair competition, the complainant has no more right to the exclusive use of a particular dress for or means of designating his goods than he has to the exclusive sale of such goods, and any other person has a right to adopt the same dress for or means of designating his goods, so long as the purchasing public are not thereby deceived. Fraud and deception lie at the very foundation of a suit brought for unfair trade, and in the absence of deception—in the absence of a sale of goods by one dealer as and for the goods of another dealer—there is no case of unfair competition and the complainant's case, as such, must fail. It is quite true that there have been cases in which the courts have issued an injunction even though it was not made to appear that the defendant's goods were sold as and for the complainant's goods; but in those cases, without exception, the court was able to say from an inspection of the complainant's and defendant's packages that if the defendant was permitted to place his goods upon the market in the manner complained of there was a liklihood that his goods would be sold as and for the complainant's goods; and it was therefore held that the complainant was entitled to an injunction restraining the sale of the defendant's goods in that manner, upon the theory that it is the policy of the law to arrest what might result in the sale of

defendant's goods as and for the complainant's goods before
706 such sales have actually taken place. Gannert v. Rupert, 127 Fed. 932, 934. In such cases the complainant fails to make out a case of actual unfair competition in trade, for the reason that he fails to show that the defendant has sold his goods as and for the complainant's goods, but he does make out a case for injunctive relief which will prevent the sale of the defendant's goods under circumstances which the Court is satisfied might result in the sale of the defendant's goods as and for the complainant's goods. Therefore, the fact that in a particular case an injunction is granted restraining the sale of the defendant's goods in a particular manner does not raise a presumption that unfair competition has actually occurred in that case, but shows merely that the Court is satisfied that if the defendant continues to sell his goods in that manner unfair competition may result. And even if the Court can see from the evidence in the case that with regard to some of the sales of the defendant's goods confusion in trade or unfair competition has resulted, it could not be assumed that the same was true with regard to all sales of the defendant's goods; and, therefore, if an accounting should be ordered in such case it could only relate to such goods as were actually sold by the defendant as and for the goods of the complainant, since goods that were not so sold would not be sold in unfair competition with the complainant. And it would be incumbent upon the plaintiff on such accounting to point out to the Court instances of such goods as were sold in unfair competition with it "as and for" the goods of the plaintiff.

This distinction between patent, trade mark and unfair competition cases and the measure of the complainant's right to recover on accounting in those cases is recognized and will be found running through all of such cases. For instance, in the case of Layton Pure Food Company v. Church & Dwight Company, 182 Fed. 33, 34, a strict trade-mark case, our Circuit Court of Appeals pointed out that in such case the complainant has an exclusive right to the use of its trade mark upon that particular class of goods, and that anyone who affixes that mark to similar articles is an infringer regardless of whether his intention was wrongful or innocent, and regardless of whether the result has been to injure the complainant, for in such case "intent and damage are immaterial"; in the case of Layton Pure Food Company v. Church & Dwight Company, 182 Fed. 41, also a strict trade mark case, our Circuit Court of Appeals said on this point:

"The complainant is the owner of a trade mark for baking soda and baking powder consisting of this picture of a cow and this is valuable property. It is entitled to be protected in the exclusive
use of this property. Every sale under this trade mark
707 of a package of baking powder manufactured by another is an infringement of the complainant's right and a trespass upon its property.

In the case of Kann v. Diamond Steel Company, supra, an unfair competition case, our Circuit Court of Appeals held that the

deceit of the ordinary purchaser to such an extent that he buys the property of one manufacturer in the belief that they are those of another is a sine qua non of the maintenance of such a suit; in the case of Centaur Company v. Marshall, supra, also an unfair competition case, our Circuit Court of Appeals said that the deceit of the purchaser so that he buys the article of one manufacturer in the belief that they are those of another is a sine qua non of such a suit and "it is only when the likeness deceives, and only to the extent that it thus deceives, that any legal injury results, or that a court of equity may grant relief." And in the case at bar our Circuit Court of Appeals hold that the limit of the complainant's right is a right to be protected from the use by the defendant of the name American Lady under circumstances which shall lead the public to believe that its shoes are the shoes of the complainant.

In the case of G. W. Cole Company v. American Cement & Oil Company, 130 Fed. 705, the Circuit Court of Appeals for the Seventh Circuit recognized and pointed out the distinction between such cases where it said:

Unfair competition is distinguishable from the infringement of a trade mark in this: that it does not involve necessarily the question of the exclusive right of another to the use of the name, symbol or device."

This same distinction was recognized by the Circuit Court of Appeals for the Second Circuit in the case of Baker v. Baker, 115 Fed. 297, in which it was said (299):

The evidence upon the accounting failed to disclose that complainant was entitled to any recovery of profits, or any except nominal damages, by reason of the defendant's conduct. It failed to disclose that a single person had purchased goods marketed by the defendant supposing them to be the product of the complainant, or that the complainant had lost a single customer by defendant's conduct."

The Circuit Court of Appeals for the Second Circuit thus clearly recognizes and adopts the doctrine which we have contended for above. That in a case of this character it is not necessary that unfair competition has actually occurred in order that an injunction may issue, as the Court may be satisfied from the evidence before it that if the defendant is allowed to continue to sell his goods in the manner shown by the record it may result in the sale
708 of the defendant's goods as and for the complainant's goods; and the Court will arrest this threatened or probable deception by its writ of injunction; and the fact that an injunction is issued does not raise a presumption that the defendant has actually *sold* its goods as and for the complainant's goods. Nor does the fact that in a particular case an accounting is ordered [—] raise a presumption that unfair competition has actually occurred, but merely that the Court is satisfied that the defendant has adopted means which, if allowed to continue, may result in the sale of his goods as and for the complainant's goods and that the complainant ought to have an opportunity to prove, if it can, that such sales have actually taken place and to recover profits and damages.

If it can prove such facts, an accounting is sometimes ordered to give it an opportunity to make such proof. So in the case of Baker v. Baker, supra, the complainant showed that the defendant had adopted means which would result in the sale of its goods as and for the complainant's goods and the Court granted an injunction and also an accounting to give the complainant an opportunity to prove that such sales had actually occurred; but on the accounting the evidence "failed to disclose that a single person had purchased goods, marketed by the defendant, or that the complainant had lost a single customer by defendant's conduct;" and the Court held, therefore, that the complainant was not "entitled to any recovery of profits, or any except nominal damages, by reason of the defendant's conduct."

In the leading case of Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, the Supreme Court had before it a case in which the complainant attempted to monopolize a name which was descriptive of the article to which it was applied, as was also done by the complainant in this case. Like the Circuit Court and Circuit Court of Appeals in this case, the Supreme Court in that case held that the complainant was not entitled to a monopoly of the name sought to be appropriated; and it also held that the case could not be maintained as a case for unfair competition, for the reason that:

"Relief in such cases is granted only where the defendant, by his marks, signs, labels or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacture, to the injury of the plaintiff."

Thus the Supreme Court squarely adopts the doctrine enunciated and laid down by the courts in this and other circuits and
709 in so many words states that in cases of unfair competition relief is granted only where the defendant palms off his goods as and for the goods of the plaintiff, to the injury of the latter, so that the measure of the plaintiff's recovery upon accounting would be the extent to which the defendant palmed off his goods as and for the complainant's.

We have now discussed, we believe, every relevant federal case bearing upon the question of accounting in unfair competition cases except the case of Fairbanks v. Windsor, 118 Fed. 96, and the case of Society Anonyme v. Western Distilling Co., 46 Fed. 921, cited in support of the decision in Fairbanks v. Windsor.

In the case of Fairbanks v. Windsor the complainant in that case had brought suit against a defendant named R. W. Bell Mfg. Company on the ground of unfair competition in trade. In that case the lower court on January 8, 1896, held that the defendant was not guilty of unfair competition and dismissed the complainant's bill. The complainant appealed to the Circuit Court of Appeals for the Second Circuit, and that Court reversed the decision of the lower court and held that the defendant was guilty of unfair competition. The Bell Company became involved in financial difficulties and a receiver for its property was appointed who on July 8, 1896, sold

to Windsor a part of the assets of the Bell Company including a large quantity of the boxes and cartons complained of in the suit against that company. Windsor leased the old plant of the Bell Company and proceeded to manufacture soap powder, selling the same in the boxes and cartons purchased from the receiver until, on March 5, 1897, the mandate of the Circuit Court of Appeals reversing the decision in the case against Bell was filed, when he promptly ceased the use of those cartons. The Fairbanks Company then began suit against Windsor for unfair competition based upon the above facts and Judge Hazel held that Windsor had been guilty of unfair competition and must account for all profits made by him from the sale of soap powder in the cartons complained of. However, on an appeal from that decision of Judge Hazel the Circuit Court of Appeals for the Second Circuit held that inasmuch as Windsor had only used the cartons during the period that the order of the lower court in the first case remained in force, he was not guilty of unfair competition and was not liable to account to the complainant and it reversed the decision of Judge Hazel. Thus Judge Hazel's decision (which is contrary to the settled law as we have seen) cannot be considered as an authority to the effect that in cases of this character the complainant is entitled to recover all profits made by the defendant; and even if his decision had not been reversed it
710 could not be recognized as law, for the reason that it is in conflict with the decision of the Circuit Court of Appeals for that circuit in the case of Baker v. Baker (115 Fed. 297), supra, in which that Court held that the complainant was only entitled to recover on the accounting for goods actually sold by the defendant as and for the complainant's goods.

The case of Society Anonyme v. Western Distilling Co., 46 Fed. 921, cannot be regarded as an authority upon this point, for the reason that in that case the only question presented to Judge Thayer upon exception to the Master's report was the question as to whether or not certain items of expense should be deducted in computing the defendant's profit, but it does not appear that in that case the question as to whether or not all profit made by the defendant could be recovered on accounting was raised. Certainly there is nothing in the report of Judge Thayer's opinion to indicate that he was passing upon the present question; and as an authority upon this point that opinion amounts to nothing at all, as it does not even touch upon this point.

It will be seen from the foregoing that while there is absolutely no Federal authority to support the complainant's position that it is entitled to recover on this accounting all profits made by the defendant from the sale of shoes marked with the name American Lady, there are a great many decisions of Federal Courts, including decisions of the Supreme Court and of several U. S. Circuit Courts of Appeal—among them our own—to the effect that the complainant is only entitled to recover on this accounting such profits as were made by the defendant from the sale of shoes marked with the name American Lady and sold as and for the complainant's shoes to the deceit of the purchaser. In addition to those decisions of the

Federal Courts we have two decisions by State courts of last resort to the same effect.

In the case of Clark Thread Co. v. William Clark Co., 56 N. J. Eq. 789, both the plaintiff and the defendant were entitled to the use of the name Clark on thread, but it appeared that some acts of the defendant had invaded the rights of the complainant and constituted unfair competition in trade. The Court granted both an injunction and an accounting, and on this point is said:

"It seems to us inequitable to hold the defendant responsible to the complainant for all the profits realized by the defendant from its wrongful conduct. Its responsibility to the complainant should be confined to such profits as were diverted from the complainant, and such damages as the complainant otherwise sustained."

711 In the case of W. R. Lynn Shoe Co. v. Auburn, Lynn Shoe Co., 100 Maine 461, 479, the defendant was found guilty of unfair competition and the Court held that the complainant was entitled to recover all profits made on goods sold in the simulated dress or package and referred the cause to a Master to take an account of such profits. The Master refused to include in the accounting certain shoes sold by the defendant for the reason that "the evidence wholly fails to show any unfair competition or any ground for the inference that the plaintiff was injured thereby;" and in speaking of this matter the Supreme Court of Maine said (103 Maine 334):

"Since it was possible and even feasible for the defendant to sell some shoes of such kind and under such circumstances as not to affect injuriously the plaintiff's trade, the finding of the Master is not found to be clearly wrong. Granting the general fraudulent character as to the plaintiff of the defendant's business conduct, we should not assume that none of its business transactions were free from that fraud."

The Master also excluded certain other shoes sold by the defendant from the accounting but which the plaintiff claimed should be included on the ground that the sales were "in pursuance of the defendant's fraudulent purpose condemned by the Court, and were therefore unlawful, and also affected the market to the detriment of the plaintiff." In disposing of this contention the Supreme Court of Maine said (103 Maine 334):

"But by the terms of his commission the Master was not authorized to assess any punitive damages, but only such as were actually sustained by the plaintiff and resulted from the unlawful acts of the defendant in unfair competition. The burden was on the plaintiff to prove the fact that it sustained damage from those particular sales. The Master reports, however, that there was no evidence that any purchasers or the public were misled by these particular sales, and no evidence is adduced that those sales crowded out any sales the plaintiff could have made but for them. In the absence of such evidence it should not be assumed that every sale by the defendant of shoes not impressed with a deceptive trade mark deprived the plaintiff of a sale, or injured its reputation or even narrowed its market. It should not be assumed that any purchaser of the de-

fendant's shoes in those cases would have purchased shoes of the plaintiff if the defendant company had never existed."

The foregoing cases, as well as the following, establish clearly the proposition: That in case of a strict trade mark, whether the same be a name susceptible of appropriation as a trade mark
712 or a mark or device, the one first to adopt and use such trade mark as applied to a particular class of goods, is entitled to its exclusive use; and that in such a case, where the defendant is found to have infringed by using the same mark, or one in simulation thereof, fraud will be presumed, because in such a case defendant has infringed complainant's exclusive right.

McLean v. Fleming, 96 U. S. 253;
Filley v. Fassett, 44 Mo. 168;
Liggett & Myers Tobacco Co. v. Sam Reid Tob. Co., 104 Mo. 53;
Church & Dwight v. Russ, 99 Fed. 276.

It is equally clear from the majority opinion of the U. S. Court of Appeals in the case at bar (which is the law of this case) that said opinion holds:

(*a*) That complainant is not entitled to the exclusive use of the name "The American Girl" or the name "American Girl."

(*b*) That, to use the very language of that majority opinion, at page 415 of 165 Fed., "the name 'The American Girl', applied to shoes, is not the subject of a valid trade mark."

(*c*). That in the case at bar the majority opinion granted the complainant a decree against defendant only on the theory of "Unfair trade" and not to prevent defendant from selling shoes, or to compel defendant to account for shoes sold, marked with the name "American Lady", unless, in the sale of such shoes, they were "not accompanied with other matter clearly indicating that such shoes are of its own manufacture and therefore not of complainant's."

It is equally clear, from decisions hereinbefore considered, as well as from the following cases, that in cases such as the one at bar—cases of "Unfair trade" where there is no question of the exclusive right to a particular name or mark—the action, especially on the accounting feature, is based, fundamentally, upon deception, unfairness and fraud.

Coates v. Merrick Thread Co., 149 U. S. 562;
Daviess County Distillery Co. v. Martinani, 117 Fed. 186, 188;
Goodyear Co. v. Rubber Co., 128 U. S. 598, 604;
Heide v. Wallace, 129 Fed. 649, 650;
Hilson v. Foster, 80 Fed. 896, 897;
Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 549, affirming 31 Fed. 776.

713 It therefore follows that plaintiff is not entitled to recover one cent of profits or damages in this case, because of the sale of defendant's "American Lady" shoes, marked and sold as

shown by the evidence before the Master and the stipulation of June 4, 1910, because:

(1) Under the majority opinion of the Court of Appeals in this case, the case is one of "Unfair trade" and not one of a valid trade mark in a name to which complainant has an exclusive right.

(2) Defendant is not shown to have sold since the date of filing the bill (Jan. 29, 1903) a single pair of "American Lady" shoes which were "not accompanied with other matter clearly indicating that such shoes are of its own manufacture and therefore not of complainant's (see page 418, of 165 Fed.).

(3) In respect to the sale of the defendant's said shoes, since the date of filing the bill, the plaintiff has utterly failed to prove that any such shoes were sold, to the deception of the purchaser, in connection with "the numeral mentioned" (in said majority opinion) and "the catch phrase 'with the character of the woman' or any phrase in simulation of the phrase 'a shoe as good as its name'", failed to show any fraud, and failed to show that a single purchaser has, since the filing of the bill, been deceived into buying any of defendant's said shoes believing that the same were complainant's "The American Girl" shoes.

The equitable rule as to recovery of profits in a patent case or in a case of a strict or technical trade mark, in both of which cases the complainant is held to have an exclusive right which has been invaded by the defendant, is the same; it is this:

In equity the profits which the complainant seeks to recover must be shown to have been actually received by the defendant out of the infringement; in other words, the fruits of the advantage which he derived from the use of that invention over what he would have had in using other means open to the public and adequate to enable him to obtain an equally beneficial result.

Coupe v. Royer, 151 U. S. 565;
Tilghman v. Proctor, 125 U. S. 136.

But the above rule has no application to a case of alleged unfair trade—the case at bar; for in such a case the complainant has no exclusive right, and in the case at bar the Court of Appeals held that defendant may use the name "American Lady"
714 (complainant having no exclusive right to "American Girl") in connection with its shoes, when, in the sale of defendant's shoes, they are accompanied with other matter clearly indicating that they emanate from the defendant and not from the complainant.

Hence, as stated by Nims on Unfair Business Competition, page 461, it is well settled in cases of alleged unfair trade (the case at bar) that:

"Sales under a trade name, condemned as involving unfair competition, but not under unauthorized marks, made to persons who knew the goods were made by defendant, or to persons at a distance who knew nothing of plaintiff, are not to be assumed to have been injurious to plaintiff."

Therefore, in cases of alleged unfair trade (the case at bar) the burden of proof is on the plaintiff to affirmatively show:

(*a*) That the sales of goods accounted for involved all the objectionable conditions of unfair trade;

(*b*) That as to each of such sales the purchaser was deceived, buying defendant's article believing it to be the plaintiff's.

In the absence of such affirmative showing by the plaintiff, in cases of alleged unfair trade, of which the case at bar is an example, there is no presumption that the defendant's goods were sold "as and for" the goods of the plaintiff, and that the profits made were illegitimate profits "made by reason of the infringement", but they are legitimate profits belonging to the defendant and with respect to which complainant is not entitled to recover a penny.

This is the true rule governing cases like the case at bar, readily distinguishable from the rule applicable in patent and strict trade mark cases, in which latter cases the element of exclusive ownership is necessarily involved; and this rule, applicable to cases of alleged unfair trade, is the one adopted by the U. S. Circuit Court of Appeals for the Second Circuit in the case of Baker v. Baker, 115 Fed. 297, in which it is said, at page 299 of 115 Fed.:

"The evidence upon the accounting failed to disclose that complainant was entitled to any recovery of profits, or any except nominal damages, by reason of the defendant's conduct. It failed to disclose that a single person had purchased goods marketed by the defendant supposing them to be the product of the complainant, or that the complainant had lost a single customer by defendant's conduct."

715 In the case at bar, as all defendant's American Lady shoes sold since the filing of the bill and accounted for before the Master were sold by defendant at wholesale to persons who knew that they were the shoes of the defendant, and as every pair of said shoes were sold to defendant's customers in cartons each of which cartons plainly bore the name of the defendant, in two places, and also stated, in accordance with the fact, that defendant was the maker thereof; and as with respect to none of the sales of defendant's shoes made since the filing of the bill is it shown that the purchaser knew anything of the plaintiff, The Wolf Brothers & Company, or of the plaintiff's shoes marked with the name American Girl, none of these sales can be assumed to have been injurious to the plaintiff. Therefore, the rule laid down by Nims in his work on Unfair Competition, at page 461, and the rule laid down by the U. S. Circuit Court of Appeals for the Second Circuit, in the case of Baker v. Baker, 115 Fed. 299, quoted above, are strictly applicable. In other words, there is no showing by the plaintiff on this accounting that in respect to any of the sales accounted for before the Master defendant's profits thereon arose by reason of the infringement (in the way of unfair trade) which the majority of the Court of Appeals found had taken place by reason of the sum of the various things done by defendant before the filing of the bill.

As To The False Proposition—False In Fact Here And False In Law—That This Defendant Put It In The Power Of Unscrupulous Retailers To Palm Off The Defendant's American Lady Shoe On Customers, As And For Complainant's "The American Girl" Shoe.

As to the above proposition, we desire to say:

(1) That there is not an iota of evidence before the Master that any retailer, since the filing of the bill in this case, or at any other time, for that matter (although any time prior to Jan. 29, 1906, is not relevant to the inquiry on this accounting), ever sold defendant's American Lady shoes as and for plaintiff's "The American Girl" shoes, to the deception of the purchaser.

(2) That the evidence before the Master is that defendant has only sold its American Lady shoes at wholesale.

(3) That since the filing of the bill defendant has been guilty of no fraud whatever in the marking or selling of its American Lady shoes, since January 29, 1906 (the date of filing the bill); because since that date it has plainly marked, on the shoes themselves, or at least, in every case, on the cartons containing
716 every pair of its American Lady shoes sold, the name of defendant company and the word "Makers".

(4) So that, in the language of the majority of the Court of Appeals in this case (see 165 Fed. 418), since the filing of the bill, defendant has not used the name American Lady, "as applied to shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's."

(5) That as to the markings upon the bottoms of defendant's shoes and upon the cartons or boxes in which defendant's shoes were placed, the majority opinion of the Court of Appeals in this case (which is the law of this case, binding on the Master) finds, as a matter of fact, that since the filing of the bill the defendant has not been guilty of any simulation; for as to this the majority opinion states, at page 417 of 165 Fed.;

"In some respects the markings upon the bottoms of defendant's shoes and upon the cartons and boxes in which the shoes were placed were in simulation of those of complainant; but, as the simulation in these respects was discontinued by defendant upon the bringing of this suit, we will not extend this opinion by pointing out the similarity."

Therefore, in the sale of defendant's American Lady shoes since the filing of the bill, defendant has been guilty of no fraud and is in no way liable on this accounting.

Furthermore, even had it been shown that, in respect to any of defendant's shoes sold by defendant since the filing of the bill, any unscrupulous retailer had deceived a customer by palming off defendant's American Lady shoes, sold by the defendant packed in cartons marked as above stated and as stipulated by the stipulations of June 4, 1910, and January 11, 1911, as and for plaintiff's American Girl shoes (a fact which has not been shown), if that was a fraud it would be the fraud of such particular retailer and not a fraud for which defendant would be liable, under the decisions of the United States Supreme Court and of the United States Court of Appeals.

In respect to such a contention the Supreme Court of the United States says, in the case of Coats v. Merrick Thread Co., 149 U. S., at pages 569 and 573:

"Indeed, such dealers could not possibly fail to know what they were buying, and the fraud, if any, was practiced on the buyer of a single or a small number of spools, who might to induced
717 to purchase the thread of the defendants for that of the plaintiffs." (Above is from page 569 of 149 U. S.).

* * * * * * *

"If the purchaser of such thread desires a particular make he should *either* call for such, in which case the dealer, if he put off on him a different make, would be guilty of fraud, for which the defendants would not be responsible." (Above is from page 573 of 149 U. S.)

Similarly, in the case of Proctor and Gamble Co., v. Globe Refining Co., the United States Court of Appeals says, at page 362 of 92 Fed. Rep.:

"If the consumer called for 'Every Day' soap, and the retailers supplied him with 'Everybody's soap,' it would be fraud for which the defendant would not be liable, as was pertinently said by Mr. Justice Brown in Coats v. Thread Co., already cited."

And this precise distinction has been made, by the United States Supreme Court in respect to the accounting feature of a strict case of "unfair trade." We refer to the case of Saxlehner v. Siegel et al., 179 U. S. 42. In that case Siegel-Cooper Co., the manufacturer or wholesaler, was held liable to an injunction because it had sold a bitter water under the name Hunyadi-Matyas, in bottles which bore blue and red labels in simulation of the blue and red labels of complainant's bitter water marked Hunyadi-Janos. In the case immediately preceding, found between pages 19 and 41 of 179 U. S. (the case of Saxlehner v. Eisner & Mendelson Co.) the United States Supreme Court had held that the complainant had no trade name in, or exclusive right to, the name Hunyadi for bitter water, as that name, applied to bitter water, was a name that any one could use for bitter water; but in the later case in 179 U. S. 42 which we are now considering—purely a case of "unfair trade"—the Supreme Court held that the defendant, Siegel-Cooper Co. (the manufacturer or wholesaler), as well as the defendants, Geis and Marquet (retailers) should be enjoined, not from using the name Hunyadi on bitter water, but from using that name on bottles bearing blue and white labels in simulation of the labels on the plaintiff's bottles of bitter water. But, on the accounting feature, the United States Supreme Court made precisely the distinction which we are trying to point out, and which the United States Supreme Court made in the case of Coats v. Thread Co., at pp. 569 and 573 of 149 U. S., and which the United States Court of Appeals makes in Proctor &
718 Gamble Co. v. Globe Refining Co., at page 362 of 92 Fed. Rep., supra, in this:

(*a*) That, because it found that Siegel-Cooper Company (the manufacturer or wholesaler) had acted innocently and had not palmed off its bitter water as and for the bitter water of the plaintiff to the deceit of any one, there should be no accounting against it.

(*b*) And that if there had been any palming off of the plaintiff's goods for those of Siegel-Cooper Co., that was the fraud of the other

defendants—Gies and Marquet, the retailers—for whose fraud Siegel-Cooper Co. was not responsible.

(c) That as to the retail dealers, defendants Gies and Marquet, who had palmed off Siegel-Cooper Company's bitter water on a call for plaintiff's, plaintiff would have been entitled to an accounting but for the fact that their sales were so small that an accounting was not worth while.

Therefore, under these decisions, it is clear that complainant cannot recover profits made by defendant in the sale of its American Lady shoes such as sold by it since the filing of the bill, because:

(1) As those shoes were packed and sold at wholesale by defendant, marked as stated aforesaid and in cartons aforesaid—all as appears from the stipulations of June 4, 1910, and January 11, 1911—they are without the scope of the decree, and in their sale defendant was guilty of no fraud, not even of the technical or constructive fraud which warranted the decree against Siegel-Cooper Co. in the case in 179 U. S. 42, supra.

(2) There is not an iota of proof that since the filing of the bill, in a single case, a retailer, who had purchased defendant's American Lady shoes from defendant since the filing of the bill, had sold such shoes, to the deceit of the customer, as and for plaintiff's "The American Girl" shoes.

(3) That had such an instance been shown, in the language of the United States Supreme Court and of United States Court of Appeals in the cases cited, supra, "it would be a fraud for which the defendant would not be liable."

Non Constat that because the Majority Opinion of the Court in this case authorized a Decree for an Accounting as well as an Injunction, therefore, the Majority of the Court of Appeals in this case meant to say that necessarily the Complainant would be entitled to recover on the Accounting.

It does not follow at all that because the majority opinion of the Court in this case ordered an accounting as well as an injunction it therefore follows that complainant is necessarily entitled to recover on the accounting, for the following reasons:

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In the first place, it is perfectly clear from the opinion of the majority of the court, as the same is found between pages 413 and 418 of 165 Fed., as well as from the well-settled law in unfair competition cases, as shown from the decisions considered in this brief, that fraud and actual deception must be shown as a condition precedent to the recovery of damages or profits; and that actual fraud and deceit in the sale of defendant's goods as and for the goods of complainant is not established by showing that defendant's American Lady shoes were sold, since the filing of the bill, in accordance with the facts found in the stipulations of June 4, 1910, and January 11, 1911.

The majority opinion of the court expressly found that there was no valid trade-mark in the name American Girl as applied to shoes, and it is clear from reading the said majority opinion that the only reason the majority of the court granted the complainant any accounting at all was because it conceived that possibly complainant

might be able to show that since the filing of the bill, in some instances, defendant had committed fraud in the sale of its American Lady shoes by selling said shoes in connection with the numerals mentioned and with the catch phrases mentioned, to the deception of certain purchasers. This is clear from the last paragraph but one of the majority opinion of the court, where the court says:

"Complainant is entitled to a decree enjoining the defendant from using the name 'The American Lady,' as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's, and from using, in connection with such name, as applied to its shoes for women, the numerals mentioned, or the catch phrase 'With the character of the woman,' or any other phrase in simulation of the phrase 'A shoe as good as its name,' and also to an accounting as before stated."

This is perfectly clear from the last words of the above paragraph which are as follows: "and also to an accounting as before stated." What do those words mean? It clearly appears from the majority opinion that no prior reference had been made to the accounting and therefore those words must be coupled with the context of the above-quoted paragraph, when it then becomes clear that the Court only meant to say, in harmony with the decisions to which we have already referred and in harmony with the injunctive order, that if complainant could show actual fraud in regard to any sales of defendant's shoes since the filing of the bill by which any customers of the defendant were deceived, or that in the sale of its
720 American Lady shoes the defendant had sold the same in connection with the numerals theretofore mentioned in the opinion and with the catch phrases mentioned in the preceding paragraph, to the actual deception of purchasers, then, as to such sales, there might possibly be a recovery as to damages and profits, because in such instances there might be said to have been fraud, not in merely using the name American Lady, on defendant's shoes, "when defendant's shoes were accompanied with other matter clearly indicating that such shoes were of its own manufacture, and therefore not of complainant's," and that in doing that, in connection with the use of numerals and catch phrases in simulation of complainant's numerals and catch phrases, some of defendant's customers had been actually deceived. It was for the complainant to establish clearly such cases of fraud and actual deception, if any such existed, which induced the majority of the court to allow an accounting to go. But, as the record before the Master shows, not a single instance of such fraud and deception has been shown to have taken place since the filing of the bill; and the burden of proving such instances of actual fraud, where the purchaser was actually deceived, under the decisions hereinbefore considered, was thrown on the complainant.

On an accounting in equity to recover damages and profits the accounting must be had on equitable principles and the complainant can recover only such damages as he can show that he has actually suffered by reason of the infringement, or such net profits as he can show that the defendant has made by reason of the infringement.

It is not within the power of the Master to allow the complainant punitive damages or punitive profits. In other words, it is not within the power of the Master to punish the defendant by reason of the alleged infringement.

In the case of Hennessy v. Wilmerding-Loewe Co., 103 Fed. 90-96, the case was one of a strict trade-mark in the name Hennessy applied to brandy, and the defendant had infringed this strict trade mark. In that case the Court clearly shows the distinction between damages and profits recoverable in equity, and then says, at page 96 of 103 Fed.:

"The complainants in the case at bar might have chosen to prosecute their rights by an action at law. But they have decided to apply for relief to a court of equity. The functions of a Master on an accounting do not include the imposing of exemplary damages by way of punishment. They are confined to the estimation of the profits realized by the infringer, on the one hand, and of such dam-
721 age as has been suffered by complainants, on the other, for the purpose of giving him compensation therefor. Complainants are not entitled to an award of punitive damages."

In the case at bar there is no question of recovering damages, since the complainant could only recover damages if it had shown, in respect to any particular sales made by the defendant, that it would have made those sales had the defendant not made them, by showing what profits the complainant would have made had it made those sales and by also showing, in respect to each particular sale, that the defendant had infringed the rights of the complainant. The complainant has shown nothing of this sort and does not claim damages. The complainant in this case is really contending only for the profits made by the defendant, and these profits, as we have already shown, complainant is not entitled to recover; for this case as we have shown, is one of alleged unlawful competition in business, and in such a case, as pointed out by the United States Circuit Court of Apeals for the Second Circuit in the case of Baker v. Baker, at page 299 of 115 Fed., before the complainant can recover any profits it must show, as to each sale made by the defendant, that the purchaser bought the defendant's goods "supposing them to be the product of the complainant."

The rule which we invoke, that the Master cannot punish the defendant on these accounts in equity, but is limited by the terms of the decree, and can only, in the extremest case, award the actual damages which the plaintiff can show that it has suffered by reason of the infringement, or the actual profits which it can be shown the defendant made by reason of the infringement, is recognized and applied by the Supreme Court in the case of Livingston v. Woodworth, 15 Howard, star pages 559 and 560, as follows:

"We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts; but upon this principle of chastisement the Master admits that he has been led, in contravention of his original view of the testimony, and upon conjecture as to the [real-ty] of the facts, and not upon facts themselves, to double the amount which he had stated to be a compensation to

the plaintiffs below, and the compensation prayed for by them, and the Circuit Court has, by its decree, pushed this principle to the extreme by adding to this amount the penalty of interest thereon from the time of filing the bill to the date of the final decree.

722 We think that the second report of the Master, and the final decree of the Circuit Court, are warranted neither by the prayer of the bill, by the justice of this case, nor by the well established rules of equity jurisprudence.

If the appellees, the plaintiffs below, had sustained an inquiry to their legal rights, the courts of law were open to them for redress, and in those courts they might, according to a practice, which, however doubtful in point of essential right, is now too inveterate to be called in question, have claimed not compensation merely, but vengeance, for such injury as they could show that they had sustained. But before a tribunal which refuses to listen even to any, save those whose acts and motives are perfectly fair and liberal, they cannot be permitted to contravene the highest and most benignant principle of the being and consitution of that tribunal.

There they will be allowed to claim that which, ex aequo et bono, is theirs, and nothing beyond this."

The above rule is precisely the same whether it be a case of infringement of a patent, infringement of a trade-mark or a case of unlawful competition; but, as we have already said and fully discussed in this brief, and as stated by the United States Court of Appeals in the case of Baker v. Baker (a case of unfair competition), 115 Fed. 297, the complainant can recover no profits made by the defendant in the sale of defendant's goods, unless complainant show, as to each sale made by the defendant, that the purchaser bought the goods from the defendant "supposing them to be the product of the complainant."

The principles governing the recovery of profits in a suit for unfair competition in business in many respects are not unlike those applicable to a case of infringement of a design patent, where the question is whether or not the defendant's design and that of the patent are so nearly alike in general appearance as to be calculated to deceive the unwary, so that the design made by the defendant can be sold "as and for" the patented design of the complainant. But even in a design patent case, in the matter of recovery of profits, the complainant can only recover profits made by the defendant, which profits are shown to be attributable to the use by the defendant of the design covered by the patent. The leading case on a design patent and the recovery of profits or damages in such a case is the case of Dobson v. Hartford Carpet Co., 114 U. S. 445-6, where the Supreme Court says, on this question, as follows:

723 "The true rule, which applies also to a patent for a design, was formulated thus, by this court, in Garretson v. Clark: 'The patentee must, in every case, give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole ma-

chine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.' The case of Manufacturing Co. v. Cowing, 105 U. S. 253, was a case falling within the last clause of the rule thus stated, and was an exceptional case, as was stated by the Chief Justice, in the opinion. The general rule was recognized in that case, and the exception was made, in regard to the oil-well gas pump there involved, because there was only a limited and local demand for it, which could not be, and was not, supplied by any other pump.

The rule in question is even more applicable to a patent for a design than to one for mechanism. A design or pattern in ornamentation or shape appeals only to the taste through the eye, and is often a matter of evanescent caprice. The article which embodies it is not neces-arily or generally any more serviceable or durable than an article for the same use having a different design or pattern. Approval of the particular design or pattern may very well be one motive for purchasing the article containing it, but the article must have intrinsic merits of quality and structure, to obtain a purchaser, aside from the pattern or design; and to attribute, in law, the entire profit to the pattern, to the exclusion of the other merits, unless it is shown, by evidence, as a fact, that the profit ought to be so attributed, not only violates the statutory rules of 'actual damages' and of 'profits to be accounted for,' but confounds all distinctions between cause and effect."

This identical rule is reaffirmed by the Supreme Court in the case of Dobson v. Dorman, 118 U. S. 10.

In the case at bar, as we have already shown, the complainant is not entitled to recover profits on shoes marked with the name American Lady and sold by the defendant since the filing of the bill, because the majority opinion of the Court of Appeals recognizes that there is no trade-mark or trade name in the name American
724 Girl, but the complainant is only entitled to recover profits on such shoes sold by the defendant since the filing of the bill and marked with the name American Lady and not accompanied in any way with anything which would clearly indicate that those shoes did not emanate from the defendant; and, further, over and above this, as we have already shown in our brief, as to each sale of American Lady shoes made by the defendant since the filing of the bill (this being a case of unfair trade), the burden was on the complainant to show that such shoes were sold by defendant "as and for" the shoes of the complainant; and this is precisely what the complainant has failed to do. Following this principle in the case of W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co., 69 Atlantic 569, 103 Me. 334, decided Dec. 19, 1907, the Master refused an accounting as to certain shoes for the reason that:

"'The evidence [whol-y] fails to show any unfair competiton or any ground for the inference that the plaintiff was injured thereby' * * * since it was possible and even feasible for the defendant to sell some shoes of such kind and under such circumstances as not to affect injuriously the plaintiff's trade, the finding of the Master is not shown to be clearly wrong. Granting the general fraudulent character as to the plaintiff of the defendant's business conduct, we

should not assume that none of its business transactions were free from that fraud."

The Master also excluded sales to dealers in Auburn and Lewiston because the dealers there knew that the shoes were not the product of the plaintiff; also, sales to parties who never purchased goods from plaintiff and did not appear to know of its existence, as it did not appear that such shoes bore any deceptive mark. Plaintiff claimed these sales should be included on the ground that the sales were "in pursuance of the defendant's fraudulent purpose condemned by the Court, and were therefore unlawful, and also affected the market to the detriment of the plaintiff. But by the terms of his commission the Master was not authorized to assess any punitive damages, but only such as were actually sustained by the plaintiff and resulted from the unlawful acts of the defendant in unfair competition. The burden was on the plaintiff to prove the fact that it sustained damage from those particular sales. The Master reports, however, that there was no evidence that any purchasers or the public were misled by these particular sales, and no evidence is adduced that those sales crowded out any sales the plaintiff could have made but for them. In the absence of such evidence it should not be assumed that every sale by the defendant of shoes not im-
725 pressed with a deceptive trade-mark deprived the plaintiff of a sale, or injured its reputation or even narrowed its market. It should not be assumed that any purchaser of the defendant's shoes in those cases would have purchased shoes of the plaintiff if the defendant company had never existed."

Therefore, from any point of view, in the light of the authorities, the complainant is not entitled to recover a penny either as damages or profits, against the defendant in this case.

A recent and most important case confirming all that we have said as to the marked distinction between a case of a trade-mark or a trade name proper and a case of unfair competition is the unanimous opinion of the Circuit Court of Appeals for the Third Circuit in the case of Gulden v. Chance found, in connection with illustrations, between pages 302 and 320 of 182 Fed., number of Dec. 22, 1910. This opinion should be taken in connection with the opinion of the United States Circuit Court of Appeals in the case of Chance v. Gulden, 165 Fed. 624, 92 C. C. A. 58. In that case it was a question of the trade name Don Cæsar as applied to olives. The first time this case came to the attention of the Court it was on the proposition that complainant had a trade-mark right in the name "Don Carlos" for olives and that the defendant had infringed complainant's trade name, or trade-mark, by using the name "Don Cæsar" on olives. The Court sustained complainant's contention in that respect, holding that complainant had a valid technical trade-mark in the name Don Carlos, which had been infringed by the defendant using the name Don Cæsar on the same class of goods, and this utterly irrespective of any fraudulent intent on the part of the defendant, and irrespective of whether or not the defendant had simulated the labels or packages used by the complainant in the sale of its Don Carlos olives.

In the latter decision (182 Fed. 303-320) the question arose as to

whether or not the defendant, apart from any question of a strict trade-mark or trade name, had been guilty of unlawful competition in business in simulating complainant's packages, labels, etc. In discussing this question the Court of Appeals for the Third Circuit in the last-named case makes very clear the distinction between a trade-mark case and a case of unlawful competition, showing that in the former case, where the complainant has a true trade-mark or trade name, and the defendant has infringed such trade-mark or trade name, defendant's intent, or any question of actual fraud, is immaterial; but expressly held that where it is a question of unfair competition, and apart from any question as to a true or strict trade-mark, the question of fraud and defendant's intent is of the very essence of the action. In regard to these questions we quote
726 from the decision of the Court in the last-named case. On the question of strict trade-mark we quote from pages 305 and 306 of 182 Fed. as follows:

"This case was before this court at the October Term, 1908 (165 Fed. 624, 92 C. C. A. 58), on an appeal from an interlocutory decree awarding a preliminary injunction restraining the present appellees from using the name 'Don Cæsar' or any equivalent thereof upon or in connection with or as a designation of olives packed and sold or offered for sale by them, and from putting up, or packing, offering for sale, or selling olives in glass bottles or other packages or otherwise with the name 'Don Cæsar' or any equivalent thereof, attached or affixed thereto or in connection therewith as a designation or identification thereof; and from infringing upon Gulden's trade-mark 'Don Carlos' by using in connection with or as a designation of olives sold or offered for sale by them the words 'Don Cæsar,' or any other words that are a colorable imitation of the words 'Don Carlos' or in any other manner whatever. This court reversed the interlocutory decree, holding that the mere use of the words 'Don Cæsar' as applied to olives was not an infringement of Gulden's trade-mark 'Don Carlos,' and saying:

"'In the opinion of the Court below, the use of the trade-mark "Don Cæsar" was a clear infringement of the trade-mark "Don Carlos" used by complainant. So that, whether the "Don Cæsar" was used on a label in colorable imitation of complainant's, or upon any label, or in any way affixed to any bottle, keg, box or package, it was held to have infringed the property right of the complainant to his trade-mark "Don Carlos," even though there were no fraudulent attempts to imitate or otherwise appropriate the same. Indeed the decree, by its express language, precludes, as the opinion of the Court disavows, any idea or suggestion of unfair competition by reason of the size, color, or general appearance of any label on which the name "Don Cæsar" appears. It is a bald injunction against the use by the defendants of the name "Don Cæsar," by whatever devices accompanied or however affixed to any package of olives packed by them. All question of unfair competition, therefore, is eliminated from consideration in this appeal, the sole question being whether the use of the words "Don Cæsar," however placed, upon any package of defendants' olives was an infringement of the property right of complainant in his trade-mark of "Don Carlos." This property

right related to the words "Don Carlos" alone, unaccompanied by any label, device, figure or coloring. As stated by the complainant in his application for registration under the act of Congress, the trade-mark consists of the word "Don Carlos." The court below has distinctly said that the facts are not enough to make out a
727 charge of unfair competition, and its decree rests solely upon similarity of the historical name used by defendants to that used by the complainant, irrespective of any question as to the intent of the defendants and of any evidence in regard thereto. * * * If there were any fraud or unfair competition on the part of the defendants, in the manner of using the words "Don Caesar" on their packages of olives, as alleged by complainant in his bill, the Court will have an opportunity to deal with that charge at the final hearing, upon the testimony adduced by the complainant and upon that which may hereafter be adduced by the defendants relavant thereto.'

"We are thoroughly satisfied of the correctness of the views thus expressed by this Court on the former appeal and reaffirm the proposition then laid down to the effect that the use of the name 'Don Caesar' as applied to olives is not of itself an infringement of the trade-mark 'Don Carlos' as applied to them. The infringement of a trade-mark either registered or unregistered does not necessarily involve actual fraud or even wrongful intent on the part of the infringer. Nor does the former opinion of this Court on a fair reading lend any countenance to such an idea. The owner of a valid trade-mark has a vested right of property in it, of the benefit of which he cannot against his will be deprived by any other person with impunity, whatever may be his motive."

On the question of unfair competition in business, we quote from the last-named opinion of the Court of Appeals for the Third Circuit, found at page 319 and 320 of 182 Fed., as follows:

"The evidence shows that olives packed and dressed by the defendants have been mistaken for those of the complainant, and it appears from the testimony of Gulden, the general manager of the complainant's business, that in a single year, from December, 1906, to December, 1907, in the district or territory previously canvassed by Wood there was a falling off in such business of $24,750, representing a loss to the complainant of $5,000, of which ninety per cent was in the Don Carlos brand of olives. No importance is to be attached to the fact that the complainant has packed and sold olives in various bottles dressed differently from those particularly referred to in this bill, whatever might be its effect in a suit limited to a charge of infringement of trade-marks. The question now before us involves unfair competition in trade as contradistinguished from the infringement of trade-marks, and the defendants, having been shown to have indulged in unfair competition with respect to the business of the complainant carried on under certain labels and packages, are not entitled to immunity by reason
728 of the fact that the complainant has used in his business other bottles and packages with respect to which no charge of unfair competition can justly be sustained against them."

"We think that an injunction should be granted in this case per-

petually restraining the defendants, their servants, agents and employes, from directly or indirectly packing and selling or offering for sale stuffed Manzanilla olives in any ring bottle bearing a neck label similar or substantially similar to that shown in complainant's Exhibit 8 'defendant's ring bottle of stuffed olives'; that also from directly or indirectly packing and selling or offering *from* sale Spanish olives in any bottle bearing a body label similar or substantially similar to the Don Cæsar label shown in Complainant's Exhibit No. 7, 'defendants' bottle of Don Cæsar olives'; and also from directly or indirectly packing and selling or offering for sale any Spanish olives in any bottle with a flaring or fluted base and bearing a body label similar or substantially similar to the Don Cæsar label shown in Complainant's Exhibit No. 9, 'bottle of olives with flaring bottom', or bearing a neck label similar or substantially similar to that shown in Complainant's Exhibit No. 8, 'defendants' ring bottle of stuffed olives; and also from directly or indirectly packing or selling or offering for sale any Spanish olives in any bottle which in its configuration and its label or labels, is or will be similar or substantially similar to Complainant's Exhibit No. 4, Complainant's Exhibit No. 5, or Complainant's Exhibit No. 6. The complainant is also entitled to recover from the defendants all profits and damages lost and sustained by him by reason of all sales by the defendants of Spanish olives bottled and labeled as shown in Complainant's Exhibit No. 7, Complainant's Exhibit No. 8 and Complainant's Exhibit No. 9, or bottled and labeled in such manner as to be substantially similar to the three last-named exhibits or any of them; and to an account therefor. The decree below must be reversed, with costs, and with directions for such further proceedings in the court below as will afford the complainant relief pursuant to this opinion; and it is so ordered."

Thus we find confirmation of our contention in the case at bar. In the case at bar the majority opinion of the Court of Appeals—which is the law of this case—has expressly held that there is no trade name or trade-mark in the name American Girl, and consequently the defendant in this case has not infringed complainant's trade-mark by using the name American Lady on its shoes. Therefore, the case at bar is purely one of unfair competition in business; in such a case, as we have repeatedly shown in this brief, actual fraud is of the essence of the action and no recovery
729 can be had on the accounting except as to such sales of defendant's shoes since the filing of the bill of complaint herein as can be shown to have been made by the defendant, to the actual deception of defendant's customers, and that defendant's customers, in each particular instance have purchased defendant's shoes believing the same to be the shoes of the complainant.

As to the Use of Defendant's Name on its Shoes and on its Cartons, With or Without the Word "Makers".

As a matter of fact, as the evidence shows and as the stipulations before the Master show, every pair of American Lady shoes sold by the Hamilton-Brown Shoe Company since the filing of the bill was

sold in a carton bearing prominently thereon the name Hamilton-Brown Shoe Company and also the word "Makers". It is also true that while none of its American Lady shoes was sold except in these cartons, some few of its American Lady shoes did not have on the shoes themselves either the name Hamilton-Brown Shoe Co. or the word "Makers", while the majority of the shoes sold since the filing of the bill had, either on the lining of the shoes or somewhere about the shoes, or on the soles of the shoes, the name Hamilton-Brown Shoe Co., and in a great many cases, in addition, had the name Hamilton-Brown Shoe Co. and the word "Makers" on the shoes.

It is also true, as appears from the evidence and the stipulations before the Master, that every pair of American Lady shoes sold by Hamilton-Brown Shoe Co. since the filing of the bill was actually manufactured by Hamilton-Brown Shoe Co.; but subject to our objections of record, the complainant undertook to show, and the Master permitted the complainant to show, that as to some other shoes (not American Lady shoes at all) sold by Hamilton-Brown Shoe Co. in some instances such other shoes, although marked on the cartons with the word "Makers" and on the shoes with the name Hamilton-Brown Shoe Co., were shoes not actually made by Hamilton-Brown Shoe Co., but made under the directions of Hamilton-Brown Shoe Co. As nearly as we can unedrstand the extraordinary position of the complainant taken on this record, this evidence was adduced for the purpose of trying to show that the word "Makers" on the shoe cartons and the word "Makers" on the shoes themselves does not necessarily mean that such shoes were actually made by the concern whose name is on the shoes themselves or on the cartons containing the same. This is a most extraordinary position and only tends to show that the complainant and its counsel fail utterly to grasp the real point in this case
730 and in all trade-mark or unfair competition cases, and that is that the name of an individual or concern on goods which he sells, whether he make them or not, shows that the goods sold by him are goods which he guarantees or for which he is responsible to the trade, and that they emanate from him and not from anyone else. Furthermore, it is established as a fact in this case and is also so stipulated that every pair of American Lady shoes sold by the defendant are shoes manufactured by the defendant at its own factory; but it would have been immaterial, even if it had been established as a fact in this case, that the American Lady shoes sold by defendant were not manufactured by the defendant. The mere fact that the defendant put its name on the cartons in which those shoes were sold and on the shoes themselves clearly indicates, and in effect states, that the Hamilton-Brown Shoe Co. is responsible for and guarantees such shoes and that they emanate from Hamilton-Brown Shoe Co. and from no other concern.

That it is utterly immaterial whether goods sold under a particular name and bearing the name of the individual or concern selling them are in fact actually made by him or not, see the decisions of the United States Supreme Court and other courts in:

Menendez v. Holt, 128 U. S. 520;

Godillot v. Hazard et al., 44 N. Y. Sup. 427; also see same case in Price & Steuart Trade-Mark Cases, page 128, and leading cases there cited, both American and English decisions;

Insurance Oil Tank Co. v. Scott, 33 La. Ann. 943; also same case in Price & Steuart Trade-Mark cases, page 486, and leading cases there cited.

Of course, the word "Makers" on its shoes or other articles indicates that the shoes are made by the person or concern whose name they bear; but in trade-mark cases it is immaterial whether or not, as a matter of fact, the person selling the goods marked with his name is the actual maker or has the goods made for him; it is sufficient in cases of trade-mark or unfair competition that by placing his name on his goods, or on boxes or wrappers containing the same, the party in question thus clearly indicate that the goods emanate from him, and that he is responsible for the same, and that they do not emanate from some other individual or concern. In cases of Wormser v. Shayne, 111 Ill. App., and Regent v. Hascker, 75 Nebr. 426, 106 N. W. 595, 1906, it was held that the fact that the defendants advertised shoes sold by them as made by themselves whereas they were in fact made by others (though,
731 as defendants claimed, under their special direction), held not to be such a material and fraudulent misrepresentation as to preclude the defendants from the relief demanded in their cross bill.

Surely, if a party is not deprived of equitable relief because he has marked his shoes with the word "Makers" when, as a matter of fact, he did not make them, but had them made for himself by some third party, then clearly a defendant in a suit who is actually shown to have actually manufactured the shoes which he has marked with the word "Makers" is not to be punished as to some other shoes not involved in the accounting and which were marked with the word "Makers" because he did not make such other shoes, but had them made under his direction by some third party.

The real point in these "unfair trade" cases is that, whether or not the word "makers" is used on the goods themselves or on the cartons or packages in which the goods are sold, the name of the person who actually sells the goods appearing on the goods themselves or on the cartons or packages in which the goods are sold accomplishes the necessary and desired purpose of showing that the goods in question emanate from the person whose name appears on the goods or on the cartons or packages containing the same and not from some other party. Indeed, in the case of Gluckman v. Strauch, 91 N. Y. Sup. 223, it was held that the complainant was not guilty of misrepresentation such as would prevent him from equitable relief even though he stated on his goods as sold that he was the "sole maker" of the article in question, when the fact was that he did not make the article at all, it being made by others especially for him. The facts in that case were substantially as follows: The plaintiffs, who dealt in cigarette papers, sought to enjoin the defendant from fraudulent imitation of their goods in respect to trade-mark, label and appearance of package. Plaintiffs' label bore

the words "Gluckman & Son, Sole Manufacturers, Paris"; they had no factory or place of business in Paris, but the cigarette papers were manufactured there especially for them, with their name on the watermark. Held, that the statement on the label was substantially, though not exactly, true, and did not constitute a false representation of a material fact so as to disentitle them to relief.

In the case of Coats v. Merrick Thread Co., 149 U. S. 562, which was a case of alleged unfair competition in business, the Supreme Court found that there was no fraud and no unfair competition, and, at pages 569 and 571, to show that defendant had taken the
732 pains to show that its goods emanated from defendant and not from the plaintiff, comments on the fact (so applicable to the case at bar) that defendant's goods (thread), as well as the advertisements of the same and the packages containing the same, bore thereon, as is the case with defendant's advertisements (see stipulations of January 11, 1911, and June 4, 1910) in the case at bar and defendant's cartons and shoes, the name of the defendant company—thus clearly showing that they were the goods of the defendant and not those of the plaintiff. As the Supreme Court clearly points out in that case, the name of the defendant company on the goods, advertisements or packages containing the goods (the question of any exclusive right to a trade name or trade mark being absent, as in the case at bar) was quite sufficient to clearly indicate that they emanated from defendant and not from plaintiff. That is also the leading case of unfair trade in which the Supreme Court says, at pages 569 and 573 of 149 U. S., as follows:

"Their wrappers and boxes are also so clearly distinguishable from those of the plaintiffs that it would be hardly possible to mistake one for the other. We think the defendants have clearly disproved any intention on their part to mislead the dealers who purchase of them. Indeed, such dealers could not possibly fail to know what they were buying, and the fraud, if any, was practiced on the buyer of a single or small number of spools, who might be induced to purchase the thread of the defendants for that of the plaintiffs." * * * "if the purchaser of such thread desires a particular make he should either call for such, in which case the dealer, if he put off on him a different make, would be guilty of fraud, for which the defendants would not be responsible, or should examine himself the lettering upon the spools."

It must be borne in mind that the case at bar, under the stipulations and evidence, the defendant is shown to have sold all its "American Lady" shoes at wholesale, its business being wholly with the dealers, to whom also its catalogues are addressed; and that plaintiff has utterly failed to show a single instance where the defendant, or any customer of defendant, has sold a single pair of defendant's American Lady shoes as and for plaintiff's. We say this, although, as pointed out by the Supreme Court in the case of Coats v. Merrick Thread Co. at pages 569 and 573 of 149 U. S., of any dealer who had purchased defendant's American Lady shoes from the defendant had put off on any foolish, ignorant purchaser the American Lady shoe of Hamilton-Brown Shoe Co. as and for

the American Girl shoe of The Wolf Brothers & Co., he (the
733 dealer) would have been 'guilty of a fraud, for which the defendant would not be responsible."

The majority opinion of the U. S. Circuit Court of Appeals in this case (in the light of which the decree in this case must be construed) should be read also in the light of what the same Court has decided in similar or analogous cases. When this is done it will then be clear that if the Master allows complainant to recover profits made by the defendant since the filing of the bill, on American Lady shoes sold by defendant, when the cartons in which the shoes were sold were all plainly and prominently marked with the name Hamilton-Brown Shoe Co. and the word "Makers", the Master will be reversed, if not by the Circuit Court, then surely by the United States Circuit Court of Appeals for this circuit.

We can illustrate this by the decision of the U. S. Circuit Court of Appeals for this circuit, opinion by Hook, J., concurred in by Adams, J., in the case of Trinidad Asphalt Mfg. Co. v. Standard Paint Co., 163 Fed. 977. In that case the complainant claimed a trade mark in, and consequently the exclusive right to use, the name "Rubberoid" for a roofing material made of gum and having the properties of rubber. The defendant used the name "RubberO" applied to the same class of goods, but in the sale of his goods associated its business name with its product, by attaching its name to labels affixed to rolls in which its goods were sold. The majority of the Court held that complainant could not hold the exclusive right to the name "Rubberoid" and consequently that the defendant was within its rights and neither liable for infringement of a trade-mark proper nor for unlawful competition in selling its rolls of roofing marked with the name "RubberO" and associated with the name of the defendant company: just as, in the case at bar, it has been decided that complainant has no right to exclude others from using the name "American Girl" as applied to shoes and that defendant may use the name "American Lady" as applied to its shoes and to the cartons in which they are sold to its customers, when the shoes themselves or the cartons in which defendant sells its said shoes to its customers are plainly marked with the name of the defendant company, thus clearly indicating that defendant's said shoes emanate from the defendant and not from the complainant.

To show from the opinion of the Court of Appeals in the last named case, in harmony with all the leading decisions, that where the complainant has no trade-mark in or exclusive right to a particular name, there is no unfair trade and no unlawful competi-
734 tion in the defendant using a similar name, when the defendant marks on the goods themselves or on the packages or containers in which he sells his goods his name, we here quote from Judge Hook's opinion in the said Trinidad case, our quotation being from pages 980 to 983 of 163 Fed.:

"The rule as to unfair or fraudulent competition does not necessarily involve the right to the exclusive use of a word or symbol, for though one's trade-mark may be invalid the circumstances attending its use by another may be such as to constitute an invasion

of his rights and a fraud upon the public. It proceeds upon ethical considerations and has its foundation in business honesty. The evil against which it is directed has a twofold aspect, the deception of the purchasing public, and the consequent piracy of the reputation and good will which a competitor has earned by fair conduct and the quality of his goods, and which constitute a valuable asset in his business. Briefly stated, the rule is that one should not be permitted to sell his goods as the goods of another. If he uses a generic name or descriptive term which a competitor has employed before him, he should not by other words, signs, or symbols, or by the dress, appearance, or form of package so imitate his competitor's course or way as to deceive the ordinary purchaser, giving such attention as purchasers usually do. But all must submit to the competition which comes alone from the fair and truthful employment of generic names and terms descriptive of the qualities and characteristics of articles of trade and commerce, unaccompanied by other acts designed to induce confusion and error in the mind of the public.

"We discover nothing in defendant's conduct justifying the charge of unfair competition. In the last analysis the charge rests solely on the use of the word 'rubbero' and the similarity thereof to 'ruberoid', or its equivalent, 'rubberoid'. Complainant has no monopoly of the resemblance to rubber of roofing that has none in its composition, and obviously it cannot secure a monopoly of the appropriate term descriptive of that resemblance by invoking the doctrine of unfair competition. The word 'rubberoid' is part of the common heritage, and all who can truthfully apply it to their products are entitled to do so, taking due care that they do not otherwise trespass upon the rights of competitors. The defendant being entitled to the proper use of the word 'rubberoid', the complainant cannot justly complain of the use of 'rubbero'. That complainant marked its roofing in rolls and defendant did the same is not significant. That was the usual ordinary course of those engaged in the business. The form was not peculiar or fanciful, but was
735 one of convenience, due to the physical characteristics of the material. It is as natural that such roofing should be in rolls as carpet, matting or paper, or as dress fabrics in bolts, thread on spools, or matches in boxes. Similar considerations apply to the cutting of the roofing into strips of convenient width and the designation of the weight or thickness thereof. There was no imitation of the arrangement, color, design, or general appearance of the wrappers and markings on the packages. On the contrary, those of defendant were in such marked contrast to complainant's as to repel all suggestion of design on the part of the former to misrepresent the origin or ownership of its product. Moreover, its name and address were plainly printed on the labels. It would be a result unsustained by reason or authority if one, after vainly attempting through a trade-mark to secure a monopoly of a generic or descriptive word, should nevertheless be granted one by decree of a Court, applying the doctrine of unfair competition to those who simply used the word in the appropriate naming or description of their goods, but in other respects plainly distinguished them from the

goods of their competitor. Yet that is practically what complainant is attempting in the second branch of its case, for it has no other basis than the mere use by defendant of the word 'rubbero'. If at complainant's instance a court should enjoin the use of 'rubbero', then logically none of the large number of other manufacturers who make roofings resembling rubber can lawfully call their products 'rubber roofing' or 'rubberoid roofing', because of similarity to the term selected by complainant, and thus complainant would be allowed to fence off and appropriate to its exclusive use a part of our common vocabulary. As well might a manufacturer be decreed the exclusive right to call his sugar sweet or his vinegar sour.

"In the Singer Mfg. Co. v. June Mfg. Co., supra, the Supreme Court held that the name 'Singer' had become the generic designation of a certain class of sewing machines, and therefore the Singer Company could not appropriate it as a trade-mark, though it had exclusively used it many years. It also expressly recognized the right of any manufacturer of that type of machines to apply the name 'Singer' thereto, provided it was clearly and unmistakably specified in connection therewith that they were the product of the maker, and not of the Singer Company, 163 U. S. 207, 16 Sup. Co. 1016, 41 L. Ed. 131."

(A reference to the decision of the Supreme Court in the Singer case in 163 U. S. 169-204, will show, as pointed out [elsewhere] in this brief, that all that the Supreme Court required the defendant to do was to stop using a fraudulent name plate
736 which defendant had attached to its machine and to put the full name of the defendant company (the June Manufacturing Company) on its sewing machines, instead of using thereon, the fraudulent initials "J. M. Co." which were in simulation of the initials "S. M. Co.", which latter initials were the initials of the Singer Mfg. Company. The Supreme Court expressly held that the defendant could use the name Singer on its sewing machines but that as the defendant had not used its own full name in connection with its sewing machines it was obliged to do so in the future, so that in selling defendant's sewing machines under the name Singer its customers might not be led to believe that the Singer machine sold by defendant was a Singer machine made by the Singer Mfg. Company, the complainant). "The requirements of honest competition mentioned by the Court in that case were fully met by the defendant here.

"In Centaur Co. v. Heinsfurter, 28 C. C. A. 581, 84 Fed. 955, an injunction was sought restraining the defendant from using the word 'Castoria.' It was held that the word had become the descriptive name of the medicine to which it was applied, and therefore plaintiff could not appropriate it as a trade-mark, though it had long enjoyed the exclusive use of it. Mr. Justice Brewer, speaking for this Court, said of the claim of unfair competition:

'But, as we have heretofore observed, in the present case, outside of the use of the word 'Castoria', there is nothing to mislead the public into the belief that the Castoria manufactured and sold by the defendants was in fact manufactured and sold by the plain-

tiff. On the contrary, the information was full and specific that the defendants were the manufacturers and venders.'

This excerpt aptly fits the case at bar." (A reference to the opinion in this Castoria case, 84 Fed. 955, will show that the Court of Appeals for this circuit in an opinion by Mr. Justice Brewer held that as complainant was not entitled to the exclusive right to the name Castoria as a medicine, the defendant who had plainly marked his own name on his packages containing Castoria which he sold, had thus plainly indicated that his product was not the product of complainant and therefore had not been guilty of unfair competition.) "True, in both these cases there were patents which had expired, and the names 'Singer' and 'Castoria' had become the generic names of the articles during the existence of the monoply. When the patents expired, and the exclusive right to manufacture ceased, the right to use the names also became a public one through a species of dedication. But in respect of the question now being considered those cases are indistinguish-
737 able in principle from the one before us. It is immaterial that names like 'Singer' and 'Castoria' became public property by acquiescence of those who first employed them, instead of being naturally so by reason of structure and original meaning, as is the case with an ordinary appellative like 'rubberoid'. The important thing is the fact that they are public property, not how they became so. If they are, it follows from that quality alone that all may truthfully apply them to their products, and that no one can lawfully monopolize them. Though the cases cited also involve other questions, they recognize and enforce the established rule that unfair competition cannot arise from the mere use of words belonging to the public, accompanied by a fair and truthful statement of the ownership and source of manufacture.

"In Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247, the rule was expressly applied. The complainant had for a long time made 'Brown's Iron Bitters', when defendant put upon the market a medicine he called 'Brown's Iron Tonic.' The Court, after observing that there could be no valid trade-mark in the words 'Iron Bitters', addressed itself to the claim of unfair competition, and after considering the similarities of the form and dress of the packages found that they afforded no ground for complaint. So, as in the case at bar, the question finally resolved itself into one of the mere use of complainant's words, or words similar thereto. The Court said:

" 'But if the words: Iron Bitters' cannot be lawfully appropriated as a trade-mark, it is difficult to see upon what theory a person making use of these or similar words can be enjoined. We understand it to be conceded that these words do not in themselves constitute a trade-mark. It follows, then, that another person has the right to use them, unless he uses them in such connection with other words or devices as to operate as a deception upon the public.' "

(In this case of Brown Chemical Co. v. Meyer, 139 U. S. 540, which merely affirmed the opinion of Judge Thayer in the Court below, the Supreme Court held that there was no exclusive property in the name "Iron Bitters" and that the defendant, who had plainly

marked his full name on the bottles or packages which contained his iron bitters, had not been guilty of unfair competition.)

"And then the Court disposed of the addition of the patronymic 'Brown' by finding from the facts in the case defendant had the right to use it also. The same rule was applied on the circuit in Brown Chemical Co. v. Myer (C. C.) 31 Fed. 453, by
738 Judge Thayer, and in Gessler v. Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20, and Alff v. Radam, 77 Tex. 530, 14 S. W. 164, 9 L. R. A. 145, 19 Am. St. Rep. 792.

"In Reddaway v. Banham, L. R. App. Cas. (1896) 199, the decree directed by the House of Lords to be entered by the lower court recognized the right of defendants to use the name 'camel hair belting' under restrictions similar to those imposed by the Supreme Court in the Singer case. By long use the name had come to signify plaintiffs' goods. The decree which was directed (page 222) was 'for an injunction restraining the defendants and each of them from using the words "camel hair" as descriptive of or in connection with belting manufactured by them or either of them, or belting (not being of the plaintiff's manufacture) sold or offered for sale by them or either of them, *without clearly distinguishing such belting from the belting of the plaintiffs.*' (The italics are ours.) In respect of distinguishing, Lord Morris said:

"'That, to my mind, is obviously done when the respondents put prominently and in a conspicious place on the article the statement that it was camel hair belting manufactured by themselves. Having done so, they would, as it appears to me, fully apprise purchasers that it was not Reddaway's make, by stating that it was their own.' Pages 221, 222.

"The decree is reversed, and the cause remanded, with directions to dismiss the bill."

It thus clearly appears from this majority opinion of the U. S. Court of Appeals for the Eighth Circuit in this Trinidad case, in 163 Fed. 977, as we think it clearly appears from the majority opinion of the Court of Appeals in the case at bar, that the defendant has not been guilty of unfair competition in the sale of any of its American Lady shoes since the date of the filing of the bill of complaint in this case; for it clearly appears from evidence before the Master as well as from the exhibits and stipulations entered into between the parties, not only that many of its American Lady shoes were marked on the shoes themselves with the name Hamilton-Brown Shoe Co., and in many cases also with the word "Makers", but that every pair of American Lady shoes sold by Hamilton-Brown Shoe Company since the filing of the bill was sold in a carton which carton bore prominently on the lid thereof the words "Hamilton-Brown Shoe Co.,", and on the front end of each of said cartons was distinctly marked the characteristic belt trademark of Hamilton-Brown Shoe Co., the center of the belt being made prominent by a red background, and on which belt trademark appears the name Hamilton-Brown Shoe Co., and in the

center of said belt trade-mark appears prominently the
739 word "Makers". It would thus appear, we respectfully submit, that if the Master in this case finds that defendant must account to the complainant for any of its American Lady shoes sold in the manner aforesaid since the filing of the bill and marked on the shoes themselves with the name Hamilton-Brown Shoe Co., the Master is going directly in the teeth of the decisions and in violation of the law as applicable to this case, as shown by the decisions to which we have referred, and any such ruling of the Master surely must be reversed by the Court of Appeals for this circuit in view of its distinct opinions in strictly analogous cases.

Precisely the same question was also decided in the same way by the U. S. Circuit Court of Appeals for this circuit in an opinion rendered by the same judges (Munger and Van Devanter, JJ.), who united in the majority opinion in the case at bar, in the case of Rice-Stix & Co. v. Scriven Co., 165 Fed. 639. The majority opinion, by Judges Munger and Van Devanter, was rendered in the case at bar on Nov. 17, 1908, and is found in 165 Fed., 413, while the majority opinion in the said Scriven case, delivered by the same judges, was rendered Nov. 19, 1908, and is found in the same volume at page 639. Surely the judges did not mean to announce and do not in fact announce one principle in one case and a different principle in another. The two cases are precisely alike in respect to the rule which we invoke here; where they differ they relate to matters foreign to the state of facts developed on this accounting. In the case at bar (165 Fed. 413) Judges Munger and Van Devanter hold that complainant has no exclusive right to the name "American Girl" for shoes and that defendant may use the name "American Lady" for its shoes when accompanied with matter clearly indicating that they are shoes which emanate from defendant. In the Scriven case (165 Fed. 639) the same judges hold that the Scriven Co. has no exclusive right to the name "Elastic Seam" for drawers, sold in cartons, and that Rice-Stix & Co., might continue to use "Elastic Jean" for its drawers sold in cartons so long as it clearly indicated that they were the drawers of Rice-Stix & Co. In the case at bar, because the same judges found that defendant had "imitated the complainant" in "several respects", by using certain numerals, catch phrases, etc., other than the mere use of the name American Lady (all as herein pointed out and as specified by the Court at pages 414 and 416 of 165 Fed.) and not merely because the defendant had used the name "American Lady", they ordered an injunction in this case and an accounting as specified at page 418 of 165 Fed. But it is entirely clear from the decree in this case and from the opinion of said judges in the case
740 at bar, in harmony with the well-settled principles of law governing in cases of alleged unfair trade again declared by them in the Scriven case (see pp. 646-7 of 165 Fed.), only two days after their decision in the case at bar, that they never intended that the Hamilton-Brown Shoe Co., should be enjoined from selling or made to account for shoes marked with the name American Lady,

when it was clearly indicated, on the shoes themselves or on the cartons containing the shoes, as they were sold by the defendant, that they were made by or emanated from the Hamilton-Brown Shoe Co., and therefore did not emanate from The Wolf Brothers & Co.

This is clear from reading that part of the opinion of these same judges in the Scriven case, as the same appears between pages 646 and 648 of 165 Fed. There they refer to the respective markings on the drawers themselves—the markings of the complainant and the markings of the defendant (see p. 647 of 165 Fed.). On neither of those markings does the name of the complainant or defendant appear; but the drawers of both were sold in cartons on which the name of the complainant, on the one hand, and of the defendant, on the other, did appear. This was held amply sufficient by Judges Munger and Van Devanter; and in that connection they refer to the Singer case, supra, quoting them-from to the effect that the only duty which rested on the defendant and which the defendant had performed was putting its full name on its cartons which contained its drawers, thus dissassociating its "Elastic Jean" drawers from complainant's "Elastic Seam" drawers.

It is significant that in discussing the rule of law applicable in the Scriven case (which is precisely the rule applicable to the case at bar so far as the evidence before the Master on this accounting is concerned) the same judges who delivered the majority opinion in the case at bar refer expressly to the Singer case (163 U. S. 169) to show that the defendant was warranted in using the name "Elastic Jean" on his drawers, when its cartons contained the full name of defendant. For in the Singer case, as we repeatedly point out herein, the Supreme Court found objection to defendant's conduct, not in the fact that he had used the name Singer, but that instead of using its full name it had used a name plate in imitation of the name plate of Singer Mfg. Co., and had used the initials J. M. Co., which looked too much like complainant's initials S. M. Co. The Supreme Court said in that case, in effect: The defendant must stop using that plate which imitates complainant's plate; it must also stop using the initials J. M. Co.; but it may use the name "Singer" if it also use its full name, June Manufacturing Co.

741 And in the Scriven case the same judges who decided the case at bar, on the doctrine of the Singer case, held that the defendant might use the name "Elastic Jean" on its drawers, since it disassociated itself from the complainant by selling its goods in cartons plainly marked with the full name of the defendant company.

Therefore, it is clear that the ultimate decision in this case must be, in harmony with all the decisions to which we have referred and in harmony with justice and also common sense: That complainant is not entitled to recover one cent in the way of profits on "American Lady" shoes sold by defendant since the filing of the bill, because:

1. It appears from the evidence and stipulations before the Master that defendant has sold no shoes marked with the name "American Lady", since the filing of the bill, "without directing the mind of the trading public to which it sold its shoes and to which

it sent its catalogues" (by its name on the shoes themselves or on the cartons in which each pair of its said shoes were sold and in and on each of its catalogues) "to the fact that the 'American Lady' shoes so sold by defendant were produced and put upon the market by Hamilton-Brown Shoe Co.", to paraphrase the language of the Supreme Court in the Singer case, approved and adopted by the very judges who decided the case at bar in their decision in the Scriven case (see p. 647 of 165 Fed.).

2. That in respect to "American Lady" shoes sold by defendant since the filing of the bill, the proofs before the Master show that all the defendant did (as was the case before the same judges in the said Scriven case) was to sell its said shoes under its own name and as and for its own shoes; and in respect to those shoes it did not imitate the complainant in the "several respects" the sum of which, as pointed out by said same judges in this case (see pages 414 and 416 of 165 Fed.), constituted the only infringement prohibited by the said judges and in respect to which they intended that complainant might have an inquiry on this accounting (see page 418 of 165 Fed.).

3. That the same judges have already found (a fact in this case making against complainant's contention and which must be reckoned with and cannot be overcome) that since the filing of the bill "the marking upon the bottom of defendant's shoes and upon the cartons and boxes in which the shoes were placed were" not "in simulation of those of complainant" (see p. 417 of 165 Fed.).

4. That there is not an iota of evidence produced by complainant before the Master showing that in respect to any "American
742 Lady" shoes sold by defendant since the filing of the bill any one has been deceived into buying such shoes believing the same to be the plaintiff's "American Girl" shoes. Therefore, to paraphrase the language of the U. S. Court of Appeals in a case of alleged unfair competition, strictly applicable here (Baker v. Baker, 115 Fed. 299):

"The evidence upon the accounting fails to disclose that complainant is entitled to any recovery of profits, or any except nominal damages, by reason of defendant's conduct. It failed to disclose that a single person had purchased shoes marketed by the defendant supposing them to be the product of the complainant, or that complainant had lost a single customer by defendant's conduct."

The same two judges who delivered the majority opinion in the case at bar and in the said Scriven case (165 Fed. 647), in the latter case also dispose of (favorably to this defendant here) a strange contention made by the complainant before the Master here. The complainant contends that it is entitled to recover of the defendant all profits made by defendant on the sales of defendant's American Lady shoes sold since the date of the filing of the bill when said shoes were not marked with the words "Hamilton-Brown Shoe Co., Makers"; that the mere marking of the name Hamilton-Brown Shoe Co. on the shoes or on the cartons is not sufficient. This is a strange contention. In the Scriven case, supra, the defendant's drawers (see p. 647 of 165 Fed.) were marked "Elastic

Jean Drawers", etc., but did not bear the name of the defendant company, though the cartons in which the drawers were sold by defendant did bear the name of the defendant company. Now, expressly following the decision of the Supreme Court in the Singer case, the said same two judges who decided this case and the Scriven case, held (see 165 Fed. 647) that this marking did "sufficiently direct the mind of the trading public to the fact that though the thing is of same" (or a similar) "name that it is something produced and put upon the market by himself" (the defendant).

Of course it does! The name of a manufacturer on goods sold by him or on packages containing his goods, is notice to the world that the goods so marked are his product, or made by him or fathered or guaranteed by him, and are not the product of his rival. In this it answers all the purposes of the law applicable to trade and the word "Makers" is mere surplusage. The defendant does not have to advertise his rival and say: "This American Lady shoe is made by Hamilton-Brown Shoe Co., and is not the American Girl shoe made by The Wolf Brothers & Co."

743 Besides, the evidence and stipulations before the Master show, in harmony with the directions of the majority opinion (165 Fed., p. 418), the terms of the decree in this case, and the opinion of the same two judges in the Scriven case (p. 647 of 165 Fed.), that not a pair of American Lady shoes were sold by defendant since the filing of the bill unless they were sold to the dealers in cartons, each of which cartons bore prominently thereon, on the lid as well as on the front end, the name Hamilton-Brown Shoe Co., and also bore on the front end of the carton, prominently, the word "Makers" associated with defendant's name. Thus it appears that during the period of this accounting no American Lady shoes were sold by defendant which (to use the exact language of the said two judges in this case as found at page 418 of 165 Fed.) were "not accompanied with other matter clearly indicating that such shoes are of its own manufacture and therefore not of complainant's". This of itself is all sufficient, under the decisions of the same judges in the Scriven case (see page 647 of 165 Fed.) and in this case (see page 418 of 165 Fed). But furthermore, of all the shoes accounted for before the Master (none of which were sold except in the cartons marked as above stated) the majority also bore, at least on one shoe of each pair, the name Hamilton-Brown Shoe Co. associated with the name American Lady and in many cases the name Hamilton Brown Shoe Co. on the sole of each shoe. Therefore, we again repeat that it will be going counter to the decisions, counter to the terms of the decree in this case, counter to the decision of the two judges who rendered the majority opinion in this case, counter to the rule established by the Supreme Court of the United States in the Singer case and in the other decisions of the Supreme Court cited in this brief, counter to the decision of the said same two judges in the parallel case of Scriven Company (see page 647 of 165 Fed.), and counter to the established rules of law governing the recovery of damages and profits in cases of alleged "unfair trade" if the Master do otherwise than hold that

complainant is entitled to no more than merely nominal damages or profits in this case (see Baker v. Baker, p. 299 of 115 Fed.).

The evidence of Bertha Blome, of J. H. Maize and of W. F. Bloecher utterly fails to meet the requirements of law to show a "custom" or "usage" among shoe dealers—retailers of shoes—not to use the cartons in which the shoes are sold to the dealers by the manufacturers in the sale of shoes at retail, and not to sell and deliver to the customers buying at retail, shoes in the cartons in which the shoes are sold by the manufacturer or wholesale
744 jobber to the retailer—much less does the evidence show that it was the "custom" or "usage" among retailers of Hamilton-Brown Shoe Company's American Lady shoes not to sell the same to the retail purchaser in the American Lady cartons of Hamilton-Brown Shoe Company and not to expose the cartons containing the American Lady shoes of Hamilton-Brown Shoe Company in the stores in which said shoes are sold at retail.

In the first place, as will appear from the authorities which we will presently consider, after we have discussed the evidence on this point, in order to establish a usage or custom it must be shown to be uniform, certain and notorious. The evidence in this case is, and the stipulations so agree, that since the filing of the bill Hamilton-Brown Shoe Co. never sold a single pair of American Lady shoes that were not sold in cartons like "Defendant's Exhibit, American Lady Shoe Carton," and that each of these cartons contained, prominently on the lid of each carton, the words "Hamilton-Brown Shoe Co.'s American Lady." Furthermore, it appears from the evidence and the stipulations in this case that on the front end of each of these cartons, in connection with the name "American Lady," appeared the picture of Martha Washington and the belt trade-mark of Hamilton-Brown Shoe Co. On the black belt of this trade-mark appears prominently, in white letters, the name; and the center of this belt has a red background on which appears prominently, in white letters, the word "Makers." Therefore, this legend appeared on every carton containing every pair of American Lady shoes sold by Hamilton-Brown Shoe Co. since the filing of the bill, namely: That the shoes contained in each of these cartons were a pair of Hamilton-Brown Shoe Co.'s American Lady shoes, and that the Hamilton-Brown Shoe Company was the maker of these shoes. And thus it is true that since the filing of the bill, putting aside all question of the marking of the shoes themselves, not a single pair of American Lady shoes were sold by Hamilton-Brown Shoe Co. which were "not accompanied with other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Co." Thus the Hamilton-Brown Shoe Co., which sold its shoes only at wholesale and only in these cartons, in thus marking every one of its cartons took every reasonable precaution to see to it that the purchaser knew that the American Lady shoes thus sold by Hamilton-Brown Shoe Co. were the Hamilton-Brown Shoe Company's American Lady shoes and that the maker of the shoes was the Hamilton-Brown Shoe Co.

Furthermore, as these cartons are a convenient means of carry-

ing the shoes and protecting them, as they constitute a good
745 wrapper for every pair of shoes, and reach the purchaser gratis with each pair of shoes, there is every fair presumption, in the absence of clear proof of a general and universal custom to the contrary, that the retailer would sell the shoes in these cartons, especially in view of the fact that the evidence shows that Hamilton-Brown Shoe Co.'s American Lady shoes have been sold and are widely advertised as a special leading brand, and always in connection with the name Hamilton-Brown Shoe Co.

Furthermore, as we have seen, and as is fully discussed in this brief, even had it been shown that in some special instances a dealer had taken a pair of Hamilton-Brown Shoe Co.'s American Lady shoes out of the box and sold such shoes to a purchaser, on a call for The Wolf Brothers & Company's American Girl shoes, to the deception of the purchaser, such a sale would have been a fraud, not of the Hamilton-Brown Shoe Co., but of the particular retailer in such particular instance. This the Supreme Court of the United States and other courts have repeatedly decided as we point out in this brief, and this rule is of special application to cases of unfair competition in business, where the court has decided that the complainant has no exclusive right in a particular name as a trademark. We say this here and now, because even if the complainant had shown a general custom or usage among retailers in general to sell the Hamilton-Brown Shoe Company's American Lady shoes, to customers buying at retail, without selling them in the boxes in which the customer received them from the Hamilton-Brown Shoe Co., or by not exposing those boxes or cartons to the view of the customer, the establishment of such a usage or custom would not militate against the defendant in this case, because nevertheless the fraud, if it were shown that the customer had purchased Hamilton-Brown Shoe Company's American Lady shoes, under such circumstances, believing the same to be the Wolf Brothers & Company's American Girl shoes, as stated by the Supreme Court in cases considered in this brief, would have been the fraud of the retailer and not of the Hamilton-Brown Shoe Co., for which fraud the retailer would alone be responsible.

But we shall now consider the only evidence in this case in and by which we apprehend the complainant may make pretense that it has proved such a "usage" or "custom."

Testimony of Bertha Blome.

Bertha Blome's testimony begins at page 113 of the transcript of the record before the Master. After giving her name she was asked by Q. 192:

746 "Miss Blome, I will ask you whether on or about February 15, 1910, you went over at my request, to the 'Shoe Mart,' for the purpose of purchasing a pair of 'American Lady' shoes?"

Her answer is "Yes"; but it will be noticed in this connection that she went to the Shoe Mart for the purpose, not of buying Wolf Brothers & Co.'s American Girl shoes, but for the purpose of buying

a pair of American Lady shoes. She then identifies a pair of American Lady shoes, each of which shoes, as her testimony shows, and as the shoes themselves will how, is plainly marked on the sole thereof with the name American Lady and with the name Hamilton-Brown Shoe Co. It will also be noticed that these shoes were purchased on February 15, 1910. Miss Blome says that when she purchased these shoes from the Shoe Mart they were handed to her in a carton which is not one of the cartons of Hamilton-Brown Shoe Co.'s American Lady shoes, but a special carton of the Shoe Mart. She also says that all the shoe cartons in that store were like the one which she produced with that pair of shoes and were not cartons like the Hamilton-Brown Shoe Co.'s American Lady shoe cartons. She does not pretend to say, and the evidence does not support the assumption, that all the shoes in that Shoe Mart store were American Lady; quite the contrary, it would appear that there were a variety of shoes in that store, but that the special practice of the Shoe Mart, so far as this stenographer observed (Miss Blome is a stenographer) was to have cartons of its own for each pair of shoes and not the cartons of the various manufacturers from whom it purchased its shoes; but she does say (page 116 of the transcript) that all the cartons or boxes of shoes were on the shelves in the store and that a pair of shoes which she purchased was taken down with its carton and delivered to her. It would thus appear that had it not been the special practice of the Shoe Mart to sell its shoes in its own cartons, to the extent that it had in stock Hamilton-Brown Shoe Co.'s American Lady shoes, these would have been quite a display of Hamilton-Brown Shoe Co.'s American Lady shoe cartons in that store, to the extent that that store might have contained Hamilton-Brown Shoe Co.'s American Lady shoes; but she says that in that Shoe Mart store the cartons were all plain white cartons or boxes with numbers on them and had no printing on their face.

The cross-examination of Miss Blome shows that she [wos] not in any way deceived and that she merely went there to purchase a pair of American Lady shoes and got what she purchased. In answer to Q. 212 she says she knew that each of the shoes was marked with the name "Hamilton-Brown Shoe Co." as she looked and saw this mark on each sole.

747 Therefore, there was no fraud and no deception even on the part of the retailer in this case, and all that the witness, Miss Blome, got was what she asked for, namely, a pair of American Lady shoes; and each of these American Lady shoes bore prominently on the sole of each shoe the name "Hamilton-Brown Shoe Co." and the name "American Lady." For the rest, the shoes will speak for themselves and show what is upon them. These shoes were offered in evidence and marked "Complainant's Exhibit No. 2, April 7, 1910, Henry H. Denison, Master," and the shoe carton she got with those shoes is marked "Complainant's Exhibit No. 3, April 7, 1910, Henry H. Denison, Master."

This Miss Blome, whose direct testimony shows that she is a stenographer and made that single purchase at the direction and request of Mr. Werner, complainant's solicitor, is no competent witness as to

any universal uniform and general custom, but merely shows the circumstances detailed above and the special practice which she, on that occasion, found in vogue at the Shoe Mart store in St. Louis. It is also significant that the pair of shoes which she purchased on that occasion were plainly marked, at least on the sole of each shoe with the name American Lady associated with the name Hamilton-Brown Shoe Co., thus each of those shoes was accompanied with matter clearly indicating that those shoes emanated from or were made by Hamilton-Brown Shoe Co. She did not purchase on that occasion any American Lady shoes which did not have on the shoes themselves the name Hamilton-Brown Shoe Co.

A reference to the decisions which we will presently consider will show that this testimony of Miss Blome is absolutely useless and of no effect as touching on the question of any custom or usage, but [at] most simply shows a special practice which she saw in vogue on one occasion at the Shoe Mart retail store.

Testimony of John H. Maize.

The testimony of John H. Maize begins at page 121 of the typewritten record before the Master. Mr. Maize says that at the time of giving his testimony he was Superintendent of the Shoe Mart, and that in one capacity or another he has been with the Shoe Mart from the time it started business, which was about November, 1906. He is shown the pair of shoes and carton which had been purchased by Miss Blome and identifies them as shoes purchased at the Shoe Mart retail store. It appears from the testimony of this witness (we refer specifically to page 129 of the record before the Master) that the Shoe Mart had been in the habit of purchasing shoes from different manufacturers, therefore by no means confining itself to shoes made by any particular manufacturer; indeed, in answer to Q. 286 he expressly says that they have never purchased all of their ladies' shoes exclusively from one manufacturer. He also says, in answer to Q. 287, at page 132 of the record, that the only American Lady shoes he purchased were shoes of that name manufactured by Hamilton-Brown Shoe Co.

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Although this witness does state that the Shoe Mart has purchased American Lady shoes from the Hamilton-Brown Shoe Co., he expressly states, in answer to Q. 310 at page 138 of the record, that he cannot give the number of American Lady shoes that were purchased by the Shoe Mart from Hamilton-Brown Shoe Co. since the Shoe Mart was started. In fact, he nowhere says when the Shoe Mart first began to purchase the Hamilton-Brown Shoe Co.'s American Lady shoes. Indeed, so far as any specific evidence is concerned, the only evidence of any particular American Lady shoes ever purchased from Hamilton-Brown Shoe Co., and sold by Shoe Mart is that particular pair of American Lady shoes, on the sole of each of which appeared prominently the name Hamilton-Brown Shoe Co., and which Miss Blome purchased from the Shoe Mart. This is the only pair of American Lady shoes specifically referred to by the witness. He repeatedly says in his testimony, though pressed closely

by leading questions put to him by Mr. Werner, that he is unable to state how many of Hamilton-Brown Shoe Co.'s American Lady shoes were ever purchased by the Shoe Mart. He specifically says, in answer to Q. 320 at the top of page 140 of the record, that he does not know how it would be possible to give a record of Hamilton-Brown Shoe Co.'s American Lady shoes which were purchased by the Shoe Mart.

The cross-examination of this witness, which begins at page 145 of the record, shows that although this witness has been connected with the Shoe Mart from the time that company started, the Shoe Mart never purchased any of the Hamilton-Brown Shoe Co.'s American Lady shoes that did not have on the inside facing of one shoe of each pair the name Hamilton-Brown Shoe Co., together with the word "Makers"; and the only specific pair of Hamilton-Brown Shoe Co.'s American Lady shoes to which his attention was called was that pair of shoes which Miss Blome purchased at the Shoe Mart, which bear on the sole of each shoe the name Hamilton-Brown Shoe Co., in connection with the name American Lady. The cross-examination of this witness, between pages 145 and 147 of the record, shows (in harmony with the stipulations in this case) that all Hamilton-Brown Shoe Co.'s American Lady shoes which the Shoe Mart purchased were sold to the Shoe Mart in cartons, each of which bore prominently thereon the name Hamilton-Brown Shoe Co. on the lid, and the words "Hamilton-Brown Shoe Co., Makers," on the front end of the carton, exactly like the marking of
749 "Defendant's Exhibit, American Lady Shoe Carton"; and the witness also says that the Shoe Mart always knew that these American Lady shoes were made and sold to it by Hamilton-Brown Shoe Co.

One of the most significant things about the testimony of this witness, Maize, is that it does not appear from his testimony when the Shoe Mart first began to buy American Lady shoes from the Hamilton-Brown Shoe Co.; and that it does not appear from the testimony of this witness that the Shoe Mart ever purchased from Hamilton-Brown Shoe Co. or ever sold any of Hamilton-Brown Shoe Co.'s American Lady shoes, which shoes did not have, either on the sole of each shoe or on the top facing of at least one shoe of each pair, the name Hamilton-Brown Shoe Co. Indeed, it utterly fails to appear from the testimony of this witness that the Shoe Mart ever dealt in or sold Hamilton-Brown Shoe Co.'s American Lady shoes which were marked otherwise that are the specific shoes to which his attention was called and which were purchased by Miss Blome, which pair of shoes bears prominently on the sole of each shoe the name Hamilton-Brown Shoe Co. in connection with the name American Lady. Therefore, even if it be considered as established that the Shoe Mart had adopted the practice of throwing away the Hamilton-Brown Shoe Co.'s cartons and using cartons of its own, it does not appear that in adopting that special practice the Shoe Mart ever dealt in or sold any of the Hamilton-Brown Shoe Co.'s American Lady shoes which were not marked on the sole of each shoe or on the facing lining of at least one shoe of each pair with the name Hamilton-Brown Shoe Co. If the Shoe Mart

had ever sold any of the Hamilton-Brown Shoe Co.'s American Lady shoes which did not have the name Hamilton-Brown Shoe Co. on the shoes themselves, complainant had a splendid opportunity of establishing that to be a fact, but failed utterly to do so.

Furthermore, a careful reading of the testimony of Maize fails to show that the Shoe Mart, during all of its existence, purchased American Lady shoes from Hamilton-Brown Shoe Co., or when it began to purchase Hamilton-Brown Shoe Co.'s American Lady shoes. Therefore, the testimony of this witness only shows that the Shoe Mart, which purchased its shoes from various manufacturers, adopted the special practice of throwing away the cartons of the manufacturers and putting its shoes in its own cartons; and the only specific American Lady shoes that t-e witness refers to are the Hamilton-Brown Shoe Co.'s American Lady shoes, which plainly bore on the shoes themselves the name of Hamilton-Brown Shoe Co.

750 T-erefore, even if this witness did prove a special practice prevailing with the Shoe Mart, so far as Hamilton-Brown Shoe Co.'s American Lady shoes are concerned, that special practice could not possibly, on any theory, have worked a fraud on the complainant (for which fraud, if it were a fraud, defendant would not be responsible), because so far as the testimony of this witness goes, and so far as any special American Lady shoes referred to by him are concerned, all those American Lady shoes were marked on the shoes themselves with the name Hamilton-Brown Shoe Co. The witness does not pretend to speak of any general practice in regard to throwing away the manufacturers' cartons existing among retail dealers in St. Louis or elsewhere, but confines himself especially to the special practice which he said prevails at the store of the Shoe Mart.

It nowhere appears in this record, from the testimony or by stipulation, that the Hamilton-Brown Shoe Co. ever sold any shoes to the Shoe Mart which did not bear on the shoes themselves the name Hamilton-Brown Shoe Co.

Testimony of W. F. Bloecher.

The testimony of W. F. Bloecher appears in the transcript of the record between pages 148 and 161. Bloecher says that he is 31 years of age, that he resides in St. Louis, and has charge of the men's shoe department of the Swope Shoe Company, which is a retail shoe store in St. Louis; and that he has been employed by the Swope Shoe Company seven years. It is significant in this connection that Bloecher admits, on cross-examination (at page 159) that the Swope Shoe Company does not sell, and never did sell, American Lady shoes. In answer to leading questions, undertaking to answer as to the practice prevailing in St. Louis, he says in answer to Q. 367, page 150:

"Well, you will find all retail stores have their own size cartons, that they use nowadays. We have not but one or two manufacturers that send us cartons that we have to change. Ours are all

furnished, one size and color, from each manufacturer, bearing no advertising whatever."

And he follows that by stating that where the manufacturer does not send the Swope Shoe Company its own carton the Swope Shoe Company immediately changes the carton to one of its own, so that in the Swope Shoe Company (which does not and never did sell American Lady shoes, it must be remembered) when one looks at the display one sees cartons containing shoes all of one size and one color.

751 Then, in answer to Q. 370, page 150 of the record, (his antecedent testimony showing that his knowledge is limited to St. Louis) this witness says that the practice of the dealer having his own cartons has prevailed "down town". When asked by Q. 371 what other retail shoe dealers "here in St. Louis" he can mention who have adopted that practice he names (see page 152) the Brandt Shoe Co., Reid Shoe Company, Hammond & Sons Shoe Company, Walk Over Shoe Co., and the G. H. Boehmer Shoe Co.; he afterwards mentioned the Shoe Mart and the Mitchell Shoe Co. And he distinctly states, in answer to Q. 373, at page 153, that he does not believe there are any others who adopted that practice. In this City of St. Louis, with a population of nearly 800,000 souls, with retail shoe stores all over the city, besides the Swope Shoe Co. (which does not sell and never did sell American Lady shoes), he can only mention nine retail stores which he says have adopted the practice of throwing away the manufacturers' cartons and using only the dealer's cartons. Of course, as the witness points out at the foot of page 157 of the record, while the Swope Shoe Co. has its own cartons and throws away the manufacturers' cartons, in selling its shoes it keeps its own cartons and uses them over again and sells the shoes to the purchaser wrapped up in a bundle. But, naturally, this practice would not prevail where the shoe dealer uses the carton of a manufacturer, because he would have a carton for each pair of shoes purchased from the manufacturer, and the simplest thing would be to sell the shoes in the cartons as they came from the manufacturer. But it is significant that this witness admits, in answer to Q. 383, that the retail purchaser in buying a pair of shoes "sees the carton on the shelf". Therefore, it would follow that where the dealer sold the shoes in the carton of the manufacturer the purchaser would "see the carton on the shelf". Of course, as the Swope Shoe Co. never uses the manufacturers' cartons, as the witness states in answer to leading question 385, the manufacturers' cartons having been thrown away, the purchaser has no chance of seeing the manufacturers' cartons.

On cross-examination this witness admits that the Swope Shoe Co. does not deal in and never has dealt in American Lady Shoes; and that the Brandt Shoe Co. has never dealt in American Lady shoes. He also admits, a thing which is peculiarly applicable to the Hamilton-Brown Shoe Co.'s widely-advertised American Lady shoes, in answer to Q. 392, page 159, that there are several retailers in the City of St. Louis dealing in shoes which are largely advertised who do not change the cartons, using the manufacturers' cartons.

and he specifically says, in answer to Q. 394, that West,
752 North and South in the City of St. Louis "dealers never change their cartons." Although Bloecher was a very willing witness for the complainant, he is forced to admit (at page 151) on cross-examination that the "Walk Over" shoe, which is widely advertised, is a shoe which is sold in the original and manufacturer's carton by the dealers. When asked about Nugent's store, which sells a great many shoes, and about the practice which prevails there, he was unable to state. He admits also that he does not know what practice prevails at the Shoe Mart.

This extraordinary testimony was strenuously objected to, and the Master more than once admitted that he did not see its relevancy; and at page 157 he only allowed it to go in, subject to our objection, to quote his own words:

"Upon the understanding by the Master that in the testimony hereafter it will be shown by the counsel for complainant to be material and relevant. So far as the Master is at present able to see this testimony is not pertinent to the issue before the Master."

This ruling of the Master is most significant, because with the testimony of this witness Bloecher, which ends at page 161 of the record before the Master, all the pretended proofs on the part of complainant as to his custom or usage breaks down, and it was never thereafter attempted to be shown in any way, how such ridiculous nonsense in the way of proof to establish a usage or custom could be relevant or material to any issue in this case. It is absurd to consider this as proof of a uniform, certain and well-defined general custom.

There were only three witnesses; the young girl stenographer, Miss Blome, does not pretend to testify to the custom, but simply testifies as to what she saw at the Shoe Mart. The witness Maize does not testify as to any general custom at all, but confines his testimony to the particular custom or practice which prevailed at the Shoe Mart. Bloecher, who is employed at the Swope Shoe Co., which store does not sell and never did sell American Lady shoes, testifies that in about eight or nine retail stores in the City of St. Louis (none of which except the Shoe Mart ever sold Hamilton-Brown Shoe Co.'s American Lady shoes, and which stores deal in special brands made for themselves) the manufacturers' cartons are not used. As to the other retail shoe stores, downtown, in the City of St. Louis, he confesses that he knows nothing; and he admits that it is the general practice with the retailers in the northern, southern and western parts of the city to sell shoes at retail
753 in the cartons received from the manufacturers.

To show how far this comes from proving any alleged custom or usage we refer to the following authorities:

To establish a usage or custom it must be shown to be definite, uniform and well known. Bouling v. Harrison, 6 Howard (U. S.) 260.

It must be "general among dealers." Colricks, et al., v. Ford, 23, Howard (U. S.) 61.

To establish a custom or usage of trade it must be shown to be

certain and uniform. Greenleaf on Evidence, 16th edition, Vol. 2, Sec. 251.

It is well settled that a usage or custom to be effective "must be uniform, notorious and well defined." Greenwich Ins. Co. v. Waterman, 54 Fed. 841, C. C. A. for Sixth Circuit, by Taft, J., citing leading cases.

In the case of Chicago, M. & St. P. R. R. Co. v. Lindeman, 143 Fed. 946, opinion by Sanborn, J., concurred in by Hook and Adams, J. J., the U. S. Court of Appeals for this circuit says (p. 948 of 143 Fed.) as follows:

"The Court charged the jury that if they found from this evidence that there was a uniform custom, for the engineer to move his engine after it was uncoupled a short distance in front of the leading car and then wait and ascertain whether or not the brakes held, and, if they did not, to receive the impact of the cars, and, if they did hold, then to proceed on out of the way of the cars, and that the engineer, Gage, and the switchman, Smith violated this custom at the time of the accident, they were guilty of negligence which if casual might entitle the plaintiff to a recovery. An exception was taken to this ruling, and it is specified as error. A custom has the force of law, and furnishes a standard for the measurement of many of the rights and acts of men. It must be certain or the measurement by this standard will be unequal and unjust. It must be uniform; for, if it vary, it furnishes no rule by which to mete. It must be known, or must be so uniform and notorious that no person of ordinary intelligence who has to do with the subject to which it relates and who exercises reasonable care would be ignorant of it; for no man may be justly condemned for the violation of a law or a custom which he neither knows nor ought to know. In short, a binding custom must be certain, definite, uniform, and known, or so notorious that
754 it would have been known to any person of reasonable prudence who dealt with its subject with the exercise of ordinary care. U. S. v. Buchanan, 8 How. 83, 102, 103, 12 L. Ed. 997; Bowling v. Harrison, 6 How. 248, 259, 12 L. Ed. 425; Collins v. Hope, Fed. Cas. No. 3003; Parrott v. Thatcher, 9 Pick. (Mass.) 426, 431; York v. Wistar, Fed. Cas. No. 18,141; Greenwich Ins. Co. v. Waterman, 54 Fed. 839, 842, 4 C. C. A. 600, 603; Robinson v. U. S., 13 Wall 363, 366, 20 L. Ed. 653; Jones v. Hoey, 128 Mass. 585, 587.

"The record in this case fails to disclose substantial evidence of one of the elements of a custom of this nature—its uniformity. Two witnesses, one of whom had taken cars down from this platform only 15 or 20 times, testified that there was such a custom, and that cars had been dropped in conformity to it. Neither of them testified that this custom either uniformly or universally prevailed, or that there was not a custom equally well established to drop them without stopping the engine after it was uncoupled to ascertain whether or not the brakes would hold the cars."

So also, in Ames Mercantile Co. v. Kimball S. S. Co., at page 336 of 125 Fed., the Court says:

" 'Usage is a matter of fact, not of opinion. Usage of trade is a

course of dealing; a mode of conducting transactions of a particular kind. It is proved by witnesses testifying of its existence and uniformity from their knowledge obtained by observation of what is practiced by themselves and others in the trade to which it relates.' Haskins v. Warren, 115 Mass. 535. And in Duer on Ins., Vol. 1, p. 182, it is said:

"'The existence of a usage, whatever may be the nature of the subject to which it relates, is in all cases a fact; a complex fact, it is true, resulting from a variety and a succession of individual acts, but still a fact, to be proved like all other facts, by the testimony of witnesses speaking from their personal knowledge. It is not created by hypothetical opinions, but by actual practice, and can only be established by a series of acts of similar character and import, performed at different times, by different persons. It is to these acts that the testimony, properly restrained and directed, should be strictly confined, and it is upon their number, uniformity, and notoriety that the weight and value of the evidence depend. Hence, where a witness swears generally that a particular usage exists, yet is unable to state from his own knowledge any instance of its actual observance, his testimony should at once be rejected; and it
755 is only by a strict adherence to this rule that the important distinction between the evidence of opinions and belief and that of fact is possible to be maintained.'

"See, also, Mills v. Hallock, 2 Edw. Ch. 652; The John H. Cannon (D. C.) 51 Fed. 46; Hall v. Benson, 7 C. & P. 711, 32 E. C. L. 835; Hamilton v. Nickerson, 13 Allen 351."

We have already shown how this whole attempt to show usage or custom not only utterly failed but is utterly irrelevant and immaterial to any issue in this case; but we want to call attention to the fact that, except for a special custom shown to exist at the Shoe Mart in the City of St. Louis, where no Hamilton-Brown Shoe Co.'s shoes are shown to have been sold that were not marked on the shoes themselves with the name Hamilton-Brown Shoe Co., there is not an iota of testimony to show that any retail dealer who ever sold the widely-advertised Hamilton-Brown Shoe Co.'s American Lady shoes ever sold the same except in the cartons of Hamilton-Brown Shoe Co., each of which cartons plainly bears upon it, in prominent letters, the name Hamilton-Brown Shoe Co. and also bears the word "Makers" in prominent letters associated with the name Hamilton-Brown Shoe Co. on the front end of each carton, exactly where the marking would be called to the attention of the purchaser; for all of the three witnesses who testified in regard to the selling of shoes say that the shoes are so displayed on the shelves in the cartons that the cartons are plainly visible to the purchaser. It would therefore follow that where the American Lady shoes are sold (except in the case of the Shoe Mart, in which case the American Lady shoes bore the name Hamilton-Brown Shoe Co. on each shoe) the purchaser would necessarily notice the carton and therefore see that the shoes were of the manufacture of Hamilton-Brown Shoe Co.

The net result of all this "perpendicular rubbish," in the feeble attempt to prove a usage or custom, is what we have shown above;

and there is not an iota of proof that any retailer, dealing in Hamilton-Brown Shoe Co.'s American Lady shoes, ever failed to sell such shoes in the cartons of Hamilton-Brown Shoe Co., except in the single case of the Shoe Mart. But in the case of the Shoe Mart the only specific American Lady shoes which that concern is shown to have sold had plainly marked on the sole of each shoe the name American Lady and the name Hamilton-Brown Shoe Co. If the proof of such a pretended custom were relevant or material on any hypothesis, the burden of proving the existence of such a general and uniform custom, among retailers who dealt in Hamilton-Brown Shoe
756 Co.'s American Lady shoes was on the complainant. It is only necessary to read the testimony of the three witnesses named, in the light of the authorities, to see at once that complainant's attempt in that direction has proven only this—a lamentable failure. "Nascitur ridiculus mus."

Complainant's Inconsistent Position on This Record.

In the early part of the taking of complainant's proofs before the Master and in connection with the taking of complainant's proofs before the Master, defendant's counsel put in evidence, in connection with a stipulation that the same was a true copy, a copy of the petition made to the United States Supreme Court for certiorari in this case, which petition for certiorari was made by the complainant. Defendant put in evidence this copy of complainant's petition to the Supreme Court for certiorari for the purpose of showing the inconsistent position subsequently taken by the complainant on the accounting before the Master. By reference to the said petition for certiorari and to pages 2 and 4 thereof we find the following statements contained in that petition and which were made by the complainant. At page 2 of the said petition for [*cretiorari*] we find the following:

"The Court of Appeals reversed the decree and enjoined defendants from infringing the words 'The American Girl' in a manner and under circumstances constituting unfair trade, but the Court refused to protect the words as a trade-mark."

Nevertheless, on an accounting before the Master the complainant is seeking to recover profits made by the defendant in the sale of defendant's American Lady shoes, and is invoking in this connection the rule, and none other, which might be applicable if the U. S. Circuit Court of Appeals in the case at bar had sustained the name "American Girl" as a trade-mark, the exclusive right to which was in the complainant.

At page 4 of the said petition for certiorari complainant makes the following statement:

"The Court accordingly enjoined defendant 'from using the name The American Lady as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture and therefore not of complainant's.' (R. 515.)

"The plaintiff, in connection with its trade name, had also used a catch phrase, 'A shoe as good as its name,' which defendant simu-

lated, and certain arbitrary numbers which defendant copied, and the injunction covered those points; but the important relief
757 which plaintiff asked, in order to protect 'The American Girl' as a trade-mark, was denied."

In the above statement complainant recognizes exactly what we contend for, namely, that the Court of Appeals in this case had no fault to find with the defendant in selling its shoes under the name American Lady "when accompanied with other matter clearly indicating that such shoes are of its own manufacture"; and also that it was the sum of various things found to have been done by defendant that the majority of the Court of Appeals found objection to, and which are the things contemplated by the decree, namely:

(1) Using the name American Lady in connection with defendant's shoes, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture;

(2) Using a catch phrase which the majority of the Court of Appeals thought was in simulation of complainant's catch phrase; and

(3) Using certain numbers which complainant had used. And, as stated at page 4 of complainant's said petition for certiorari, "the injunction covered those points," (that is to say, the sum of the three various things which we have specified above).

This was the position taken by the complainant, in harmony with the decision of the majority of the Court of Appeals in the case at bar, when the complainant sought, by petition for certiorari, to have the Supreme Court of the United States review the decision of the majority of the Court of Appeals and adopt the view expressed in the minority and dissenting opinion of Judge Sanborn. But the Supreme Court denied the petition for certiorari. Notwithstanding the position taken by the complainant in its petition for certiorari, on this accounting (which is based on a decree following the majority opinion of the Court of Appeals) complainant boldly takes the position that it is entitled to invoke the same rule as to recovery of profits that it might have invoked had the majority of the Court of Appeals sustained the view that American Girl was a trade-mark to which the complainant had the exclusive right, and that, therefore, defendant had infringed that trade-mark by using the name American Lady in connection with its shoes; for, on this accounting, the complainant takes the position (absolutely inconsistent with its position on petition to the United States Supreme Court for certiorari) that it is entitled to recover from the defendant all the profits
758 the defendant has made on American Lady shoes sold by the defendant since the filing of the bill, notwithstanding the fact that the stipulations before the Master and the proofs before the Master show that every pair of American Lady shoes sold by the defendant since the filing of the bill was "accompanied with other matter clearly indicating that such shoes are of its own manufacture."

We say that complainant has taken a position before the Master on this accounting inconsistent with the position which it took in its

petition to the Supreme Court for certiorari, because it is clear from the majority opinion of the Court of Appeals in this case, as well as from the decree entered in pursuance of that opinion, that the defendant does not have to account here for any shoes sold by it which it is not also enjoined from selling; and it appears from the majority opinion of the Court of Appeals in this case, as well as from the decree entered in pursuance of that opinion, that the defendant is not enjoined from selling, and does not have to account for, American Lady shoes, when those shoes, as sold by the complainant, were "accompanied with other matter clearly indicating that such shoes are of its own manufacture."

"Consistency, thou art a jewel!" unknown to complainant and complainant's counsel.

As to the Best Practice for the Master to Follow in the Matter of Making His Report and in Regard to the Matter of Costs.

The first of the above matters we are now about to consider is only by way of suggestion to the Master; the other of the above matters mentioned in this last heading is properly for the Court to determine, and our only reason for mentioning it here is that we expect to use this same brief on any exceptions that either side may make to the Master's report, and, therefore, we put it in the brief now.

A reference to the decision in the case of Bliss v. Anaconda Copper Mining Company, 156 Fed. 309, will show that it is the best practice for the Master to follow to submit a draft of his report to the counsel for the respective parties, before filing his report with the clerk of the court, for the purpose of inviting suggestions or requests for additional findings, or for modifications or greater certainty in those submitted. Therefore, we invite the Master to examine the authority above cited and follow the course suggested.

As to costs. It appears from the record in this case that before any of the voluminous testimony which has been taken before the Master was taken, and before any session had before the
759 Master, the following stipulation entitled in this cause was filed before the Master, and with the clerk of this court, said stipulation being dated January 31, 1910, and being in the following words:

"Stipulation Acknowledging Tender of One Dollar in Full Settlement of Damages and Profits on Accounting.

"It is hereby stipulated and agreed by and between the parties to this cause that after the mandate from the United States Circuit Court of Appeals in this cause was filed in the United States Circuit Court, and before the order was entered by the United States Circuit Court referring this cause to the Special Master for an accounting, the defendant, Hamilton-Brown Shoe Company, did make due and lawful tender of the sum of one dollar, lawful money of the United States, to the complainant, The Wolf Brothers and Company,

in full settlement of all damages and profits which the complainant may be entitled to recover upon said accounting.

THE WOLF BROTHERS AND COMPANY,
Complainant.

By PERCY WERNER AND
SIMEON M. JOHNSON,
Solicitors for Complainant.

HAMILTON-BROWN SHOE COMPANY,
Defendant,

By PAUL BAKEWELL, *Solicitor for Defendant.*

St. Louis, Mo., January 31, 1910.

Notwithstanding the above stipulation as to the said offer made by defendant to complainant, complainant has insisted upon proceeding with this accounting and many sessions have been had before the Master and voluminous testimony taken before the Master stenographically and reduced to typewritten form. In these respects, and also in respect to the fact that both sides have had to employ counsel in the proceedings before the Master, both sides must have been put to great expense on this accounting before the Master. It clearly appears from what we have already said in this brief that complainant is not entitled to recover anything more than nominal damages or profits to the extent of one dollar, as made in the offer referred to in the said stipulation.

Under these circumstances, and as the complainant is not entitled to any recovery on this accounting, except a nominal recovery of one dollar, all the costs in this case since the entry of the interlocutory decree and all the Master's fees, charges and expenses properly taxable in this case should be paid by the complainant.

760 While, under Equity Rule 82 (Desty's Federal Procedure, 9th edition, Vol. 3, p. 1800), the compensation of the Master "shall be charged upon and borne by such of the parties in the cause as the Court shall direct," this rule has been construed by the courts uniformly in favor of the proposition that where the complainant insists upon pressing an accounting, and as a result is entitled to recover and does recover only nominal damages or profits, in such a case the complainant must pay all the costs on the accounting, including the Master's fees. See Garretson v. Clark, 15 Blatchf. 70, Fed. Case No. 5248; Fisk v. West & Bradley Co., 19 O. G. 545, Fed. Case No. 4830*a*.

In Hill v. Smith, 32 Fed. 753, the Master refused damages to the complainant, but undertook to put the costs of the reference upon the respondent. Judge Butler, however, said that while the complainant was entitled to the taxable costs up to the date of the entry of the interlocutory decree, the complainant had to pay all the costs on the accounting before the Master, stating:

"To that point" (up to the interlocutory decree) "he was successful. The costs subsequently created arose from the prosecution of his claim for damages. In making his claim he was unsuccessful. In view of the circumstances, he should bear the costs created by

pressing it. The result shows that they were unnecessarily incurred. If he had been deceived or misled, or by other means induced by the respondent to set up and prosecute the claim, a different view might, and no doubt would, be entertained."

In Hohorst v. Hamburg-American Packet Co., 76 Fed. 472, the Master found nominal damages only for infringement of plaintiff's patent, and it appeared that the value of the Master's services was $550, of which $200 had been paid by the plaintiff, and the Master thought the balance should be apportioned. The Circuit Court (Judge Lacombe presiding) held to the contrary and said:

"Complainant having been defeated upon the accounting, should pay the Master's fees. The result of the litigation shows that he has needlessly harassed the defendant, and it would be inequitable to require defendant to pay the expenses of defending himself against an improper claim."

This question is settled in this Circuit by the decision of our United States Circuit Court of Appeals in Dowagiac Mfg. Co. v. Minnesota Co., 183 Fed. 314, number of February 16, 1911.

These decisions clearly show that where the complainant recovers only nominal damages or profits on an accounting, the complainant must pay the costs of the reference and the Master's fees on the accounting.

761 The record also shows, as we have already pointed out herein, that before the accounting proceeded, defendant offered to the complainant one dollar, as nominal damages and profits on this accounting. This was done by the defendant for the very purpose of showing at the outset that the defendant has sought to prevent this expensive and unnecessary accounting.

That the allowance of the Clerk, Master and Receiver is a matter which is reviewable on appeal, see In re Michigan Central Railroad Co., being a decision of the United States Court of Appeals for the Sixth Circuit, by Lurton, J., in 124 Fed. 732.

PAUL BAKEWELL AND
LUKE E. HART,
Solicitors for Defendant, Hamilton-Brown Shoe Company.

HENRY S. PRIEST,
Of Counsel for Defendant.

St. Louis, Mo., March, 1911.

EXHIBIT DEFENDANT'S SECOND BRIEF BEFORE THE MASTER.

[Seal George Bakewell, Notary Public.]

Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5262. In Equity.

THE WOLF BROTHERS & COMPANY, Complainant,
vs.
HAMILTON, BROWN SHOE COMPANY, Defendant.

Before Henry H. Denison, Esq., Special Master.

Defendant's Reply Brief on the Accounting.

Paul Bakewell and Luke E. Hart, Solicitors for Defendant.
Henry S. Priest, of Counsel for Defendant.

Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5262. In Equity.

THE WOLF BROTHERS & COMPANY, Complainant,
vs.
HAMILTON, BROWN SHOE COMPANY, Defendant.

Defendant's Reply Brief on the Accounting.

For the reasons stated in our main brief before the Master, we contend that the complainant is not entitled to recover one
762 penny of profits upon this accounting. However, the complainant, upon a theory which we think is not sound, and which is absolutely without support in reason or authority, does claim that it is entitled to recover profits made by the defendant during the period of the accounting. As stated above, we contend that that claim of the complainant is wholly without foundation, and we contend further that the complainant's claim in its brief as to the amount of profits made by the defendant during the period of this accounting from its American Lady shoes under the different markings is not correct.

For convenience of the Master we shall now undertake to point out, as shown by the record in this case, the amount of the defendant's profits on American Lady shoes during the period of this accounting, under each of the different styles of marking on the shoes themselves shown to have been employed by the defendant during that period, all of which were, in addition, packed and sold by the defendant in cartons such as described in the stipulations in

this case and illustrated by "Defendant's Exhibit, American Lady Shoe Carton," and by "Defendant's Exhibit 498" that is to say: Every pair of American Lady shoes sold by the defendant during the period covered by this accounting was sold in a box on the lid of which appeared prominently the words "Hamilton, Brown Shoe Company's American Lady," and on the front end of which appeared the belt trade mark of the Hamilton, Brown Shoe Company bearing the name Hamilton, Brown Shoe Company, and in the center of the belt trade mark, in white letters on a red background, appeared prominently the word "Makers." For particulars in this regard we refer particularly to the stipulation of June 4, 1910, the exhibits referred to in and attached to said stipulation and to "Defendant's Exhibit, American Lady Shoe Carton" and "Defendant's Exhibit 498."

For the purposes of this accounting the period inquired about may be divided into five shorter and arbitrary periods, to-wit, January 29, 1906, to December 10, 1906; December 10, 1906, to December 12, 1907; December 12, 1907, to December 11, 1908; December 11, 1908, to December 10, 1909; December 10, 1909, to March 9, 1910.

period

During the first ^ (January 29, 1906, to December 10, 1906) the defendant manufactured 491,849 pairs of American Lady shoes, the selling price of which was $983,698 (468). During that period the jobbing profit made by defendant, without allowing for the items of expense coming under the heads of "Advertising" and
763 "interest on capital," was 4.5885% of the selling price of the goods sold (Exhibit 2 of Kribben report). Multiplying the aggregate selling price of the American Lady shoes, $983,698, by the percentage of jobbing profit made during that period as above, 4.5885%, gives $45,136.98 or the aggregate jobbing profit on all American Lady shoes sold during that period, exclusive of cost of "advertising" and "interest on capital." The total factory profit for that period, without allowing for the items of "advertising" or "interest on capital" was $65,083.23 (468, 470, 584).*

Adding the total jobbing profit of $45,136.98 to the total factory profit of $65,083.23 gives the defendant's total profit for that period, or $110,220.21, but which does not take into account the expense of "advertising" or "interest on capital" invested, which the stipulation of January 11, 1911, shows "was devoted exclusively to the American Lady line of shoes" (470, 585). During the fiscal year beginning December 10, 1905, and ending December 10, 1906, the defendant expended on account of "advertising", as shown by Exhibit 1 of Kribben's report, $149,092.06.

It is stipulated in this case (600-1) that the Master may assume that 10½/12 of the amounts for the fiscal year 1906 represent that part of the fiscal year beginning January 29, 1906, (600-1). Therefore, 10½/12 of $149,092.06, the "advertising" expense for the fiscal year 1906, or $130,455.55, represents the "advertising" ex-

*NOTE.—numbers in parenthesis found in the brief refer to the typewritten pages of Master's record.

pense for the period from January 29, 1906, to December 10, 1906. The stipulation of January 11, 1911, at page 7 thereof, shows that of the amount thus expended on account of "advertising" twenty per cent, or $26,091.11, "had reference exclusively to the American Lady shoes and * * * forty per cent of said 'advertising' referred exclusively to the American Lady shoes and the American Gentleman shoes, each of which was given equal prominence in said advertising' ". Therefore, since forty per cent "of the amount expended on account of advertising * * * referred exclusively to the American Lady shoes and American Gentleman shoes", and since each of those "was given equal prominence in said 'advertising' ", each of those shoes must be charged with one-half of that amount or twenty per cent "of the amount expended on account of advertising," or $26,091.11 additional to the twenty per cent of said "advertising", or $26,091.11, which "had reference exclusively to the American Lady shoes." It also appears from the stipulation of January 11, 1911, at pages 8 and 9 thereof, that during that
764 period the defendant "had invested in its business, over and above borrowed moneys, $2,500,000 * * * upon which no allowance for interest is made" in computing the expenses or profits, and that of that amount $264,774.65 was devoted exclusively to the American Lady line of shoes (585). Interest on that amount of $264,774.65, which "was devotel exclusively to the American Lady line of shoes", at the legal rate of 6%, for 10½ months, amounts to $13,900.67.

Therefore, we find that the items of expense under the heads of "advertising" and interest on capital invested, which must be deducted from the total profits of $110,220.21 exclusive of those charges, are as follows: The amount of "advertising" which "had reference exclusively to the American Lady shoes" was $26,091.11; one-half of the amount of the "advertising" which "referred exclusively to the American Lady shoes and the American Gentleman shoes", and which is chargeable to the American Lady line of shoes, was $26,091.11; and the interest on the amount of capital which "was devoted exclusively to the American Lady line of shoes" was $13,900.67, and the sum of those three items is $66,082.89, which, when deducted from the total profit of $110,220.21, which does not allow for those charges, leaves a balance of $44,137.32, or the actual profit of the defendant on the American Lady line of shoes during the period from January 29, 1906, to December 10, 1906.

The total actual profit on the American Lady shoes during that period, amounting to $44,137.32, divided by 491,849 (the number of pairs of American Lady shoes manufactured and sold during that period), gives $.08973754 as the actual profit of the Hamilton, Brown Shoe Co. on each pair of American Lady shoes manufactured by it during that period.

During that period (January 29, 1906, to December 10, 1906), as appears from page 8 of the stipulation of June 4, 1910, "each and every one of said shoes was plainly marked on the sole thereof with the name Hamilton, Brown Shoe Co. and the name American Lady, * * * and as to 244,000 pairs" of said shoes "one shoe

of each pair had attached to the inside lining thereof a silk top facing * * * which bore upon it the name American Lady and the belt trade mark of the Hamilton, Brown Shoe Co., upon which belt trade mark appeared the name Hamilton, Brown Shoe Co. with the word 'Makers' in the center of said belt trade mark" (473).

Therefore, the 491,849 pairs of American Lady shoes manufactured during that period may be divided into two classes as to marking, to-wit, (1) the 244,000 pairs which bore the name
765 Hamilton, Brown Shoe Co. and the name American Lady on the sole of each shoe and which also bore the silk top facing with the name "American Lady", the belt trade mark, the name "Hamilton, Brown Shoe Co.," and the word "Makers" on one shoe of each pair, and (2) the 247,849 pairs which bore the name Hamilton Brown Shoe Co. and the name American Lady on the sole of each shoe and did not bear any other mark. Multiplying the profit on each pair of shoes sold during that period of $.08973754 by 244,000 (the number of pairs of shoes in the first class) it gives $21,895.96, or the actual profit made by defendant on all shoes sold during that period and belonging to the first class. Multiplying the profit on each pair of shoes sold during that period of $.08973754 by 247,849, (the number of pairs of shoes in the second class), it gives $22,241.36 or the actual profit made by the defendant on all shoes sold during that period and belonging to the second class.

Pursuing this same method as to each of the periods of this accounting, the results may be summarized as follows, the references to the pages of the record being in parentheses:

(Here follows table marked page 766.)

767 The above summary shows the exact amount of profit made by the defendant on American Lady shoes, during the period of this accounting, under each of the different styles of markings, on the shoes themselves, shown to have been employed by the defendant during that period, and that summary is correct. In preparing that summary we have pursued the only method, we believe, which can be followed and arrive at the correct amount of defendant's profits under the different styles of marking.

To begin with, we have taken the aggregate selling price of American Lady shoes sold during the different periods of this accounting as shown by the stipulations of June 4, 1910, and January 11, 1911, in the first paragraph of the schedules for the different periods appearing in those stipulations, and we have multiplied this aggregate selling price by the percentage of jobbing profit on the aggregate business done for that same period as shown by Exhibit 2 attached to the report of the witness Kribben. In doing this we have taken what Mr. Kribben shows is the percentage of jobbing profit without making any allowance in the cost of doing business for the amount "spent for advertising," and the stipulation of January 11, 1911, (587) shows that Mr. Kribben made "no allowance for interest" in arriving at that percentage. By thus multiplying the aggregate selling price of the American Lady shoes sold during a particular period by this percentage of jobbing profit, on the aggregate business done during that period, exclusive of those two items, as given by complainant's witness Kribben, we get the aggregate jobbing profit on all American Lady shoes sold during that period, exclusive of those two items. Adding this aggregate jobbing profit to the total factory profit for the same period as shown in the schedule for that period in the stipulations of June 4, 1910, and January 11, 1911, gives the defendant's total profit for that period, without allowing for those two items of expenses.

The stipulation of January 11, 1911, at page 7 thereof, shows that "of the amount expended by Hamilton, Brown Shoe Company on account of 'advertising' for each" period of the accounting "twenty per centum (20%) of said advertising had reference exclusively to the American Lady shoes, and twenty per centum (20%) of said advertising had reference exclusively to American Gentleman shoes; and that forty per centum (40%) of said 'advertising' referred exclusively to the American Lady shoes and the American Gentleman shoes, each of which was given equal prominence in said 'advertising'." That stipulation also shows, at page 8 thereof, the amount of money which, during each period, the defendant "had invested in its business, over and above borrowed moneys"
768 and "which is and was at all times during the period of this accounting devoted exclusively to the American Lady line of shoes", and "upon which no allowance for interest is made in the report of the witness Kribben or in the schedules contained herein."

We have, therefore, taken 20% of the "amount expended on account of 'advertising'" for each period and which "had reference exclusively to the American Lady shoes", and we have added to that sum a like amount representing one-half of the "forty per

in the evidence of Mr. Dodge, who was asked how this sum was ascertained, and who replied that he did not remember whether it was made up from the actual examination of the bills, or by footing up the cost of the respective engravings. The master excluded the charge because he regarded it 'as more a matter of personal gratification to the defendants than a legitimate charge for expenses in conducting the business'.

"I am sorry that no one, acting under the reference, thought the subject of enough consequence to make more inquiry respecting it. I am inclined to believe that the master has misunderstood its character or design. It was probably a species of advertising the mitre machine—appealing to the eye by pictures and thus attracting the public attention. In this view it was as legitimate an expenditure, and enters as directly into the cost of manufacturing and selling, as advertising in newspapers, which has become one of the recognized methods of prosecuting a successful business. Looking at it in this aspect, and assuming from the uncontradicted proof, that the money was expended, I must regard the charge as proper and sustain the exception."

Judge Nixon thus clearly points out and holds that money spent in advertising the infringing article, "thus attracting the public attention", "has become one of the recognized methods of prosecuting a successful business", and that money thus spent is a legiti-
770 mate expenditure which enters "directly into the cost of manufacturing and selling" and should be allowed in arriving at the defendant's profits.

In the case of Manufacturing Co. v. Cowing, 105 U. S. 253, 257, the Supreme Court held, as pointed out by it in the case of Seabury v. Am Ende, 152 U. S. 569, that in computing the defendant's profits he should be allowed "for the use of tools, machinery, power, and other facilities employed in the manufacture", and it disapproved the report of the Master for the reason that he had failed to make such allowances. The Supreme Court thus clearly lays down the rule that the defendant is entitled to an allowance for the facilities employed in manufacturing the alleged infringing article which is the equivalent for the capital invested in "tools, machinery", etc.

The later case of Seabury v. Am Ende, 152 U. S. 561, in which the case of Manufacturing Co. v. Cowing was explained, was a case in which the defendant upon accounting claimed an allowance for interest on capital invested; but it appeared that in addition to manufacturing the infringing article the defendant manufactured several other and wholly different articles, and the record failed to distinguish to the satisfaction of the master and the court between the profit derived from the use of the plant and the real estate and which was attributable to the infringing article and the other articles manufactured, and the master and the court held, therefore, that, it not being possible for "the master to make a satisfactory apportionment or allowance for interest on the investment", (see 569, 152 U. S.) no such allowance could be made in that case. The Supreme Court while thus up-holding the master in refusing to make an allowance for interest on the investment in that particular case, because the

centum of said 'advertising' which referred exclusively to the American Lady shoes and the American Gentleman shoes, each of which was given equal prominence in said 'advertising'," and have also added to that sum the legal rate of interest, 6%, (Rev. St. of Mo., 1909, Sec. 7179), on the amount of money which the defendant "had invested in its business over and above borrowed moneys" and "which was devoted exclusively to the American Lady line of shoes" and "upon which no allowance for interest is made" elsewhere; and we have then deducted the sum of those items, representing expense of "Advertising" and "interest on capital" and for which no allowance was made in arriving at the defendant's total profit on American Lady shoes, from the amount of the defendant's total profit on American Lady shoes exclusive of those items, and the remainder represents the actual profit of the defendant on American Lady shoes during the particular period in question. In making this deduction we have merely followed the stipulations between the parties on this accounting and the settled rule of law applicable to this point, as laid down by the courts in analogous cases.

In the first place, the stipulations settle, as pointed out above, the exact amount which the defendant expended in advertising its American Lady shoes during each of the periods of this accounting and they also settle the exact amount of its capital which was, during each of those periods, devoted exclusively to the American Lady line of shoes; and the facts thus stipulated are not open to question by either of the parties. That those items are proper elements to be charged in ascertaining the expense of doing business and must be deducted before arriving at the defendant's actual profit on the goods in question, under the facts as thus set forth in those stipulations will not, we believe, admit of question.

In considering this question the item of interest has been sometimes disallowed because of the difficulty of apportioning the amount of the capital which is properly attributable to the alleged infringing business; but where it is shown, as in this case, just what amount of the defendant's capital is properly attributable to the alleged
769 infringing business, then the defendant is always allowed to deduct interest on that amount as a proper charge in arriving at the defendant's actual profit from the infringing business, and, in like manner, when the expenses of advertising can be ascertained and the proportion of it which related to the alleged infringing article determined, it is always charged in with the items of expense which must be deducted before arriving at the defendant's profit. We know of no exception to this rule and we do not believe that one can be found in the books.

In the case of La Baw v. Hawkins, 2 Ban. & Ard. 561, 566; Fed. Cas. No. 7961, Judge Nixon had under consideration exceptions to the report of the master on accounting, for infringement of a patent for a mitre machine, and in passing on those exceptions he said:

"The remaining exception is to the refusal of the master to allow the item of $64, the amount spent by the defendants for 'electrotyping and engraving'. The testimony in regard to this charge is extremely meagre. The only reference to it, that I have found, is

record failed to disclose what proportion of the capital invested in the defendant's entire business was devoted to the infringing article, recognized the principle for which we contend and plainly indicated that if, under the record in that case, it had been possible to distinguish between the capital invested in the infringing business and the capital invested in the business pertaining to the other articles manufactured by the defendant, it would have allowed for interest on the capital invested in the infringing business, when, after holding that the facts as thus indicated did not warrant an allowance for interest on the capital invested in the infringing business, it said at pages 569 and 570 of 152 U. S.:

"We do not wish to be understood as holding that in no case where the plaintiff's damages are measured by the defendant's profits, ought there to be an allowance, in the latter's favor, of in-
771 terest on the money invested in the plant. Nor do we say that such an allowance may not be properly made, even where the use of the plant is not wholly restricted to making the infringing article. But the evidence, in such a case, should enable the master to satisfactorily apportion the interest between the several kinds of business."

In discussing this same point in the Fourth Edition of his work on patents Mr. Walker says, at pages 564 and 565, section 718, as follows:

"When taking an account of profits in the method indicated in the last section, it is generally easy to ascertain the amount which the defendant realized for the articles which he made and sold; but [*is*] is generally difficult to determine how much it costs him to make and sell them. Such an inquiry must consist of collecting direct evidence upon the subject; and cannot consist in ascertaining the cost to other parties, of making and selling similar articles. (Robins v. Illinois Watch Co., 78 F. R. 124, 1897; and 81 F. R. 957, 1897.) One such inquiry occupied exchancellor Walworth, as master, more than ten years, and occupied the judge who passed upon the exceptions to his report at least as many weeks. (Troy Iron & Nail Factory v. Corning, 6 Blatch., 328, 1869.) When such accounts are taken, the elements which are allowed to enter into that cost are the following:

"1. The market value of materials on hand at the time the infringement began, and the actual cost of materials subsequently purchased, but not the market value of the latter at the time they were used in infringing. (Rubber Co. v. Goodyear, 9 Wallace, 803, 1869.)

"2. Money paid in reasonable amounts to persons employed in making and selling the infringing articles, even where those persons were officers or stockholders of the infringing corporation. (Rubber Co. v. Goodyear, 9 Wallace, 803, 1869; American Nicholson Pavement Co. v. Elizabeth, 1 Bann. & Ard. 442, 1874; Steam Stone Cutter Co. v. Mfg. Co., 17 Blatch. 29, 1879; National Folding Box & Paper Co. v. Dayton Paper Novelty Co., 95 F. R. 994, 1899.)

"3. Proper remuneration for the labor of the infringer in conducting the infringement. This element has been disallowed in one

case (Williams v. Leonard, 9 Blatch. 476, 1872); but the same reasoning, which justified the Supreme Court in allowing the members of a defendant corporation for their personal services, calls for the same allowance where the men who infringe, do so as
772 partners or as individuals. Where a number of men form a corporation and, as such, infringe a patent by making and selling specimens of a patented thing, the Supreme Court approves a proper allowance for their labor, being made an element in the cost of those specimens, when those men are forced to pay over those profits to the patentee. There is the same reason for making the same allowance, where two such men make and sell such specimens as partners, or where one man does so alone. But it is the labor of the infringer in making or selling infringing articles, or in performing an infringing process, that is contemplated in this paragraph. Salaries which are received by partners in the place of partnership profits, or which are paid for a general oversight of partnership business, do not come in this category. (Callaghan v. Myers, 128 U. S. 663, 1888.)

"4. Interest on borrowed money: (Rubber Co. v. Goodyear, 9 Wallace, 804, 1869) but not interest on capital stock; except where the property represented by the capital stock was used only in conducting the infringing business, or where the defendant clearly proves what portion of the value of that property was thus used, so as to enable an apportionment of interest to be made between the infringing business, and the other business contemporaneously conducted by the defendant. (Seabury v. Am. Ende, 152 U. S. 554, 1894.)

"5. Expenses of selling, including advertising (Rubber Co. v. Goodyear, 9 Wallace, 804, 1869; Manufacturing Co. v. Cowing, 105 U. S. 257, 1884; La Baw v. Hawkins, 2 Bann. & Ard. 566, 1877, Fed Cas. No. 7961) and commissions (Kissinger-Ison Co. v. Bradford Belting Co., 123 F. R. 94, 1903).

"6. Miscellaneous expenses equitably chargeable to the infringing business (Winchester Arms Co. v. American Cartridge Co., 62 F. R., 278, 1894; Piaget Novelty Co. v. Headley, 123 F. R. 897, 1903)."

The difficulty which confronted the master and the court in the Seabury v. Am. Ende case is not present in this case; for we are not only able to show the proportion of the defendant's capital which was invested in the alleged infringing business but the complainants have stipulated that the money thus invested was "devoted exclusively to the American Lady line of shoes," thus clearly bringing this case within the principle of those cases and showing the exact amount of capital upon which, under the ruling in those cases, the defendant is entitled to an allowance in determining the amount of its profits on American Lady shoes.

It being settled, therefore, that the expense of advertising and interest on capital are to be allowed in arriving at the de-
773 fendant's profits, when the same can be distinguished from the general expenses and business of the defendant; and inasmuch as the stipulations in this case show the exact proportion of the

"advertising" expense and capital which was devoted to the American Lady business as distinguished from the defendant's other business, we have, as pointed out above, deducted the sum of those items during the different periods of this accounting from the amount of the defendant's total profit, exclusive of those items for the same period, and the remainder is the actual profit of the defendant on American Lady shoes during that particular period.

Dividing the amount of the defendant's actual profit on American Lady shoes as thus given by the number of pairs of American Lady shoes sold during that period gives us the defendant's actual profit on each pair of American Lady shoes sold during that period; and by multiplying the amount of the defendant's actual profit on each pair of American Lady shoes sold during a given period by the number of pairs of American Lady shoes sold under the different styles of marking employed during that period, we get the amount of the defendant's actual profit on American Lady shoes sold under each of those different styles of marking during that period. By adding the amount of the defendant's profit under the different styles of marking employed during each one of the arbitrary periods into which the period of the accounting has, for convenience, been divided, we get the amount of the defendant's total actual profit on American Lady shoes sold under each of the different styles of marking during the entire period of this accounting.

That is the method that has been pursued in preparing the foregoing summary; it is the only method that can be pursued which will give the correct amount of the defendant's profits during the period of this accounting under the different styles of marking employed, and by pursuing this method we find that, as stated in the foregoing summary, during the entire period of the accounting, the defendant's actual profits on shoes marked on the sole of each shoe with the belt trade mark of the defendant bearing thereon the name "Hamilton, Brown Shoe Company" and with the name American Lady in the center of the belt, and the silk top facing of one shoe of each pair of which bore the name American Lady, the belt trade mark of the defendant with the name "Hamilton, Brown Shoe Company" thereon and the word "Makers" in the center of the belt, were $35,575.57.

The defendant's actual profits on shoes marked on the silk top facing of one shoe of each pair with the name American Lady, the belt trade mark with the name "Hamilton, Brown Shoe Company"
774 thereon and the word "Makers" in the center of the belt, which includes the shoes so marked and which also bore other marks as in the first classification, were $47,859.57 (the master has already ruled—see pages 79, 80, 93, 96, 537, 540 and 541 of the record—that shoes marked as in the two classifications just mentioned do not have to be accounted for).

The defendant's actual profit on shoes marked on the sole of each shoe with the belt trade mark bearing thereon the name "Hamilton, Brown Shoe Co." and with the name American Lady in the center of the belt, which included the shoes so marked and which also bore other marks as in the two preceding classifications, was $88,693.77.

The defendant's actual profit on shoes marked only on the sole of each shoe with the belt trade mark bearing thereon the name "Hamilton, Brown Shoe Co." and with the name American Lady in the center of the belt, was $53,118.30.

And the defendant's actual profit on shoes marked only with the name American Lady was $103,862.46.

However, as shown by the stipulations of June 4, 1910, and January 11, 1911, "every pair of American Lady shoes manufactured and sold by Hamilton, Brown Shoe Company between January 29, 1906, and November 15, 1909" and "between November 15, 1909, and March 9, 1910, as said shoes were sold and shipped by said Hamilton, Brown Shoe Company, was sold and delivered to its customers in cartons, each of which cartons bore prominently on the lid thereof in white letters on a black background, at the head of said lid, the words "Hamilton, Brown Shoe Co.'s, and at the foot of said lid, in equally prominent letters, the name 'American Lady,' while at the front end of each of said cartons appeared the name 'American Lady' and the belt trade mark of the Hamilton, Brown Shoe Company, which belt trade mark consisted of a black strap in the center of which was a red background, the words 'Hamilton, Brown Shoe Company' appearing in white letters on the black strap and the word 'Makers' appearing in white letters on the red background; said particular way of marking each of said cartons being exemplified by 'Defendant's Exhibit, American Lady Shoe Carton, January 31, 1910. Henry H. Denison, Master'" and by "Defendant's Exhibit 498, 1/11/1911. Henry H. Denison, Master," and by the exhibits attached to the stipulation of June 4, 1910.

Although, at great pains, we have made the calculations in respect to defendant's profits made on the various classifications of shoes covered by the accounting and hereinbefore re-
775 ferred to, nevertheless we insist upon all of our objections heretofore made before the Master and of record, and upon the position taken in our main brief.

Although the Master allowed this evidence, which we objected to, to be taken, "subject to objection," with the result that there was brought out the evidence as to the various shoes sold by the defendant since the filing of the bill and marked as hereinbefore stated, nevertheless the whole matter is still within the breast of the Master. We believe the Master must now see that it was error on his part to have admitted that evidence and thus force the defendant to account for profits in respect to the shoes hereinbefore considered; for, as pointed out in our main brief, none of those shoes which the defendant was forced to account for before the Master are shoes with respect to which complainant is entitled to recover a penny in the way [*or*] profits or damages. All the shoes of the various classifications considered herein are shoes which were marked, either on the shoes themselves or on the cartons in which the shoes were sold, with matter clearly "indicating" that they were shoes made by the defendant and that they were not made by or emanated from the complainant. No one was deceived into buying

any of those shoes believing that they were the American Girl shoes made by The Wolf Brothers & Co., the complainant in this case.

Specific Reply to the Complainant's Brief.

On Saturday, March 25, 1911, complainant's counsel supplied defendant's counsel with six copies of the brief for the complainant; and on the same day the [*the*] defendant supplied the complainant's counsel with six copies of the defendant's main brief. Also, on the same day, the defendant's counsel supplied the Master with copies of defendant's main brief.

We have a right to assume, as such course would be the only fair and just one, that the brief of the complainant which was served upon defendant's counsel on March 25th contains the main presentation of the complainant's case. That brief covers eleven printed pages.

That brief on behalf of complainant starts out with a consideration of the decree. The decree speaks for itself, and we submit that it must be interpreted in the light of its terms and of the majority opinion of the Court of Appeals in this case, which opinion is the foundation for the said decree. We have so considered it in our main brief.

We notice at page 2 of complainant's brief that reference is made to a part of what Judge Dyer said on Monday, Feb-
776 ruary 28, 1910 (Record 107*a* to 107*c*). What Judge Dyer there said was not in fact, and was not intended to be, a final determination by the Circuit Court in respect to any of the matters submitted to the Master on this accounting; it was merely provisional. The history of the remarks of Judge Dyer on that occasion is briefly this: The Master had ruled, subject to our objection and to our exceptions made to the Master's ruling, that certain shoes had to be accounted for. We contended that the Master was in error and brought the Matter to the Court's attention with a view of preventing the Master from proceeding with that inquiry. The Court merely resolved any doubt in the matter in favor of the ruling of the Master, at that stage of the proceedings, and, in legal effect, simply ruled that the Master might proceed with that inquiry at that time, to ascertain the whole facts. We do not understand that that provisional ruling of Judge Dyer was either absolutely binding on the Master or precluded us from contending before the Master that any of the shoes hereinbefore accounted for are shoes which should not have been accounted for. Certainly that provisional [ruling] of Judge Dyer does not prevent defendant from making this contention either before the Master or before the Court, in the light of all of the evidence and stipulations taken before the Master, together with the exhibits introduced on this accounting before the Master. In fact, even in those provisional remarks of Judge Dyer he does not limit himself to the statements found at page 2 of complainant's brief; for he also adds in the last paragraph of those remarks (Record 173) a matter which is entirely consistent with the position which defendant takes, where he says:

"I am satisfied that the Court of Appeals meant by that decision that the Hamilton, Brown Shoe Co. could sell the shoes bearing the word American Lady providing that it was accompanied by a clear indication that it was the manufacture of the Hamilton Brown Shoe Co."

This remark is not inconsistent with the decree, as we understand it, nor with the majority opinion of the Court of Appeals. We contend that all the shoes accounted for and hereinbefore considered were "accompanied," either on the shoes themselves or on the cartons in which each pair of shoes was sold, with matter "clearly indicating" that such shoes were of the manufacture of Hamilton, Brown Shoe Company. We say this in the light of what we have said in our main brief, of the decision of the majority of the Court of Appeals in this case and of the decisions of the courts in analogous cases to which we have referred in our main brief.

777 The attempt at the foot of page 2 and top of page 3 of complainant's brief to argue that one of defendant's counsel (Judge Priest), in certain statements made by him on the record, has taken a position inconsistent with the defendant's contention and the consistent and repeated position which the defendant's counsel have taken throughout this entire record and in defendant's main brief, is only another evidence of the weakness of complainant's case; for in quoting from the statements of Judge Priest as the same appears on the record, the complainant's brief contains only one sentence of Judge Priest's statements, stripped of its context. On the other hand, we would refer to all of Judge Priest's remarks found at page- 437 and 438 of the record, particularly to the following paragraph found at page 438 of the record:

"The said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case which were marked with the name of American Lady and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton, Brown Shoe Company. So, that the issue plainly before the Master, under this reference, pursuant to that decree, is confined, to such shoes as were marked American Lady *and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton, Brown Shoe Company.*"

In the above quotation we have purposely italicized certain portions of Judge Priest's remarks, which show that Judge Priest's remarks, taken as an entirety, harmonize with the consistent and persistent attitude taken by defendant's counsel on this record.

The statement at page 3 of complainant's brief to the effect that a shoe marked "American Lady" means a shoe made by the complainant in this case, and that the majority of the Court of Appeals so held, we respectfully submit, is not true in point of fact. This is precisely what the majority of the Court of Appeals did not hold; for the majority of the Court of Appeals in the case at bar distinctly held that the name American Girl was not a trade mark and that the complainant had no exclusive right to the name American Girl. For the rest, we would refer to what we say in our main brief

on this proposition, in treating the majority opinion of the Court of Appeals, especially what appears in that brief between pages 9 and 40 thereof.

It is impossible to say, in the light of the majority opinion of the Court of Appeals in this case, that the name American Lady on a shoe signifies that the shoe is the American Girl shoe of The
778 Wolf Brothers & Company, without holding that the majority of the Court of Appeals in this case decided that the name American Girl was a true trade mark, the exclusive right to which was in the complainant, and that the name American Lady was a mere simulation of the trade name or trade mark American Girl (Precisely what the majority opinion did not hold). This, we believe, is a complete answer to the matter which appears at page 3 of complainant's brief.

All that is said at pages 4 and 5 of complainant's brief is completely answered by what we have already said in this brief or in our main brief.

What is said at page 5 of complainant's brief in regard to what Mr. McElroy has testified to at page 54 of the record before the master is completely met and answered by the stipulation of June 4, 1910, which was subsequently made, and was made for the purpose of clearing up and making definite any such matters in the record as are referred to at page 5 of complainant's brief.

We notice in some parts of complainant's brief, notably at pages 6 and 7, that reference is made to the "old record," meaning by that the record in the Court of Appeals. This is unwarranted on the part of complainant, for the reasons set forth in our main brief between pages 2 and 9. Besides, these references to the old record are utterly immaterial in view of the record and stipulations before the master.

Even on the Untenable Hypothesis That Defendant Must Account for All or Any of the American Lady Shoes Hereinbefore Referred to, Nevertheless Defendant is Entitled to Deduct Interest on Capital Invested and Which Was Devoted Exclusively to the American Lady Line of Shoes and also the Proportion of Advertising Expense Which Referred Exclusively to the American Lady Line of Shoes.

As to this matter we think we have already in this reply brief completely answered the untenable position taken by complainant's counsel at pages 6 and 7 of complainant's brief. The case of Providence Rubber Co. v. Goodyear, 9 Wallace, 804, referred to at page 7, is not in point on this proposition, and certainly in its facts does not militate against the position which we have taken, for the following reasons:

In the first place, that was a suit under a patent where it was a question of infringing the complainant's exclusive right. In the second place, in the Goodyear case there was no question of deducting the cost of advertising; but, what is more significant, if there be anything in the case of Rubber Co. v. Goodyear against our con-
779 tention under the facts in this case, Rubber Co. v. Goodyear was overruled and a contrary doctrine established in Manu-

facturing Co. v. Cowing, 105 U. S. 257, and Seabury v. Am Ende, 152 U. S. 569. See particularly in this connection what the Supreme Court says in the case of Seabury v. Am Ende at pages 569 and 570 of 152 U. S. In this connection we also refer to the decisions heretofore considered in regard to this proposition in the early part of this reply brief.

When, as in the case at bar, the exact amount of the advertising of American Lady shoes is separated and apportioned, under the decisions upon which we rely and which are fully considered in this brief, there is no more reason why that expense should not be deducted than any other expense incident to the selling of the shoes, such as freight charges, traveling salesmen, etc.

Nor is the decision of Judge Thayer [is] Societe Anonyme v. Western Distilling Co., 46 Fed. 921, referred to at page 7 of complainant's brief, against our contention in this respect. If Judge Thayer's decision in that case were against our contention it would be overruled by the decisions upon which we rely and notably the case of Manufacturing Co. v. Cowing, 105 U. S. 253, 259, and Seabury v. Am Ende, 152 U. S. 569, 570. It would also be in conflict with the decision of Judge Nixon in the case of La Baw v. Hawkins, 2 Ban & Ard. 561, 563, Fed. Cas. No. 7961.

Judge Thayer's opinion in Societe Anonyme v. Western Distilling Co., 46 Fed. 921, should be read in its entirety. It will then be found to have been merely a report of some oral remarks made by Judge Thayer in a case of a strict trade mark. That was a case where the name Benedictine was sustained as a strict trade mark and where the defendant had been found to have infringed by using the name Benedictine on its product. There was no attempt in that case to have deducted the expense on capital invested or expenses in advertising. Furthermore, it was not a case of alleged unfair competition in business. It must also be remembered in this connection that there is absolutely no proof of fraud in this case on the part of defendant in respect to the shoes accounted for and that none of those shoes is shown to have been sold, to the deception of the purchaser, as and for the shoes of the complainant. The later decisions of the Supreme Court, to which we have referred, are with us in our present contention and contradict the position taken by the complainant in this case at pages 6 and 7 of its brief.

As to the Case of Westinghouse Electric & Mfg. Co. vs. Wagner Electric & Mfg. Co., 173 Fed. 361.

780 This case is treated at pages 8 and 9 of complainant's brief, and is not in point here for the reasons fully explained in our main brief. That was a case of infringement of a patent. Furthermore, as the majority opinion of the Court of Appeals in that case will show, the majority of the Court held that the complainant was not entitled to recover a penny in the way of profits, and that is the law of that case up to the present time. Mr. Bakewell, one of defendant's counsel, is not estopped from taking the position which he takes in the case at bar by reason of anything that he said in his brief in the Westinghouse Case; but there is nothing in Mr. Bakewell's brief in that case which supports complainant's contention here, because that case is totally different in its facts from the case

at bar, and was a case involving an exclusive right and not a case of alleged unfair competition in business in which an exclusive right is absolutely absent as expressly decided by the majority opinion of the Court of Appeals in the case at bar.

Profits.

This matter is discussed at page 9 of complainant's brief. By that we understand that complainant contends that it is entitled to all the profits as found in Kribben's report. This, as we have already shown in this brief, is an untenable position.

The complainant also contends, under the heading of "Profits" (page 9 of complainant's brief), that complainant is entitled to interest on the profits found at the end of each respective period from which they are ascertained in Kribben's report. This position is absolutely untenable. In the first place, under no circumstances can interest be allowed prior to the date of a judgment rendered, in a case of this character. It is unheard of and contrary to law for the Master to allow interest for any of the arbitrary periods fixed by Mr. Kribben in his report. As a general rule, interest will not be allowed on profits made by an infringer. The reason is that profits are regarded in the light of unliquidated damages. Interest is never allowed in an accounting before a Master prior to the date of the filing of the master's report. See Parks v. Booth, 102 U. S. 96; Illinois Central Railroad Co. v. Turrill, 110 U. S. 301, 303; Tilghman v. Proctor, 125 U. S. 136, 160; Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 457.

The period of this accounting extends from January 29, 1906, to March 9, 1910, and while that period has been subdivided into arbitrary periods coming within the scope of that period, that
781 has been done merely for the purpose of convenience in making the computations necessary to arrive at the profits of the defendant during the period of the accounting, namely, between the dates of January 29, 1906, and March 9, 1910; and the Master can only consider that there is one period of this accounting, regardless of the fact that in arriving at the profits made by the defendant during that period he may have, for the purpose of convenience, taken certain portions of that period and made his computations for that period as distinguished from the entire period of the accounting.

Damages.

Complainant's brief touches on the question of damages at pages 10 and 11. There it will be found that complainant's counsel admit that no damages have been shown; that they have not "attempted" to show damages.

The elements to be considered in ascertaining damages in cases of this character are:

(1) Loss by plaintiff of justly earned profits;

(2) Injury to the reputation of plaintiff's product.

Nims on Unfair Trade, Sec. 240, page 458.

It is only necessary to refer to the record to show that complainant has shown neither of these things; it is neither shown that plaintiff has lost any justly earned profits by reason of the sale of the defendant's shoes during the period of this accounting, nor is it shown that the complainant suffered any injury to the reputation of its product by the actions of the defendant during the period of this accounting. Furthermore, as complainant's brief admits at page 10 thereof, complainant has not "attempted" to prove any damages, but "contented itself before the Master with proving the profits" made by the defendant. Therefore, complainant can recover no damages on this accounting. Walter Baker Co. v. Slack, (C. C. A. for 7th Circuit), 130 Fed. 519, 520.

As to the distinction between damages and profits, see Beach v. Hatch, 153 Fed. 763.

Even in an action at law for infringement of a trade mark or for alleged unfair competition in trade, the plaintiff must prove actual damages before he can recover anything more than mere nominal damages. See Addington v. Cullinane, 28 Mo. App. 238; Lampert v. Judge & Dolph Drug Co., 119 Mo. App. 693.

782 And punitive damages cannot be recovered in a case of this character. Lampert v. Judge & Dolph Drug Co., 119 Mo. App. 693.

The case of Conrad v. Uhrig, 8 Mo. App. 277, (opinion by Bakewell, J.), cited and quoted from at page 10 of complainant's brief, was a case at law for damages and in which proof of actual damages had been abundantly shown; it was also a case in which the defendant had not only used the plaintiff's trade name (Budweiser) for beer, but had all but forged the plaintiff's label. That case is not at all in point here, and, as we have already said, was not a case in equity but one at law. Judge Bakewell said in the very outset of the opinion in that case:

"This is an action in the nature of an action of deceit for damages," etc.

The opinion then proceeds to show how the defendant had been guilty of actual fraud and how customers had been actually deceived.

That in an action in equity for infringement of a trade mark complainant is not entitled to punitive damages at all and can only recover for actual damages shown, see the authorities found in our main brief begininng at page 47.

Therefore, it is clear that the complainant is not entitled to recover any damages, either actual or puntitive, on this accounting.

Conclusion.

It is significant that in all of the complainant's main brief complainant has failed to cite a single opinion in point, applicable to the facts in the case at bar; and that if any of the cases cited in complainant's brief appear at first blush to be in point they will be found on examination either not to apply to the facts in the case at bar or to be overruled by later and controlling decisions of the Supreme Court of the United States.

We have shown by our main brief that complainant is not en-

titled to recover a penny on this accounting. In this reply brief we have made reply to everything that is said in complainant's main brief; and we have also shown that even on complainant's untenable contention, under the facts in this case and the law applicable thereto, defendant's profits on the shoes accounted for are not what complainant contends they are.

783 We have also shown in this brief that complainant is not entitled to recover a penny in the way of damages.

Respectfully submitted,

PAUL BAKEWELL AND
LUKE E. HART,
Solicitors for Defendant.

St. Louis, April, 1911.

HENRY S. PRIEST,
Of Counsel for Defendant.

EXHIBIT DEFENDANT'S THIRD BRIEF BEFORE THE MASTER.
(Seal.) George Bakewell, Notary Public.

Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5262. In Equity.

THE WOLF BROTHERS & COMPANY, Complainant,
vs.
HAMILTON, BROWN SHOE COMPANY, Defendant.

On Accounting.

Before Henry H. Denison, Esq., Special Master.

Rebuttal Brief on Behalf of Defendant.

Paul Bakewell and Luke E. Hart, Solicitors for Defendant.
Henry S. Priest, of counsel for defendant.

Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 5262. In Equity.

THE WOLF BROTHERS & COMPANY, Complainant,
vs.
HAMILTON, BROWN SHOE COMPANY, Defendant.

Rebuttal Brief on Behalf of the Defendant on the Accounting.

On the 17th day of April, 1911, we have received from the complainant's counsel the complainant's second brief. It will be no-

ticed at once from this second brief for the complainant, in comparison with the short first brief filed by the complainant, that complainant, as we suspected, did not fully and frankly set forth its contention in its main brief but has attempted to do so by its
784 second or reply brief. Thus, it would seem, complainant in trying to reverse the proper order of things and would seem to be trying to make out its case in reply instead of in chief.

However, except for a few remarks which we will now proceed to make, we are satisfied that complainant's contention is completely met and answered by our main brief and by our reply brief.

Before taking up in detail our answer to the complainant's second or reply brief, we desire to note the following:

Confirmation of the position taken in our main and reply briefs and of the authorities therein cited and quoted from is found in the decision of the U. S. Circuit Court of Appeals for the Seventh Circuit in the case of Hires Co. vs. Consumers Co., 100 Fed. 809, 813. Like the case at bar, that was a case of "Unfair trade." Recognizing the rule as to the recovery of damages and profits in such a case: that before plaintiff can recover on the accounting he must show that purchasers of defendant's goods bought defendant's goods believing them to be the goods of the plaintiff (on the question of defendant's profits), or that plaintiff had actually lost [cust-mers] by defendant's conduct (on the question of damages), as shown by the authorities in our main brief, notably the case of Baker v. Baker, 115 Fed. 299, the Court of Appeals for the Seventh Circuit, at page 813 of 100 Fed., says:

"It will be impossible to give compensation in damages; for, from the very nature of the case, it will be wholly impracticable to ascertain the extent to which the piracy upon the complainant's right has been or may be carried, or to what extent the product of the defendant has been or may be palmed off upon the public as the product of the complainant."

Therefore, in the case of Hires Co. v. Consumers Co., 100 Fed. 813, the Court of Appeals for the Seventh Circuit, while it granted the injunction, refused to order an accounting. In the case at bar the majority of the Court of Appeals found that the "piracy" did not consist in merely using the name "American Lady" on shoes, but in the sum of the various things which it found defendant had done before the filing of the bill, and it ordered an injunction accordingly. While it also ordered "an accounting as before stated" (165 Fed. 418), that was evidently done upon the hypothesis that if complainant could show, "since the commencement of the suit," that any purchasers of defendant's "American Lady" shoes had bought those shoes believing them to be plaintiff's "American
785 Girl" shoes, plaintiff might recover the profits made by the defendant in the sale of those particular shoes; or that, if complainant could show that the complainant had lost customers by reason of the conduct of the defendant in the respects as to which infringement had been found, then, as to the loss thus shown, it might recover damages. The majority of the Court of Appeals in the case at bar allowed the accounting to go, subject to these

period of time prior to the filing of the bill and since it has expressly limited this inquiry "to the time since the commencement of this suit," it follows, we submit, that the Master must take the opinion of the Circuit Court of Appeals and the decree of the Circuit Court defining the limits of the complainant's rights in this action as the measure of its right to relief, and the Master must then determine whether or not during the second period of this litigation, "the time since the commencement of this suit," the defendant has infringed the complainant's rights as defined by the Court of Appeals by selling its American Lady Shoes "in a manner and under circumstances constituting unfair trade," to the actual deception of the purchaser in each instance. The Court of Appeals found that the complainant is entitled to relief against the defendant "in a manner and under circumstances constituting unfair trade" (165 Fed. 415), and held that the defendant should be enjoined "from using the name American Lady as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's, and from using, in connection with such name, as applied to its shoes for women, the numerals mentioned, or the catch-phrase 'With the character of the woman' or any other phrase in simulation of the phrase 'A shoe as good as its name,' and also to an accounting as before stated." It will be noticed that the court thus orders an injunction prohibiting the defendant from doing the sum of the things mentioned and that their use singly is not enjoined or disapproved by the court. In the portion of its opinion just quoted the Circuit Court of Appeals holds that the complainant is entitled "to an accounting as before stated."

787 In this statement limiting the accounting the court obviously referred to the rights of the complainant in this case as defined elsewhere in its opinion, and an examination of the opinion shows that the court there held that the complainant was entitled to be protected against the defendant "in a manner and under circumstances constituting unfair trade," and that during the first period of this litigation the defendant had transgressed that right by doing the sum of the things mentioned and that the complainant had a right to have those things discontinued, and it accordingly ordered an injunction prohibiting them in the future. As to the second period of this litigation the court held that the complainant is entitled to an accounting for what? Not for infringement of a trade mark, because the majority opinion of the Court of Appeals expressly finds that there is no trade mark involved, but an accounting for American Lady shoes sold "by the defendant in a manner and under circumstances constituting unfair trade, the essence of the rule being that one person shall not, in the sale of his goods, so act as to lead the public to believe that they are the goods of another" (165 Fed. 415), being almost exactly the same language used by the Supreme Court in deciding the case of Trinidad Asphalt Mfg. Co. v. Standard Paint Co., hereinafter referred to. We submit, therefore, that it is the duty of the Master upon this accounting to take the opinion of the Circuit Court of Appeals in this case, and

difficulties inherent in the principles and rules of law governing an accounting in a case of alleged unfair trade, leaving it to complainant to make out its case, either as to profits or damages, or as to both. On the other hand, as pointed out in our main brief and in our reply brief, the plaintiff has utterly failed to make out a case for the recovery of a penny either in the way of defendant's profits or plaintiff's damages; "the evidence upon the accounting fails to disclose that the complainant is entitled to any recovery of profits, or any except nominal damages, by reason of defendant's conduct. It failed to disclose that a single person had purchased shoes made by the defendant supposing them to be the product of the complainant, or that complainant had lost a single customer by defendant's conduct." (Baker v. Baker, 115 Fed. 299). And the difficulties in the way of recovering either profits or damages in a case of this character, commented on by the Court of Appeals for the Seventh Circuit in Hires Co. v. Consumers Co., 100 Fed. 813, have not been overcome by the complainant in the case at bar, as pointed out in our former briefs. As pointed out in our main brief, page 13 thereof, quoting from the decision of the U. S. Court of Appeals for the First Circuit in the Dictionary Case (170 Fed. 169):

"The difficulties involved in ascertaining the profits or damages under the circumstances of this case" (a case of unfair trade) "are almost insoluble."

As we have repeatedly pointed out upon this record and in our main brief, there were and are two periods of this litigation: The first being the period prior to the filing of the bill of complaint and upon which the finding and decree of the court is based, and the second period being the period since the filing of the bill of complaint and upon which the finding and report of the master must be based. Those two periods are just as distinct as if they related to wholly different cases, and it is impossible to give this case proper consideration or to arrive at a correct conclusion in regard to the issues involved unless that distinction is kept clearly in mind. It has been repeatedly held and is well settled that

786 a decree must be based upon conditions as they exist at the time of filing the suit, and that in considering a case at final hearing the court can only consider testimony relating to infringement prior to filing the suit. See Humane Bit Co. v. Barnet, 117 Fed. 316.

Therefore, in deciding this case the court had before it and considered only testimony relating to the period of time prior to the filing of the bill and the Circuit Court of Appeals in its opinion and the Circuit Court by its interlocutory decree entered thereunder expressly limited the period of this inquiry before the Master "to the time since the commencement of this suit" (165 Fed. 418). It follows, therefore, that the two periods of this litigation are absolutely distinct and that they must not be confused, and that the testimony relating to one period cannot be used or considered upon a hearing relating to the other period. Therefore, since the court could and did have before it nothing but testimony relating to the

the decree of the Circuit Court in this case, which define the complainant's rights upon this accounting to be a right to be protected from the sale of American Lady shoes "by the defendant in a manner and under circumstances constituting unfair trade, the essence of the rule being that one person shall not in the sale of his goods, so act as to lead the public to believe that they are the goods, of another," i. e., a right to be protected from the sale of American Lady shoes by the defendant under circumstances which shall lead the public to believe that those shoes are shoes of the complainant; and the Master must proceed within the limitations thus expressly laid down to take an account of American Lady shoes sold by the defendant "since the commencement of this suit," "in a manner and under circumstances constituting unfair trade," which the court defines as sales made in a manner and under circumstances which actually led the public to believe that its American Lady Shoes were the shoes of the complainant and, indeed, complainant boldly states in its first brief that it has not "attempted" to offer such proof. We submit, therefore, that it has failed to make a case upon this accounting entitling it to recover one penny from the defendant.

788 The Case [or] Trinidad Asphalt Manufacturing Company vs. Standard Paint Company referred to between Pages 61 and 68 of our main brief, affirmed by United States Supreme Court, April 10, 1911.

Since we printed our main brief, and on April 15, 1911, we received from the Clerk of the United States Supreme Court a copy of the opinion of the Supreme Court of the United States in the case of Standard Paint Company, Appellant, vs. Trinidad Asphalt Mfg. Company, being an appeal from the decision of the U. S. Court of Appeals for the Eighth Circuit. This is the case which we refer to in our main brief beginnng at the foot of page 61 and ending at page 68 thereof. The opinion of the Supreme Court is by Mr. Justice McKenna and is the unanimous opinion of the Supreme Court; it was rendered April 10, 1911. In that opinion the Supreme Court of the United States refuses to follow the dissenting opinion of Judge Sanborn, but does follow in every respect, both in the reasoning and in the conclusions, the majority opinion of the Court of Appeals as found in 163 Fed. 977. The Supreme Court expressly holds that the complainant has no trade mark and no exclusive right in the name "Ruberoid." It also finds, as did the majority of the Court of Appeals in that case, that the defendant was not guilty of unfair competition in business in using the word "Rubero," the majority of the Court of Appeals having found (see page 64 of our main brief) that on the labels or the wrappers containing defendant's "Rubero" appeared plainly printed the name of the defendant. The concluding paragraph of the opinion of the Supreme Court of the United States in said Trinidad case, affirming the decision of the majority of the Court of Appeals in 163 Fed. 977, is in these pertinent and significant words:

"We think the evidence supports the conclusion of the Circuit Court of Appeals. The only imitation by the Asphalt Company of the roofing of the Paint Company is that which exists in the use of the word 'rubbero,' and this only by its asserted resemblance to the word 'ruberoid.' *To preclude its use because of such resemblance would be to give to the word 'ruberoid' the full effect of a trade-mark, while denying its validity as such.* It is true that the manufacturer of particular goods is entitled to protection of the reputation they have acquired against unfair dealing, whether there be a technical trade-mark or not, *but the essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another.* Elgin National Watch Co. v. Illinois Watch Co., supra. Such a wrong is not established against the Asphalt Company. *It*
789 *does not use the word 'rubero' in such a way as to amount to a fraud on the public. Decree affirmed.*" (Italics ours.)

Thus the Supreme Court in its very last expression relative to the nature of the action of alleged unfair trade reaffirms the following proposition- which lie at the very foundation of the action of unfair trade:

(1) That "the essence of such a wrong" (unfair trade) "consists in the sale of the goods of one manufacturer or vendor for those of another."

(2) That the defendant in the use of the name "Rubero" (complainant having no exclusive right to the name of Ruberoid") had not used that word in such a way as to amount to a fraud on the public (the defendant in the sale of its goods having clearly indicated that the goods emanated from the defendant by plainly printing the name of the defendant on the labels attached to the wrappers of its goods, as shown by the decision of the Court of Appeals quoted from at page 64 of our main brief).

(3) That to preclude the defendant from using the name "Rubero" because of its alleged resemblance to "Ruberoid" would be to give to the word "Ruberoid" the full effect of a trade mark while denying its validity as such.

It seems to us that this decision of the Supreme Court of the United States in this Trinidad case rendered as recently as April 10, 1911, taken in the light of what the majority of the Court of Appeals in the case at bar actually decided, supports the contention made in our main brief in every particular. As pointed out by us in our main brief in our analysis of the decision of the majority of the Court of Appeals in the case at bar, the majority of the Court of Appeals in the case at bar expressly held: That complainant had no trade mark or exclusive right in the name "American Girl," and that therefore defendant could not be enjoined from using the name "American Lady" as applied to its shoes; that if it had been only a question of the defendant using the name "American Lady" on its shoes the majority of the Court of Appeals in the case at bar would not have granted the complainant any relief; that it was only because the defendant was found to have done, before the filing of the bill, the sum of the various things enumerated in the early part of the majority opinion of the Court of Appeals, that, on the ground of unfair com-

petition in business, the majority of the Court of Appeals was disposed to grant the complainant relief, as to the various things done by the defendant in unfair trade; that the order for the in-
790 junction and the accounting (see last page of the majority opinion of the Court of Appeals in the case at bar) is not in the disjunctive but in the conjunctive, enjoining the defendant and ordering an accounting not merely in respect to marking the name "American Lady" on shoes, when said shoes as sold were not accompanied with other matter clearly indicating that they were of the manufacture of the defendant, but from doing the other various things mentioned.

Therefore, in the light of this recent decision of the Supreme Court of the United States in the Trididad case, we find an exact analogy between the facts in that case and the facts in the case at bar, so far as the use by the defendant in that case of the name "Rubero" and the use by the defendant in the case at bar of the name "American Lady" are concerned. The contention of the complainant in the case at bar that under the circumstances disclosed by the proofs on the accounting the complainant is entitled to all the profits made by the defendant in the sale of its shoes marked with the name American Lady, notwithstanding the fact that as to each pair of these shoes sold by the defendant, either as to the shoes themselves or as to the cartons in which every pair of said shoes was sold, they were accompanied with matter clearly indicating that the shoes were of the manufacture of or emanated from the defendant, is absolutely untenable; and to paraphrase the language of the United States Supreme Court in the Trinidad case, "would be to give to the name 'American Girl' the full effect of a trade mark, while denying its validity as such." Also, to yield to the complainant's contention and to allow the complainant to recover profits on any of the sales of American Lady shoes covered by the accounting, in the absence of specific proof as to any of such sales that defendant's American Lady shoes had been sold to the purchasers as and for the American Girl shoes of the complainant, to the deception of the purchaser, is to ignore the rule again affirmed by the Supreme Court of the United States in the said Trinidad case, namely: that in a case of alleged unfair trade "the essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

Therefore, we again repeat that the decision of the majority of the Court of Appeals for this circuit in the Trinidad case (163 Fed. 977) discussed in our main brief between pages 61 and 68, which opinion was affirmed by the Supreme Court of the United States on April 10, 1911, is, we respectfully submit, a conclusive confirmation of the correctness of the position taken by us in our main brief;
791 and that in the light of the sound principles there laid down, affirmed by the Supreme Court of the United States and applicable to a case of alleged unfair trade, on the proofs on this accounting, complainant is not entitled to recover a penny in the way of profits or damages.

Specific Answer to Complainant's Answering Brief.

As we knew must be the case (for we have made a thorough examination of all the decisions), the complainant's counsel in its brief served upon us April 17, 1911, is not able to cite a single decision in point and not overruled of any Federal Court in support of the contention that complainant is entitled to recover profits on defendant's American Lady shoes sold by defendant since the filing of the bill.

The case at bar is in the Federal Court and must be governed by the rule in respect to accountings in cases of unfair trade, as that rule has been fixed by the Federal decisions. The last decision of the U. S. Supreme Court—as recent as April 10, 1911—in the case of Standard Paint Co. v. Trinidad Asphalt Mfg. Co., as pointed out in the early part of this brief, completely supports the defendant's contention. Such federal decisions as are found in quotations from the Massachusetts case of Regis v. Jaynes & Co., 191 Mass. 245, 248, cited by complainant at pages 8 and 9 of its brief, are either not in point (relating to cases of strict trade marks or not relating to accountings at all) or have been overruled, as shown in our main brief.

The complainant's counsel are not able to cite a single opinion of any U. S. Circuit Court of Appeals in any of the nine circuits of the United States—much less are they able to cite a single decision of the U. S. Supreme Court—in support of their contention.

As to the Massachusetts case of Regis v. Jaynes & Co., 191 Mass. 245, 248, cited at page 8 of complainant's answering brief, that is an eccentric decision of a state court and is contrary to the rule and uniform decisions of the Federal Courts.

The fact that it is a decision of the State Court and one which is not in harmony with the decisions of the Federal Courts should be sufficient of itself to show that it is not an authority in the case at bar, the case at bar being in the Federal Court.

Also, as will be noticed, this case of Regis v. Jaynes, 191 Mass., was a strict trade-mark case.

792 We believe that no lawyer who had given serious study to the philosophy of the law of trade marks and of unfair trade attaches any weight to that Massachusetts case; for a careful study of that decision clearly shows that the court which delivered that opinion failed utterly to apprehend the fundamental distinction between cases of strict trade marks and cases of unfair trade. We know that that decision has been severely criticized by those whose opinions bear the stamp of authority. For instance, in the Harvard Law Review for June, 1907, No. 8 of Vol. XX, pages 620 to 633, in an exhaustive article and analyses of decisions, by Guy Cunningham and Joseph Warren, that Massachusetts case is shown to be contrary both to reason and authority, and especially to be contrary to the rule in the Federal Courts. For the convenience of the Master we here republish that entire article from the Harvard Law Review, which is as follows:

A Phase of Accounting in Trade-mark Cases.

Protection against unfair dealing by imitation of trade names, marks, or symbols is now afforded the injured trader on one of two grounds,—either by the judicial recognition of his technical trade-mark to which he may have an exclusive right in connection with a particular class of goods, or by the protection of names, marks, or signs to which he has no such exclusive right, on the ground of unfair competition.[1] It is the "good will" of the merchant, or the right to have the benefit of the reputation of his products, which is thus guarded by the courts.[2]

In Elgin National Watch Co. v. Illinois Watch Co.,[3] Chief Justice Fuller defines thus the technical trade-mark:

"The term has been in use from a very early date, and generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but as its office is to point out distinctly the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose."

Within the field of marks which are capable of exclusive ownership a trader may become entitled to the exclusive use of a name or
*sp*mbol, provided he can show priority of ownership and con-
793 tinuous use thereof associated with a particular class of goods.[4] And his rights, so far as an injunction is concerned, are to be protected irrespective of the innocent character of the defendant's acts.[5] In cases of unfair competition the courts in England logically enough do not require fraud on the part of the defendant as a necessary element of a complainant's cause of action.[6] But fraud seems to be a necessary prerequisite in the United States courts.[7] The remedy in trade-marks cases may be by action at law or in equity; in cases of unfair competition it may be in equity; in cases of trade-mark the injunction is absolute against the use of the offending mark;[8] in the other class of cases it is against the use of

[1]For a discussion of the relationship between the law of trade-marks and of unfair competition, see 10 Harv. L. Rev. 275, and 12 ibid. 243.

[2]George G. Fox Co. v. Glynn, 191 Mass. 344, 349.

[3]179 U. S. 665, 673.

[4]Gilman v. Hunnewell, 122 Mass. 139.

[5]Regis v. Jaynes, 185 Mass. 458, 460.

[6]Millington v. Fox, 3 Myl. & C. 338, 352.

[7]Elgin Nat'l Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 674; Howe Scale Co. v. Wyckoff, 198 U. S. 118; French Co. v. Saratoga, 191 U. S. 427, 440. And see W. R. Lynn Shoe Co. v. The Auburn-Lynn Shoe Co., 100 Me. 461; 16 Harv. L. Rev. 272.

[8]Bass v. Feigenspan, 96 Fed. Rep. 206.

the complainant's marks without signs sufficiently distinguishing to prevent confusion of the two commodities in the public eye.[1]

If the aggrieved trader resorts to a court of equity and is held entitled to an injunction to protect him against infringement of his trade-mark or against unfair competition, he is in the United States, in most cases, entitled to an account of damages and profits to be estimated by a master in chancery. Generally speaking, the successful complainant can recover the damages sustained by reason of the wrongful user and the profits earned by the defendant through such wrongful user.[2]

If, however, the defendant's acts were purely accidental, without any deliberate intention to deceive the public, an account of profits may not be ordered.[3]

It is the purpose of this article to discuss a rule relating to an accounting of profits affirmed by the Supreme Court of Mas-
794 sachusetts in a recent trade-mark case. This rule is found in the case of Regis v. Jaymes.[4] The plaintiffs in that case had built up since 1877 a small business in the sale of dyspepsia tablets in boxes marked "Rex." They began advertising in 1898, and the business was confined to Haverhill, Mass., and surrounding towns. The defendants were retail druggists, and began in Boston in 1903 advertising on a large scale "Rexall Dyspepsia Tablets" in ignorance of the plaintiff's rights. The defendants' labels, except for the similarity of names, differed from those of the plaintiffs, but both remedies consisted of two sorts of pills to be taken in connection with each other. The defendants did a large business, but almost entirely in Boston and so substantially outside the territory of the plaintiffs. There was no fraud involved except that the defendants continued to sell their tablets after notice from the plaintiffs of infringement of their trade-mark "Rex"; and this continuance caused absolutely no diversion of the plaintiffs' business. The plaintiffs obtained an injunction against the use by the defendants of the name "Rexall Dyspepsia Tablets" in connection with the sale of their pills.[5] A supplemental bill was filed praying for damages and profits for infringement since the filing of the original bill. The case was recommitted to the master; and at the hearing before him the defendants offered to prove that no actual deception or mistake had occurred by reason of the defendants' acts, and that there had been no sales of the defendants' tablets as and for the goods of the plaintiffs during the period covered by the accounting. The master ruled

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[1]Reddaway v. Banham, [1896] A. C. 199.

[2]Saxlehner v. Eisner & Mendelson Co., 138 Fed. Rep. 22; Walter Baker & Co. v. Slack, 130 Fed. Rep. 514; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 207.

[3]Elgin Nat'l Watch Co. v. Illinois Watch Co., 179 U. S. 665, 674; Saxlehner v. Siegel-Cooper Co., 179 U. S. 42; N. K. Fairbank v. Windsor, 124 Fed. Rep. 200; Ellen v. Slack, 24 Sol. J. 290; Moet v. Couston, 22 Beav. 578.

[4]191 Mass. 245.

[5]Regis v. Jaynes, 185 Mass. 458.

that both these offers were immaterial and that the defendants were liable for all profits. The defendants alleged exceptions. The unusual question was, therefore directly presented to the Supreme Court of Massachustts, whether, in an accounting in a trade-mark case, the defendant cannot show in relief of himself that he made no sales by reason of the resemblance between the two labels, and that there had been no confusion of the competing commodities in the public mind.[1]

Judge Sheldon, who expressly dealt with the case apart from the trade-mark statute in Massachusetts,[2] found sufficient fraud on the part of the defendants in their continuing infringement after the filing of the original bill to satisfy the requirements of Saxlehner v. Siegel-Cooper Co.[3] and other cases.[4] He overruled the defendants' exceptions, and held that a defendant must account for all profits earned by the infringing trade-mark, irrespective of the ques-
795 tion whether the purchasers had in fact bought the goods of the plaintiff believing them to be the goods of the defendant. To the correctness of this ruling we now address ourselves.

The situation was certainly an unusual one. In the ordinary accounting, from the nature of the subject-matter, it is as difficult for the plaintiff to show that any one purchaser from the defendant would have bought the plaintiff's goods had he not been misled into buying the defendant's, or that any one purchaser actually bought the defendant's goods as and for those of the plaintiff, as it is for the defendant to show the contrary. But here the small local character of the "Rex" business as compared with the infringing "Rexall" business enabled the defendants to show affirmatively what is rarely possible. Ought not the infringer to be allowed the benefit of this proof?

Let us turn to the authorities in Massachusetts, in this country, and in England. In Massachusetts, certainly, the Supreme Court was not fettered by any previous judicial expression in favor of the complainants' position.[5] The first case before the full bench

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[1]Regis v. Jaynes, 191 Mass. 245.

[2]Mass. Rev. Laws, c. 72, § 9.

[3]179 U. S. 42.

[4]Supra.

[5]Outside the present case, there is no trade-mark or unfair competition case in Massachusetts which has reached the full bench in which an accounting has been completed. Up to 1878 there was no decree for damages or profits in a trade-mark suit in equity in any case before the full bench.

Suits in equity to rotect symbols, in which the defendants succeeded and in which, of course, no question of accounting arose, are, Ames v. King, 2 Gray (Mass.) 379; Rogers v. Taintor, 97 Mass. 291; Emerson v. Badger, 101 Mass. 82; Hallett v. Cumston, 110 Mass. 29; Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69; Gilman v. Hunnewell, 122 Mass. 139; Magee Furnace Co. v. Le Barron, 127 Mass. 115; Connell v. Reed, 128 Mass. 477; Warren v. Warren Thread Co., 134 Mass. 247; Chadwick v. Covell, 151 Mass.

in a trade-mark suit in which an injunction and accounting were ordered was Lawrence Mfg. Co. v. Lowell Mills.[1] In 1878 the court below made such a decree for injunction, damages, accounting, and costs. This was affirmed by the full bench in 1880. There is nothing in the case to show that any profits were ordered by the full bench to be paid to the plaintiff, which were not profits made from customers who were deceived by the similarity between the defendant's mark and that of the plaintiff.

Lawrence v. Hull[2] was dismissed shortly in the present case on the ground that it raised none of the questions before the court. It was a bill in equity based on the statute[3] to restrain the unlaw-

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190; American Order of Scottish Clans v. Merrill, 151 Mass. 558; Weener v. Brayton, 152 Mass. 101; Covell v. Chadwick, 153 Mass. 263; Burt v. Tucker, 178 Mass. 493; Garst v. Hall & Lyon Co., 179 Mass. 588; Dover Stamping Co. v. Fellows, 163 Mass. 191; Martin v. Bowker, 163 Mass. 461; Crossman v. Griggs, 186 Mass. 275; Lothrop Co. v. Lothrop, Lee & Shepard Co., 191 Mass. 353; Messer v. The Fadettes, 168 Mass. 140.

Actions at law in which the defendant succeeded: Thomson v. Winchester, 19 Pick. (Mass.) 214; Marsh v. Billings, 7 Cush. (Mass.) 322; Chase v. Mayo, 121 Mass. 343.

In the following cases, although an injunction was granted restraining the use of plaintiff's symbols, no accounting of profits was ordered: Hoxie v. Chaney, 143 Mass. 592; Russia Cement Co. v. Le Page, 147 Mass. 206; International Trust Co. v. International Loan & Trust Co., 153 Mass. 271; Noera v. Williams Mfg. Co., 158 Mass. 110; American Waltham Watch Co. v. U. S. Watch Co., 173 Mass. 85; New England Awl Co. v. Marlborough Awl
796 Co., 168 Mass. 154; Flagg Mfg. Co. v. Holway, 178 Mass. 83; Hildreth v. McDonald Co., 164 Mass. 16; Viano v. Baccigalupo, 183 Mass. 160; Bowman v. Floyd, 3 Allen (Mass.) 76; Samuel v. Spitzer, 177 Mass. 226; Cohen v. Nagle, 190 Mass. 4; George G. Fox Co. v. Glynn, 191 Mass. 344.

Commonwealth v. Jacob Rozen, 176 Mass. 129; Commonwealth v. Abe Strauss, 188 Mass. 229; and Commonwealth v. R. I. Sherman Mfg. Co., 189 Mass. 76, were criminal proceedings under statute and have no application to this case.

In Frank v. Sleeper, 150 Mass. 583, an injunction was granted and the case sent to a master to assess damages. Nothing was said as to profits. The case is still pending in the Supreme Court; and no final decree has been entered.

New England Awl Co. v. Marlborough Awl Co. 168 Mass. 154 was the case of an imitation of a label. The Supreme Court gave the plaintiff an injunction and sent the case back to the Superior Court, where accounting was waived.

[1] 129 Mass. 325.

[2] 169 Mass. 250.

[3] Mass. Pub. Stat., c. 76, § 6. "No person carrying on business in this commonwealth shall assume or continue to use in his business the name of a person formerly connected with him in partnership,

ful use of the plaintiff's name in a partnership designation. The complainant secured his injunction, but the court went on to say:[1]

"We see no ground for giving the plaintiff profits. The plaintiff has not been competed with unfairly, and his loss bears no relation to the defendants' gains. He ought not to recover more than compensation for his loss, even if the reasoning of the Supreme Court of the United States should seem to suggest that possibility in patent cases. Tilghman v. Proctor, 125 U. S. 136, 148. Compare Root v. Railway Co., 105 U. S. 189, 214, 215."

There seems to be nothing in the statute under which the proceeding in Lawrence v. Hull was brought, which should differentiate the principles of accounting there binding from those in a proceeding to protect a common law or statutory trade-mark. This language above quoted seems to recognize a difference between the rule of accounting in a patent case, under the express pro-
797 visions of the United States Statutes, and an accounting in cases closely allied to the present. Lawrence v. Hull deserves more consideration than the Supreme Court in the present case gave it.

The Massachusetts court, therefore, when the principal case was presented for its consideration, was dealing with an open question, except in so far as the defendants' position was favorably affected by Lawrence v. Hull.

Outside of Massachusetts there are but few cases in the United States involving this point. Such a one, however, seems to be Baker v. Baker[2] in which the court says:[3]

"The evidence shows that the substantial grievance of the complainant is found in the conduct of William H. Baker at the inception and early in the history of his competition. This was remedied as to the future by the preliminary injunction in the first action. That injunction gave the full measure of relief to which the complainant, under the circumstances of the case, was entitled, except such a recovery for profits and damages as he might be found entitled to. The evidence upon the accounting failed to disclose that the complainant was entitled to any recovery of profits, or any except nominal damages, by reason of the defendant's conduct. It failed to disclose that a single person had purchased goods marketed by the defendant, supposing them to be the product of the complainant, or that the complainant had lost a single customer by the defendant's conduct."

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or the name of any other person, either alone or in connection with his own or with any other name or designation, without the consent in writing of such person or of his legal representative." § 7. "The supreme judicial court may restrain by injunction the use of trade-marks or names in violation of the provisions of this chapter."

[1] P. 252.

[2] 115 Fed. Rep. 297.

[3] P. 299.

Therefore the complainant recovered only nominal damages.[1]

There is a class of cases holding that the defendant cannot prove in reduction of profits what proportion is due to the commodity itself and what to the trade-mark, by showing that he could have sold other like goods to other people under a different mark.[2] These authorities are not decisive of the position taken by the Supreme Court of Massachusetts in the present case, though their reasoning tends to support it.

Outside the federal courts the Supreme Court of Massachusetts finds in the United States substantial support in a case in Kentucky.[3] There the defendants closely imitated the plain-
798 tiff's plows down to minute details, except the trade-mark. Although the complainant had sustained no damage, the court ordered an injunction and accounting of all profits on the ground that the defendants were endeavoring to palm off their plows as the plows of the plaintiff. Real intent to commit fraud existed in this case, and the court emphasized this in its decision:[4]

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[1] The case of N. K. Fairbank Co. v. Windsor, 118 Fed. Rep. 96, tending the other way, was overruled in 124 Fed. Rep. 200. Paul, Trade Marks ¶ 326, relies on this overruled case and on Lever v. Goodwin, 36 Ch. D. 1 (see infra), for his statement,—"Profits recoverable in equity for unfair competition are governed by the same rule as in cases for infringement of trade-marks, and are not limited to such as accrue from sales in which it is shown that the customer is actually deceived, but include all made on goods sold in the simulated dress or package, and in violation of the rights of the original proprietor." And see 10 Harv. L. Rev. 275, 298. See Little v. Kellam, 100 Fed. Rep. 353; Liebig's Extract Co. v. Walker, 115 Fed. Rep. 822, 828; La Republique Francaise v. Hegeman, 116 Fed. Rep. 1021; Luddington Novelty Co. v. Leonard, 127 Fed. Rep. 155, 157; Williams v. Metcalf, 106 Fed. Rep. 168, 172.

In Sawyer v. Kellogg, 9 Fed. Rep. 601, there is general language that a defendant must account for all profits. But the particular point now under discussion was not presented to the court, nor did it indicate how it would decide it.

But in Atlantic Milling Co. v. Rowland, 27 Fed. Rep. 24, 25, the court said extra-judicially: "It is argued that the evidence does not show that the orator would have made this profit if the defendants had not. This might be true, and not affect the rights of the parties. If the defendants made profits by their invasion of the orator's rights, the orator is entitled to them whether the same profits would have been made by the orator or not, and not to any more if they would, for the same profits could not be made by both."

[2] Benkert v. Feder, 34 Fed. Rep. 534 (where there was undoubtedly confusion, as the defendant marked his goods with the complainant's own name); Saxlehner v. Eisner, 138 Fed. Rep. 22; Graham v. Plate, 40 Cal. 593; Hopkins, Trade-Marks, 2 ed. 383.

[3] Avery & Sons v. Meikle & Co., 85 Ky. 435.

[4] P. 446.

"In this case it has been adjudged that the imitation was made with the design on the part of the appellees to make profit by the deception, and we perceive no reason why the appellants should not have the profits if they claim nothing more."[1]

The court was clearly wrong in granting the injunction at all, which somewhat discredits the case. The defendants had a clear right to imitate the complainant's plows, provided they did not imitate the trade-mark and took reasonable means to distinguish the two makes. The court could properly enjoin the sales of the plows unless marked with a distinguishing characteristic, but the relief should have gone no further.

The correct rule in such a case is that adopted in Flagg Mfg. Co. v. Holway.[2] In that case the defendants imitated the plaintiffs' zither closely, except the trade-mark. The Supreme Court held that the plaintiffs were entitled to an injunction restraining the defendants from selling zithers not more plainly marked with their own name, or some other distinguishing mark; no accounting was granted, although asked for.

Avery & Sons v. Meikle & Co.[3] was cited with approval in the recent case of W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.,[4] not cited by the court in the principal case. It is probable, though not entirely clear from the report, that in the Main case all profits were the fruit of the defendant's deception. The approval given to the far reaching Kentucky rule, that profits recoverable in equity in the cases of trade-mark or of unfair competition are not limited to such

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[1] See also Beebe v. Tolerton & Stetson Co., 117 Ia. 593. This was an action under a statute allowing profits for a forged label. On p. 597 the court said: "The statute can only be upheld on the theory that these profits are either compensatory or penal in character. If compensatory, the plaintiff must show that he or the association he represents has suffered some damage, and there is no pretense of any such proof in this case."

El Modello Cigar Mfg. Co. v. Gato, 25 Fla. 886. The bill alleged that the defendant had palmed off their cigars as and for those of the plaintiff, and that the defendants had deprived the plain-
799 tiff of profits. The defendants demurred that damages were not recoverable in excess of profits. No question of profits was involved, though the court said by way of dictum that all profits were recoverable. But in view of the allegations of the bill admitted by demurrer, none of this language is in point.

Drummond Tobacco Co. v. Tinsley Tobacco Co., 52 Mo. App. 10, 31. Accounting was here denied on the ground that it was difficult to determine the exact data which formed the elements of such an account.

Stonebraker v. Stonebraker, 33 Md. 252, 263; Stagg Co. v. Taylor, 95 Ky. 651, 669.

[2] 178 Mass. 83.

[3] 85 Ky. 435.

[4] 100 Me. 461, 479.

as accrue from sales where it is shown that the customer is deceived, is therefore, in all likelihood, obiter dictum.

On the other hand, in Clark Thread Co. v. Williarm Clark Co.[1] two manufacturers were entitled to a mark which the defendant was enjoined from infringing. The court did not hold the defendant liable to each owner separately for all profits earned from wrongful sales, or to each owner for half the profits. It said:

"Its responsibility to the complainant should be confined to such profits as were diverted from the complainant, and such damages as the complainant otherwise sustained, leaving the defendant answerable to the Mile-End Company for the profits unlawfully diverted from it."

Whatever general language in the earlier federal cases there can be found against the rule favoring the defendants, must be considered as superseded by Baker v. Baker.[2]

In other American jurisdictions the rule favoring the plaintiffs receives substantial support from the somewhat doubtful case
800 of Avery v. Meikle,[3] and discredit from Clark Thread Co. v. William Clark Co.[4] To the other United States authorities out-side Massachusetts not much importance can be attached.

The English authorities are not entirely clear.[5] The later cases throw some doubt on the earlier ruling which favored the plaintiffs' contention in the case under discussion. In Edelsten v. Edelsten,[6] the vice-chancellor in the court below refused to limit the account of profits required of an infringer in a trade-mark case on the ground that there was no proof of deception of the public. This order was affirmed shortly in the upper court. Except in so far as the defendant did not offer actual proof negativing deception, this case is authority for Judge Sheldon.

In Ford v. Fo-ster,[7] accounting was allowed of profits earned after the filing of the bill. No point was made by counsel that the defendant's liability should be reduced in the absence of proof of actual deception. The question was very shortly dealt with.

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[1]56 N. J. Eq. 789.

[2]115 Fed. Rep. 297.

[3]Supra.

[4]56 N. J. Eq. 789.

[5]In England the plaintiff stands in a better position in patent, trade-mark, and unfair competition cases than in the United States. In patent litigation in England the defendant may be compelled to destroy the infringing article or deliver it to the plaintiff. Betts v. De Vitre, 34 L. J. Ch. 289; Lancashire Explosives Co. v. Roburite Explosive Co., 12 R. P. C. 470.

In trade-mark and unfair competition cases in England it is unnecessary to prove fraud on the part of the defendant to obtain an injunction. Millington v. Fox, 3 Myl. & C. 338, 352; Cellular Clothing Co. v. Maxton, (1899) A. C. 326, 334, 335.

[6]1 De G. J. & S. 185.

[7]L. R. 7 Ch. 611.

But there seems to be some doubt indirectly cast on these rulings by the more recent case of Hodgson & Simpson v. Kynoch, Ltd.[1] The court said:[2]

"I grant an injunction restraining the defendant company, its servants and agents, from selling or offering for sale, any of its soaps in any of the four wrappers above mentioned in their present forms with lions' heads upon them, or so as to induce the belief that any of such soaps were manufactured by the plaintiffs. Then, though no actual case of a purchaser being misled into buying the defendants' instead of the plaintiffs' soap has been proved before me, I think if the plaintiffs insist upon more than nominal damages and
801 ask for an inquiry as to damages, I must grant such an inquiry, reserving the costs of it."

NEVILL, Q. C.: "May we have, instead of an inquiry as to damages, an account of profits?"

ROMER, J.: "No certainly not. I think it would be most unjust in this case."[3]

The English cases bring out another important point. If goods are sold in a deceptive dress, the infringing manufacturer is not helped by selling only to jobbers who knew of the fraud. This fact makes the jobbers equally guilty, but does not diminish the moral or legal guilt of the manufacturer. As to him the fact that the jobbers bought because of the opportunity for fraud given them only shows that the manufacturer's profits were due to the wrongful dress and not to the quality of his goods, and that therefore he should not be allowed to retain such wrongful profits. And so it was held in Lever v. Goodwin,[4] where Cotton, L. J., said:[5]

"The defendants, as I understand, do not sell anything to retail purchasers; what they sell to middlemen, that is to say, to people who purchase from them as wholesale merchants, and who are going to sell it by retail; and the complaint against the defendants is this: 'You have dressed up your soap in such a dress that those middlemen to whom you sell it are enabled, by its having that deceptive dress upon it, to sell it to the ultimate purchasers as the soap of the plaintiffs.' The profit for which the defendants must account is the profit which they have made by the sale of soap in that fraudulent dress to the middlemen. It is immaterial how the middlemen deal

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[1] 15 R. P. C. 465.

[2] P. 475.

[3] And see Magnolia Metal Co. v. Atlas Metal Co. 14 R. P. C. 389; Sanitas Co. Ltd. v. Condy, 4 R. P. C. 530.

Kerley, Trademarks, 2 ed., 425: "But if the court is satisfied that the defendant's goods have not, to any substantial extent, been passed off as those of the plaintiff, although infringing or deceptive marks have been used upon them the plaintiff ought not, it is submitted, to have any option. To allow him to take the profits made by the defendant's trade in goods which were in fact sold without deception would be unjust."

[4] 36 Ch. D. 1.

[5] P. 7.

with it. If they find it for their benefit not to use it fraudulently, but to sell the soap to the purchasers from them as Goodwin's, that cannot affect the question whether the sale by the defendants to those middlemen of this soap in a fraudulent dress was a wrongful act. It still remains a wrongful act, because it put into the hands of the middlemen the means of committing a fraud on the plaintiffs
802 by selling the soap of the defendants as the soap of the plaintiffs."[1]

It is obvious that the case would be entirely different if the jobber bought in ignorance of the resemblance complained of and no user was ever deceived, because the wrongful acts would not have led to any sales, and none of the defendant's profits would have been due to the wrongful acts.

On the one side are Avery v. Meikle;[2] W. R. Lynn Shoe Company v. The Auburn-Lynn Shoe Co.;[3] Eldesten v. Eldesten;[4] Ford v. Foster;[5] on the other, Lawrence v. Hull;[6] Baker v. Baker;[7] Clark Thread Co. v. The William Clark Co.;[8] Hodgson v. Simpson & Kynoch, Ltd.[9] These are the closest authorities for and against the principal case.

It is respectfully submitted that the case was wrongly decided. No court has a right to confiscate the defendant's property to make a present to the plaintiff. The doctrine of exemplary damages is repudiated in Massachusetts;[10] and courts of equity in particular are supposed to act on the principle that equity abhors a forfeiture.[11] Accordingly, some just reason must be found which makes it equitable that the plaintiff should receive the defendant's profits. In the ordinary case of infringement of a trade-mark the justice of such a payment is easily seen. The defendant has attempted to obtain and has obtained the benefit of a part of the plaintiff's good will by so marking his goods that the public buy on the strength of the good reputation of goods bearing the mark. The infringing goods being accordingly sold by virtue of the plaintiff's good reputation and not by reason of their own merit, it is certainly more reasonable to say that the profits are the property of the plaintiff than of the defendant. This is the only justification for giving the plaintiff the profits made by the defendant. The principal case falls entirely outside this rule. This [plaintiffs] had no good will of value in Boston, and the public did not buy the infringing goods on the plaintiffs' good will, of which they had never heard, but did buy on the defend-

[1] So Saxlehner v. Apollinaris Co., 14 R. P. C. 645, 657. Mr. Justice Kekewhich doubted the correctness of this ruling, but felt bound by it.

[2] 85 Ky. 435.

[3] 100 Me. 461.

[4] 1 De G. J. & S. 185.

[5] L. R. 7 Ch. 611.

[6] 169 Mass. 250.

[7] 115 Fed. Rep. 297.

[8] 56 N. J. Eq. 789.

[9] 15 R. P. C. 465.

[10] Barnard v. Poor, 21 Pick. (Mass.) 378.

[11] Bispham, Equity, 3 ed., 238.

803 ants', which was well known. Accordingly, the profits, being due to the defendants' reputation and not to the plaintiffs', are properly the property of the defendants, and the court should not confiscate them and give them to the plaintiffs.

The plaintiffs are amply protected by injunction against any future confusion, and ex hypothesi there has been none in the past. Had the defendants never used the mark held to resemble that of the plaintiffs, the latter would have been in precisely the same commercial position as they actually were. None of the defendants' customers had the plaintiffs in mind in making their purchases. Not one cent of the defendants' profits was made from the plaintiffs' mark. Rulings that the defendant should account for profits where there has been actual diversion of business, or where the purchaser has confused the competing marks, even though that purchaser would not have been a customer of the plaintiff had the defendant not crossed his path, are fair enough, because in both of these cases the defendant's profit comes out of the plaintiff's reputation. But it seems completely unjustifiable to hold that the money of the defendant's customers, who never heard of the plaintiff or of the plaintiff's goods, and who bought on the good reputation of the defendant's goods, rightfully belongs to the plaintiff.

The rule adopted in this case is not supported by the analogy of bills for the infringement of patents. The complainant in patent accountings has cast upon him the burden of proving affirmatively what profits the defendant derived from infringement. This sum may be nothing, or a part, or the whole of the profit derived from the sale of the infringing machine or product, according as the plaintiff succeeds or fails in proving that a part, or the whole of such profits was due to the patented invention.[1] In the case of sales of patented products ordinarily the entire profits must be accounted for, because it must be that the patented product is different from any other article or it would not be patentable; and therefore it is hard to escape the inference that the profits from selling it all proceeded from the patented invention. But it has never been held that the defendant is precluded from proving that the patented invention had no effect on his profits. For instance, if the defendant should contract to deliver a certain number of bolts suitable for certain work, and should supply patented bolts when unpatented bolts equally good for the particular purpose could have been supplied under the contract, there is no doubt the plaintiff would not
804 be entitled to any of the profits from such a sale, although if the contract had required the use of the patented bolts the defendant would have been obliged to pay his entire profits. The distinction is not technical. It is simply a matter of common sense. In the first case the defendant got no advantage whatever by the infringement, and in the latter case his entire profit was due to it; and so in the first case he should pay nothing, and in the second case all. It is hard to see, therefore, how the court, in the principal case, could adopt the following analogy:

[1]Garretson v. Clark, 111 U. S. 120.

"If any analogy from patent cases is to be adopted, we ought rather to follow the rule that where the infringing machine or device derives its entire commercial value from the patented feature or improvement, then the patentee is entitled to the entire profits realized from its sale."

This remark refers to the well-known rule of patent law, that where no apportionment is possible, because the infringing feature dominates the whole machine, the defendant must account for all profits. This rule, in other words, governs only in a case where the defendant is unable to apportion. Why the court thought that, in a trade-mark case where the defendants offered to prove affirmatively that none of the value of these infringing goods was due to the resemblance to the plaintiffs' mark, it ought to adopt the rule of patent law laid down for cases where plaintiff proves affirmatively that the entire value of the infringing goods is derived from the patented feature, is not apparent. The direct contrary seems to be the natural conclusion. Under the view held by the court in this extract, if an unfortunate defendant happened by one label to infringe several trade-marks, he would be obliged to account to the owner of each for the full profits derived from the sale of goods bearing that label. He would have no chance, as he would if the rule of the patent law were adopted, to apportion the profit due to each feature of the infringing label, and to account to each owner only for the profits derived from the use of that feature which involved his mark.

It is interesting to note that, not content with giving the plaintiffs all the money actually earned by the defendants, no part of which was earned by the aid of any resemblance to the plaintiff's trade-mark, the court gave in addition a fictitious profit by refusing to permit the defendants to charge as a part of the expense of the business the fair proportion of rent, heat, light and clerk hire, on the ground that the defendants could not prove that these charges
805 would have been less if the infringing goods had not been sold.

The court, in so doing, directly rejected the doctrine of the carefully considered Tremolo case in the Supreme Court of the United States,[1] and established an artificial profit as the profit to be paid instead of the real profit figured as any business man would figure it.

It is suggested that a rule which requires the plaintiff to prove what profits are derived from confusion and what are not, is too harsh; that this would place a burden on injured merchants which they could not sustain. Yet in patent cases the complainant is obliged to apportion what profits are due to the patented device and what to other elements of the infringing machine.[2] This burden was so difficult in the case of design patents[3] that Congress had to be resorted to for relief which the courts could not afford.[4] The

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[1]23 Wall. (U. S.) 518.

[2]Garretson v. Clark, 111 U. S. 120, 121.

[3]See Dobson v. Hartford Carpet Co., 114 U. S. 439.

[4]Act of Feb. 4, 1887, 24 U. S. Stat. at L. 387, 388.

difficulty that a plaintiff may have in proving his case has not been considered in other branches of the law an adequate reason for relieving him of that burden.[1] Such an argument, at best, only affects the burden of producing proof, not the burden of establishing the case after the proof is all in. Were this burden shifted by allowing the plaintiff to recover all profits, unless the defendant can show affirmatively that none were the result of deception, this hardship on the plaintiff would no longer exist. However, it is respectfully submitted that the plaintiff should be compelled to prove his case in accordance with rules of just compensation. Any questions with reference to the difficulty of proof, real or fancied, in this regard, should be left to the decision of Congress or the state legislatures, as in the case of design patents, not to the courts.

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Boston.

This shows how this Massachusetts case is looked upon. But that case is utterly irrelevant here, as it was not a case of unfair trade but a strict trade-mark case.

From any point of view from which we consider the Massachusetts case, which is criticized in the article from the "Harvard Law Review" just quoted, that case is not, as we have abundantly
806 shown, an authority of binding force against our contention.

Even if that Massachusetts decision, under the particular facts in that case, were sound law, it is not applicable to the case at bar; for it was a case of a strict trade-mark, involving an exclusive right, while the case at bar is a case of unfair trade, where no exclusive right is involved. As that was a strict trade-mark case the presumption might have been that the goods sold by the defendant were sold because they bore the infringing mark and thus trespassed on the complainant's exclusive right. Under such circumstances, the defendant might well have sought to overcome that presumption, due to selling his goods bearing the infringing trade-mark, by showing that his customers were not deceived—a thing which the court did not allow the defendant to do in that case. But in a case such as the one at bar (a case of unfair trade), where actual fraud is of the essence of the action, there is no presumption that the goods of the defendant were sold as the goods of the complainant; on the contrary, in a case of unfair trade, the question of whether or not the defendant's goods have been sold as and for the goods of the plaintiff is a question of fact which must be affirmatively shown by the plaintiff as a condition precedent to the recovery of defendant's profits. This is the law in the Federal Courts of the United States, as we have abundantly shown in this and in our former briefs.

The case of Reddaway v. Banham, L. R. App. Cas. 1896, 199, referred to at page 29 of complainant's answering brief, is not in point for these reasons:

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[1]Compare cases where a depositor sues a warehouseman for negligence in reference to the res. Willett v. Rich, 142 Mass. 356; Murray v. Internat'l S. S. Co., 170 Mass. 166.

(1) It is not a decision of a Federal Court of the United States;
(2) It does not touch upon the question on accounting;
(3) It is peculiar and exceptional in its facts and so far as it goes it would seem to be irreconcilable with the decisions of the Supreme Court of the United States to which we have referred, notably the case of Standard Paint Co. v. Trinidad Asphalt Mfg. Co., decided by the Supreme Court on April 10, 1911.

The Decision of the Master is not Foreclosed by the Provisional Ruling of Judge Dyer.

Conscious of the weakness of their position, complainant's counsel fall back on the provisional ruling of Judge Dyer, made at the very outset of the accounting and when the complainant had but begun to take its proofs.

807 That ruling of Judge Dyer, as we have already pointed out, was merely provisional and is in no way very binding on the master, now that all the proofs on the accounting are in. Judge Dyer, then, could not and did not go deeply into the matter; he certainly did not go into the question in the light of all the evidence taken before the Master on this accounting. At that stage of the inquiry Judge Dyer could not tell what proofs the complainant might produce. Non constat, so far as Judge Dyer then knew, the complainant might have proved, before it closed its proofs on the accounting, that defendant, since the filing of the bill, had not merely sold its shoes as shown by the proofs then before him, but that defendant had done the sum of the objectionable matters referred to in the opinion of the Court of Appeals, after the filing of the bill; and, non constat, for all that Judge Dyer then knew, complainant might be able to prove before the close of the proofs on the accounting not only actual fraud but that purchasers had bought defendant's shoes, since the filing of the bill, to the deception of the purchasers, the purchasers believing the same to be the shoes of the complainant. We must presume that the court knew the law and merely decided, at that stage, to allow the complainant to proceed with that branch of the inquiry which was then presented to the master and to the court, and afterwards to supplement that proof by that additional and necessary proof to which we refer in our former briefs and which proof had to be produced before the complainant could recover on this accounting. Therefore, Judge Dyer, then, at that early stage in the proceedings, merely resolved the doubt in favor of the Master's then ruling, in order to let all the light possible into the case; but his decision was merely provisional and is no more binding on the Master, now that all the proofs are in, than it would be on the court itself.

How monstrous to contend, as complainant's counsel virtually do contend, that that provisional ruling of Judge Dyer is virtually res adjudicata on the Master now that all the proofs are in! And such proofs! The complainant in its proofs before the Master has shown no fraud—absolutely nothing in the way of proof coming up to the requirements for the recovery of profits in a case of unfair trade.

Do the complainant's counsel expect the Master to find, because of that provisional ruling of Judge Dyer at that early stage of the accounting, against the defendant in the very teeth of the repeated decisions of the U. S. Circuit Court of Appeals for this circuit and the several other Federal Courts, and in the very teeth of the
808 decisions of the Supreme Court of the United States? It is the duty of the Master, which we have every reason to hope he will not fail to see and perform, to decide this case, now that he has all the proofs on the accounting before him, in accordance with the rule established by the federal decisions and applicable here. In so doing and thus supporting our contention he will not go counter to that provisional ruling of Judge Dyer, made only in respect to a policy deemed prudent to pursue at that early stage of the case and more than fourteen months before the proofs on the accounting were closed.

Complainant's counsel in making such a puerile contention give proof of the fact that they at least see the handwriting on the wall, and that, staggered by the light, in desperation, they are grasping at straws. Like Shylock, at last they see that they may have their pound of flesh only on condition that in taking it they do not draw a drop of Christian blood. The ducats that their client dreamed of are rapidly taking the form of "airy nothing" and vanishing before the bright light of reason, authority and justice.

The history of Judge Dyer's provisional ruling is simple: it is briefly this: Knowing that complainant could not prove on this accounting that anyone had been actually deceived into buying any of defendant's American Lady shoes believing the same to be the Wolf Brothers & Company's American Girl shoes, and knowing that defendant, since the filing of the bill, had not done the sum of the things which the majority of the Court of Appeals found to have constituted unfair trade and which induced that court to order the interlocutory decree, defendant's counsel did try to prevent the inquiry as to profits which the Master seemed willing to allow. It was in this way that, at the very threshold of this accounting, the matter was called to the attention of Judge Dyer. But, after all, all that the Master and the court permitted in this respect, by overruling, at that stage, the contention of defendant's counsel, is entirely consistent with both the Master and the Court now finding that defendant's present contention made after all the proofs on the accounting are in, is sound.

In permitting the Master to proceed to discover what defendant's profits were on the shoes accounted for as per the schedule at page 8 of defendant's reply brief, in that provisional ruling, as well as in the many later liberal rulings of the Master on this accounting and most favorable to the complainant, the idea of Judge Dyer and of the Master seems to have been one of liberality in the way of allowing a free and full inquiry and at the same time one of expec-
809 tancy, which might properly be described, in view of the well settled rules of law to which we have called attention and which are presumed to have been known to the Court and to the Master, as follows: That they would allow the complainant to ascer-

tain the profits on all the American Lady shoes sold by the defendant since the filing of the bill, no matter how they were marked, relying upon complainant's ability to supplement the evidence of the profits on such sales by proof (if complainant could produce it) that defendant, as to the shoes so accounted for, had also done those various things, the sum of which constituted unfair trade, and that complainant would also show that in the sale of the shoes thus accounted for defendant's customers had been actually deceived. In other words, neither the Master nor Judge Dyer would stop the inquiry at the threshold, as defendant's counsel urged them to do, but did allow the complainant to take the first step in the way of its proofs, to be followed later as they presumed might be the case, by the two additional elements of proof necessary to be established before complainant could make out a case for recovering any of defendant's profits on this accounting in this case of unfair trade. As it turns out, the trouble is that this expectancy on the part of the Master and the Court (an expectancy that was also evidenced on occasions by the Master in his ruling at later stages in the accounting) was never realized. The two further, necessary steps in the way of proof, alluded to above, were never taken by the complainant; it was impossible for the complainant to take those steps, because the proof did not exist. This is a case where the second and third steps count, if they can be taken, and where the first step alone counts for naught. The complainant is in the position of contending not for what is but for what "might have been," if it had been able to prove and had proved the second and third steps in the way of proof which are absolutely lacking in this case; it is in the sad plight described by the poet thus:

> "Look in my face: my name is—Might have been:
> I am also called—Too late: No More: Farewell."

The Master has no Right to Consider on this Accounting anything which was not brought before his attention in connection with the taking of the proofs and formerly introduced in evidence; he has no right to consider the old record, especially not in respect to any matters relating to a condition of affairs existing prior to the filing of the bill.

810 The authorities which we discuss in our main brief between pages 2 and 9 amply support our contention, to say nothing of the manifest justice of the proposition for which we contend. The only citation made by the complainant's counsel in respect to their strange and unjust contention in this respect is a sentence, stripped of its context, taken from the work of Street on Federal Equity Practice, vol. 2, Section 1434. That is merely the ipse dixit of Mr. Street, without warrant in reason or authority; while the only authority that Street cites in that Section 1434 is the case of Bell v. U. S. Stamping Co., 32 Fed. 549, to which we refer at page 3 of our main brief, and which is diametrically opposed to Street's contention. Street's work was published in 1909; and Foster's fourth edition of Federal Practice published in 1909, which is recognized as

a much superior authority to Street, and from which we quote at page 6 of our main brief, directly supports our contention. Complainant's counsel show their unfairness in the contention which they make in this respect and also their want of frankness. It would be an easy matter to mislead the Master by referring to the printed record before the Court of Appeals and to excerpts from it. As we have already pointed out, all of the proof contained in that record, so far as it might be relevant or material to the question then before the court, of necessity related to a condition of affairs before the filing of the bill. Indeed, it had to refer to a condition of affairs prior to the filing of the bill if the complainant intended to make out its then case. If the complainant on the accounting relied upon anything in that printed record it should have called the attention of the Master and of the defendant's counsel to the same, and these parts of the record and these exhibits should have been regularly offered in evidence, so that we might have had an opportunity to explain or rebut them, as pointed out by the court in the case of Bell v. United States Stamping Co. and by Mr. Foster in his work on Federal Practice (see our quotation from those authorities at pages 5 and 6 of our main brief). But complainant's counsel, were not frank enough to take that course, and now seek to put defendant to a disadvantage by referring to portions of and exhibits in that voluminous printed record, for the first time in their answering brief, and after we have been deprived of an opportunity of rebutting or answering any such matters found in the printed record before the Court of Appeals.

At page 28 of its answering brief complainant refers to certain portions of the old record which it says, "show that the catalogues of the defendant go to retail purchasers and that its catalogues are also addressed to such purchasers." This statement is not true;
811 for, as a matter of fact, the old record at the places referred to does not show that the catalogues of the defendant go to retail purchasers or that they are addressed to such purchasers. As a matter of fact, the only reference in the old record to catalogues being sent to anyone by the defendant is the statement by Mr. Teasdale, at page 454 of the old record, that the defendant advertises its shoes to the dealers through the trade magazines and "also by direct solicitation through the mail, in the way of circulars, catalogues, etc." There is absolutely not one thing in the record at the places indicated in complainant's brief or elsewhere in the record, old or new, to show that the catalogues of the defendant go to retail purchasers or that its catalogues are addressed to such purchasers. The only competent evidence as to this question is that brief testimony taken by defendant before the Master which shows that these catalogues are addressed to, intended for and sent to the wholesale trade. Furthermore, each of the catalogues which have been put in evidence before the Master, as is also true in regard to any of the catalogues in the previous record, plainly state, in several places on each catalogue, that they are catalogues of the Hamilton, Brown Shoe Co., of St. Louis, Mo., U. S. A., so that no one who saw one of those cata-

logues could be otherwise than informed that all the shoes listed therein were manufactured by or emanated from the Hamilton, Brown Shoe Co. and were not shoes manufactured by or emanating from The Wolf Brothers & Company.

Furthermore, every item of advertising referred to by Mr. Teasdale in his testimony was issued, as appears from his testimony, prior to the filing of the bill in this case; and it is therefore absolutely immaterial and irrelevant to the issues upon this accounting, under the express limitation in the opinion of the Court of Appeals and the interlocutory decree, even if it had been brought before the Master upon the accounting, which it was not.

Furthermore, all the things referred to in complainant's answering brief, at page 28 thereof, as found in the printed record before the Court of Appeals at blue pages 454, 217, 461, 246, 463-464 and 254, are all catalogues or hand-books published by the defendant before the filing of the bill and therefore not within the scope of this accounting. This of itself shows that they have no bearing on any question before the Master; but we again insist that the Master has no right to refer to them or to those pages of the printed record before the Court of Appeals, because the complainant did not call attention to these parts of the record or to these exhibits in connection with its proofs before the Master. This only illustrates the unfair-
812 ness of complainant's counsel in this respect and the justice of the policy of the law which requires (as pointed out in our main brief at pages 5 and 6) that such parts of the record or exhibits should have been regularly offered in evidence by the complainant so that we might have had an opportunity to explain or rebut them. However, if the Master is going to consider these matters referred to at page 28 of complainant's answering brief, then he will find:

(1) That to the extent that catalogues of the Hamilton, Brown Shoe Company are there referred to, they are all catalogues published and issued before the filing of the bill.

(2) That many of the things there referred to and all of which relate to matters published by the defendant before the filing of the bill are not catalogues at all, but some of them little hand-books.

(3) That all of these things, advertisements, catalogues or hand-books, not only were published before the filing of the bill, but that all bear on them prominently, in various places, the name and address of the Hamilton, Brown Shoe Co., so that no one short of an imbecile or an idiot, on seeing any of these things, could otherwise than know at once, in a most specific and positive manner, that they were advertisements calling attention to the fact that the shoes illustrated or referred to therein were shoes manufactured by or emanating from the Hamilton, Brown Shoe Company of St. Louis, Mo., U. S. A.

For the rest, there is nothing, which is even remotely material to the issues before the Master on this accounting and which is found in the defendant's answering brief, which is not completely met or answered by our main brief, by our reply brief sent to the Master on April 17, 1911, or by this our rebuttal brief. It follows therefore, as contended in our main brief, that on this record on the accounting

before the Master the equities are with the defendant; and that, under the well established rule governing the practice in the Federal Courts on an accounting in a case of unfair trade the complainant cannot recover a penny in the way of profits or damages.

Respectfully submitted,

PAUL BAKEWELL AND
LUKE E. HART,
Solicitors for Defendant.

HENRY S. PRIEST,
Of Counsel for Defendant.

St. Louis, April 21, 1911.

813 *(Order of Argument on Exceptions to Master's Report, Dec. 16, 1911.)*

Now at this day the complainant's and defendant's exceptions to the Master's report were argued in part.

(Order of Argument on Exceptions to Master's Report, Dec. 18, 1911.

Now at this day the defendant's and complainant's exceptions to the Special Master's report is further heard by the Court.

(Order of Submission on Exceptions to Master's Report, Dec. 19, 1911.)

Now at this day the hearing of the defendant's and complainant's exceptions to the Special Master's report is concluded and said exceptions submitted to the Court.

Final Decree.

This cause came on to be heard on the report of Henry H. Denison, Master, and the exceptions thereto, the evidence and exhibits and was argued by counsel, on consideration whereof it is Ordered, Adjudged and Decreed as follows:

That the complainant's exceptions to the Master's report be and the same are overruled. That the defendant's exceptions to the Master's report be and the same are hereby sustained.

That the complainant recover from defendant the sum of $1.00 as nominal damages.

That the complainant pay all the taxable costs on the accounting since the entry of the interlocutory decree of November 15, 1909, including all the Master's fees and fees and charges paid to or charged by the Master, as for the Master's stenographer or typewriter and the printer's bill for printing the Master's report, which,

by stipulation between the parties herein, it was agreed should be taxable as costs on said accounting. For all of which judgment is entered herein and execution therefor ordered issued against the complainant.

To all of which the complainant excepts.

It further being made to appear to this court that, from time to time since the interlocutory decree in this case was entered, a portion of the Master's fees and charges on this accounting, including a portion of the stenographer's and typewriter's
814 charges herein and a portion of the printer's bill for printing the Master's report herein, has been paid by said complainant (The Wolf Brothers & Company) and which by stipulation between the parties are taxable as costs in this case, said amount so paid by the complainant, to be ascertained by the clerk, shall be credited to said complainant.

And it also being made to appear to this court that the defendant herein, Hamilton, Brown Shoe Company, has from time to time, pending the hearing before the Master and prior to the date of this order, paid to the Master, by order of the court or by stipulation between the parties, certain portions of the Master's fees, certain portions of the charges of the Master's said stenographer and typewriter herein, and certain portions of the printer's bill for printing the Master's report herein, all of which, by stipulations between the parties, are taxable as costs in this case, it is ordered that any such monies heretofore paid by said defendant herein on account of such fees or charges be taxed against the complainant as part of the costs of this accounting, and that the sum of such amounts be ascertained by the clerk of this court, and when the same has been paid to the clerk of this court, the same shall be paid over by him to the defendant herein, Hamilton, Brown Shoe Company.

It appearing from the records of this court that the Master has already been allowed and paid the sum of Thirty-one Hundred Dollars ($3100.00) to apply on account of his services as Master in this accounting, it is further ordered that an additional sum of Two Thousand Dollars ($2000.00) be allowed to the Master, said sum to be taxed as costs in this case and to be paid by the complainant herein.

And the said complainant now in open court, and before the final settling of this decree, enters its exceptions to the order of the Court in overruling its complainant's exceptions, and each of them, to the Master's report, and in sustaining defendant's exceptions, and each of them, to the said Master's report, and in adjudging to complainant only nominal damages, and in refusing to adjudge any profits to complainant, and in taxing against complainant the costs of the accounting, and to each and every part of said decree.

DAVID P. DYER,
District Judge.

St. Louis, January 23rd, 1912.

Order Allowing Appeal and for Transmission of Physical Exhibits, February 3, 1912.

815 Now at this day comes the Complainant by its solicitors and files herein its assignment of errors and petition praying for an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the decree heretofore entered herein, on or about the 23d day of January, 1912.

Whereupon it is now ordered that the said petition for appeal be granted as prayed and that the supersedeas bond in the penal sum of Six Thousand Dollars ($6,000.00) now presented by said Complainant be approved, and that a supersedeas of said decree be awarded pending the determination of said appeal.

And now, a citation citing and admonishing said defendant to be and appear in said Circuit Court of Appeals on or before sixty days after this date is signed by the Judge and filed, and it is further ordered that the Clerk of this Court make out and certify to said United States Circuit Court of Appeals, a full, true and complete transcript of the record and proceedings herein.

It is further ordered that the Clerk of this Court be and he is hereby authorized to omit from the transcript of the record on appeal to the United States Circuit Court of Appeals for the Eighth Circuit, the original physical exhibits in this case, including shoes, catalogues and cartons, and that said original exhibits be delivered by the Clerk of this Court to the Marshal of said Court of Appeals at least ten days before this case is heard or submitted, in accordance with paragraph 1 of Rule 34 of said Court of Appeals.

DAVID P. DYER, *Judge.*

Which said petition for appeal and assignment of errors and bond referred to in the above order, are respectively in words and figures as follows, to-wit:

Petition for Appeal and Assignment of Errors.

Now at this day comes the said complainant, The Wolf Brothers and Company, and states to the Court that it feels itself aggrieved by the final decree entered by this Court in this cause on the 23rd day of January, 1912, and that it prays the Court to allow this its appeal from the said final decree, to the United States Circuit Court of Appeals for the Eighth Circuit; and for a reversal of the aforesaid decree; and respectfully submits that this Court erred:

1. In overruling complainant's exceptions and each of them to the report of the master.

816 2. In sustaining defendant's exceptions to the report of the master.

3. In holding that complainant is not entitled to recover the profits made by defendant on the 974016 pairs of shoes sold by it since the filing of the bill herein, having no other marking on them except the words "The American Lady", and in holding

that said words "The American Lady" were accompanied by other matter clearly indicating that such shoes were of defendant's own manufacture and therefore not of complainant's manufacture.

4. In holding that complainant is not entitled to recover the profits made by defendant on the 961607 pairs of shoes sold by it since the filing of the bill herein which were marked with the name "The American Lady" and with the words "Hamilton, Brown Shoe Company", and in holding that said last mentioned words was accompanying matter clearly indicating such shoes were of defendant's manufacture and therefore not of the manufacture of the complainant.

5. In holding that complainant is not entitled to recover the profits made by defendant on the 593,872 pairs of shoes sold by it since the filing of the bill herein which were marked with the name "The American Lady" and with the words "Hamilton, Brown Shoe Company" and the word "Makers", and in holding that said last mentioned words was accompanying matter clearly indicating that such shoes were of defendant's own manufacture and therefore not of the manufacture of the Complainant.

6. In holding that the matter on the cartons was other matter clearly accompanying the illegal use of the name "The American Lady" on the shoes, clearly indicating that such shoes were of defendant's manufacture and therefore not of the manufacture of the complainant.

7. In holding that "there is no evidence in the record tending to prove that a single pair of shoes marked 'The American Lady' was ever taken from the carton in which they were enclosed before sale."

8. In holding that "there is no evidence in the record tending to prove that the defendant or any of its customers have offered for sale any shoes marked 'The American Lady' as and for 'The American Girl.'"

9. In holding that the defendant was not guilty of unfair competition.

817 10. In holding that the defendant had not been guilty of unfair competition, when the stipulation entered into between the parties expressly admits that the defendant had violated the terms of the decree of the Circuit Court of Appeals and the injunction by using, in fifty per cent (50%) of its entire advertising of the "American Lady" shoes, the phrase forbidden by said decree and injunction.

11. In failing and refusing on each and all of the foregoing points to give effect to the decision of the United States Circuit Court of Appeals for the Eighth Circuit.

12. In adjudging to complainant only nominal damages and in refusing to adjudge any profits to complainant.

13. In taxing against complainant the costs of the accounting.

And your petitioner will ever pray.

By LAWRENCE MAXWELL,
SIMEON M. JOHNSON AND
PERCY WERNER,
Counsel for Complainant.

(*Bond.*)

Know All Men By These Presents, That we, The Wolf Brothers and Company, as principal, and United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety are held and firmly bound unto Hamilton, Brown Shoe Company in the full and just sum of Six Thousand Dollars, to be paid to the said Hamilton, Brown Shoe Company, certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 31st day of January in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at the November Term of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit depending in said Court, between The Wolf Brothers and Company, Complainant and Hamilton, Brown Shoe Company, Defendant, a final decree was rendered against the said The Wolf Brothers & Company, and the said Wolf Brothers & Company having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the said decree in aforesaid suit, and a citation directed to the said defendant
818 citing and admonishing it to be and appear at a session of the United Sates Circuit Court of Appeals for the Eighth Circuit, to be holden at the City of St. Louis in said Circuit, sixty days after date of said citation.

Now the Condition of the Above obligation is Such That if the said The Wolf Brothers & Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

[SEAL.] THE WOLF BROTHERS AND COMPANY,
[SEAL.] By SAM. B. WOLF, *President.*
[SEAL.] UNITED STATES FIDELITY & GUARANTY COMPANY,
[SEAL.] By MARK CRAWLEY, *Attorney in Fact.*

Approved by
DAVID P. DYER, *Judge.*

(*Opinion of the District Court.*)

DYER, *J.:*

On the 29th day of January, 1903, complainant filed its bill of complaint against the defendant in the Circuit Court of this District.

The suit was for an alleged infringement of complainant's alleged trade-mark, the "American Girl" by the use of the name "American Lady" by the defendant, and for unfair trade.

The prayer was for an injunction and an accounting. The Circuit Court denied the prayer and dismissed the bill.

From this decision the Complainant prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit. The opinion of that Court is reported in 165 Federal, at pages 413 to 418. On pages 414 and 415 the court said:

"This action was brought by complainant in which it charges the defendant with infringing its trade-mark "The American Girl" by the use of the name "The American Lady", and the portrait of a young woman. It further charges the defendant with infringing the catch phrase "A shoe as good as its name" by using the catch phrase "With the character of the woman." It also charges the defendant with infringement by adopting its numeral numbers before mentioned for similar styles of shoes. It also charges defendant with unfair trade. Proofs were taken, and upon the hearing the Circuit Court dismissed complainant's bill, and the case is brought here on appeal.

819 "The first question for consideration is whether the term "The American Girl" constitutes a valid trade-mark. We think it settled doctrine that geographical names cannot be appropriated to the exclusive use of one as a trade-mark. Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581; Genesee Salt Co. v. Burnap, 73 Fed. 818, 20 C. C. A. 27; Ill. Watch Co. v. Elgin Nat. Watch Co. 94 Fed. 667, 35 C. C. A., 237; Elgin Nat. Watch Co. v. Illinois Watch Co. 179 U. S. 665; 21 Sup. Ct. 270, 45 L. Ed. 365; Allen B. Wrisley Co. v. Iowa Soap Co., 59 C. C. A., 54 122 Fed. 795. We also think that the name applied to women's shoes is descriptive merely, viz., shoes manufactured in America, and to be worn by women, and not an arbitrary or fanciful name to indicate maker; hence the name "The American Girl" applied to shoes, is not the subject of a valid trade-mark. Nor can numeral numbers, when used to indicate styles rather than origin and manufacture, be the subject of a valid trade-mark. Shaw Stocking Co. v. Mack (C. C., 12 Fed. 707; Dennison Mfg. Co. vs. Thomas Manufacturing Co. (C. C.) 94 Fed. 651. In this case we think that the numerals used by the complainant were for the purpose of indicating and designating the different styles of shoes, rather than the maker."

This would seem to dispose of the claim of the claimant to a valid trade-mark, in "The American Girl" and "numeral numbers."

After thus disposing adversely to complainant's claim to a valid trade-mark in either "The American Girl" and "numeral numbers" the court proceeds as follows:

"While it is true that geographical names may not be exclusively appropriated as a trade-mark, yet a party having adopted a geographical name as a designation of its goods may be protected as against unfair trade. * * *

In this case while complainant is not entitled to relief upon the ground that the words "The American Girl" or the numerals applied to its several styles of shoes are valid trade-marks, yet

it is entitled to protection from their use by defendant in a manner and under circumstances [constitu-ing] unfair trade; the essence of the rule being that one person shall not in the sale of his goods so act as to lead the public to believe that they are the goods of another"

The court after stating very clearly the law of the case, discusses the evidence as it appeared in the record and drew conclusions unfavorable to the defendant.

820 The opinion concludes as follows:

"Legitimate competition in trade is not only the right of every person, but to be commended, when of public benefit. It is only when competition is deceptive that it is condemned by law. While the term "American Girl", as applied by complainant and its predecessors was not subject to exclusive appropriation by them, it had, nevertheless, by their long continued use of it, come to have a secondary meaning, indicative of the origin and manufacture of the shoes to which it was applied, and had come to be recognized in the trade as meaning that such shoes were those of complainant and its predecessors. Whatever of good will and advantage resulted from this was the property of the complainant, and, while others were entitled to use the same or any similar term, because of its being common property, they could do so only on condition that they accompanied it with such distinguishing marks or matter as would plainly indicate that it was not being used with its secondary signification; that is, as pointing to the complainant as the manufacturer of the goods to which it was applied. Howe Scale Co. v. Wycoff, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481.

"Complainant is not guilty of such laches as to deprive it of an injunction; but we think an accounting should be limited to the time since the commencement of this suit.

"Complainant is entitled to a decree enjoining the defendant from using the name "The American Lady" as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's and from using, in connection with such name, as applied to its shoes for women, the numerals mentioned, or the catch phrase "With the character of the woman", or any other phrase in simulation of the phrase "A shoe as good as its name", and also to an accounting as before stated."

These lengthly quotations from the opinion are made for the purpose of showing that we are now considering questions of "unfair trade", and not that of infringement of a valid trade-mark. This, therefore, being a question of unfair trade we must look for the rule applicable thereto, with the view and for the purpose of determining whether in this particular case "unfair trade" exists

When the mandate of the Court of Appeals was filed in this court, the following order was entered.

821 "The mandate of the United States Circuit Court of Appeals for the Eighth Circuit on the appeal of the plaintiff

from the decree entered herein February 3, 1908, and the opinion of said Court of Appeals having been filed in this court, it is now, in pursuance of said mandate and opinion, ordered, adjudged and decreed as follows:

1. Said decree entered herein on February 3, 1908, is set aside.

2. The defendant, Hamilton, Brown Shoe Company, its servants, agents, officers and employees, are perpetually enjoined from using the name "The American Lady", as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not the manufacture of the plaintiff, The Wolff Brothers & Company, and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408 or 397, or the catch-phrase "With the character of the woman" or any other phrase in simulation of the phrase "A shoe as good as its name."

3. The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded.

This case is referred to H. H. Denison, Esq., as Master, upon the evidence already taken in this case, and the exhibits in evidence in this case, and such further evidence as may be offered before the Master by the parties to this action, to ascertain and report the damages, since the commencement of this suit, which plaintiff has suffered, and the profits, since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case, and which were marked with the name "The American Lady", and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company."

The name of the Master, Mr. Denison, was inserted by agreement of counsel and at their request.

At the threshold of the hearing by the Master application was made by the defendant to the Court for an order confining the inquiry to certain limits. This application was denied, and in doing so the court made some remarks that have been in a manner construed as placing a wrong construction upon the language and meaning of the Court of Appeals in its decision in this case. However this may be, the purpose of the court in refusing the
822 request was to open the door to the fullest investigation.

If the court committed error in anything that was said or done by it, it is willing to correct that error, even if in doing so the correction makes it appear that the opinions then and now expressed seem contradictory.

After the court had refused to limit the inquiry, the hearing before the Master continued without further hindrance, and after a lapse of nearly two years the Master filed his report, together with the evidence taken before him.

To this report various exceptions have been taken by both the complainant and the defendant.

These exceptions have been presented by counsel in lengthy written and oral arguments, and in briefs that show great research.

These exceptions and the arguments in support thereof and against them have been considered by the court and must now be disposed of.

It appears from the evidence in the case that from the day of the filing of complainant's bill (January 29, 1906) to the day the hearing was concluded by the Master (March 9, 1910) that the defendant made and sold two million, five hundred and twenty nine thousand, four hundred and ninety five (2,529,495) pairs of "American Lady" shoes.

For convenience, this vast number of shoes may be divided into three classes, and designated as numbers 1, 2 & 3.

Number 1 embraces	593,872	pairs
Number 2 "	901,607	"
Number 3 "	974,016	"
Total	2,529,495	

The marks or brands appearing on these shoes are undisputed.

On No. 1, the words "Hamilton-Brown Shoe Company, Makers", and "American Lady" were stamped on the soles.

On No. 2, the words "Hamilton-Brown Shoe Company" and "American Lady" were stamped on the soles.

On No. 3, the word "American Lady" were stamped on the soles.

823 As to No. 1 the Master finds that the words "Hamilton-Brown Shoe Company, Makers" was matter clearly indicating that such shoes are of its own manufacture and therefore not of complainant." He therefore took that class out of the accounting.

To this decision the complainant filed exception. The Master's finding in this particular is approved and the exceptions thereto are over-ruled.

As to class two (2) the Master finds that the words "Hamilton-Brown Shoe Company" are not "matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's."

The Master after announcing that decision recommends a judgment in favor of the complainant for the sum of one hundred and ninety thousand, nine hundred and nine and 83/100 dollars ($190,909.83).

To the conclusion reached and the recommendation made by the Master as to "Class 2" the Court cannot assent.

The exceptions *to* the defendant thereto are sustained.

This brings the court to a consideration of the 3rd, and last class.

Of this class the defendant company made and sold within the time of the accounting 974,016 pairs of shoes marked on the soles thereof with the words, "American Lady".

The Master finds that the words used on the soles of the shoes were not "other matter clearly indicating that such shoes are of its own manufacture and therefore not of the complainant's."

This is followed by a recommendation that judgment be entered

in favor of the complainant and against the defendant for the sum of two hundred and fifty four thousand, four hundred and one and 72/100 (254,401.72) dollars.

On the 4th of June, 1910, the parties entered into a stipulation as follows:

"Every pair of shoes marked with the name American Lady manufactured and sold by Hamilton-Brown Shoe Company between January 29, 1906, and November 15, 1909, as said shoes were sold and shipped by said Hamilton-Brown Shoe Company, was sold and delivered to its customers in a carton, each of which cartons bore prominently on the lid thereof in white letters on a black back
ground, at the head of said lid, the words "Hamilton-Brown
824 Shoe Co.'s" and at the foot of said lid, in equally prominent letters, the name "American Lady", while at the front end of each of said cartons appeared the name "American Lady," and the belt trade-mark of the Hamilton-Brown Shoe Company, which belt trade mark consisted of a black strap in the centre of which was a red background, the words "Hamilton-Brown Shoe Company" appearing in white letters on the black strap and the word "Makers" appearing in white letters on the red background; said particular way of marking each of said cartons being exemplified by "Defendant's Exhibit, American Lady Shoe Carton, January 31, 1910, Henry D. Denison, Master;

That attached hereto, and marked "Exhibit A" is a duplicate of the label and markings thereon appearing on the lid of each carton containing American Lady shoes sold by defendant since the filing of the bill in this case."

This stipulation was further supplemented by one of January 11, 1911.

In addition to this it appears from the evidence in the case that the defendant spent thousands of dollars each year in advertising the "American Lady" shoes as of its own manufacture.

These advertisements were coextensive with the trade itself. Each and every pair of shoes marked on the soles "American Lady" went to defendant's customers in a separate carton plainly marked on each carton "Hamilton-Brown Shoe Company, Makers."

It is safe to conclude from the proof in the case and the legitimate inferences to be drawn therefrom, that, accompanying or preceding each shipment, was an advertisement quite as full of information as was contained on the carton itself.

Taking all these facts into consideration, the court is of opinion that the shoes were accompanied with "matter clearly indicating that such shoes are of its (defendant's) own manufacture, and therefore, not of complainant's". If defendant had stationed at the door of each of its customers a man with strong lungs, proclaiming in stentorian voice that "these shoes are the make of the Hamilton-Brown Shoe Company of St. Louis", it is hard to perceive how the notice to buyers of shoes would have been more effective in that way than by the means adopted.

The exceptions of the defendant to the Master's report in regard to this particular class of shoes is sustained.

825 There are in addition to those heretofore assigned other reasons why in the judgment of the court the Master's report should not be approved.

The record in this case is absolutely barren of evidence tending to show that any individual purchased a pair of shoes marked "American Lady", believing at the time of the purchase he was getting the "American Girl."

There is no evidence in the record tending to prove that the defendant or any of its customers ever offered for sale any shoe marked "American Lady", as and for the "American Girl."

There is no evidence in the record tending to prove that a single pair of shoes marked "American Lady" was ever taken from the carton in which they were enclosed, before sale.

There is no evidence in the record that the complainant's output was curtailed in the least by the sale of the "American Lady", nor is there any evidence that complainant lost a single customer by reason of anything done by the defendant or any of its customers.

If the court correctly understood counsel for complainant, no claim to the contrary of these facts was made.

It was argued that no proof of this character was required, but that the complainant had the right to recover the profits on every pair of "American Lady" shoes sold by the defendant after the date of the filing of the bill, on the ground that the shoes themselves were not accompanied by such marks as indicated their origin.

It was contended that the defendant made it possible for its customers to offer for sale and sell defendant's manufacture as and for the manufacture of complainant. If all of this were conceded how was it possible for the complainant to be damaged, unless some one availed himself of such an opportunity?

The defendant had as much right to sell its shoes as the complainant had to sell those of its manufacture, provided, that it did so within the limitations stated by the court of appeals.

In the various authorities that have been referred to by counsel, none state the rule as to unfair trade more clearly than the Court of Appeals in this case. The court said:

826 "The essence of the rule being that one person shall not in the sale of his goods so act as to lead the public to believe that they are the goods of another."

Applying this rule to the evidence in this case the complainant's demand for damages must fail.

Hardly less specific is the declaration of the Court of Appeals of the Eighth Circuit in the case of Walter Baker Company vs. Sydney C. Grey et al., recently decided and as yet unreported.

Judge Knappen of the Sixth Circuit in delivering the opinion of that court in a recent case of Rathbone, Sard & Co. v. Champion Steel Range Co. (189 Fed. Rep.) declared the same rule.

The opinion of the Court in that case is fairly well summarized in the [syl-abus], as follows:

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vender for those of another."

The fact that an article of defendant's manufacture is represented by unprincipled retailers as that of complainant does not render defendant liable for unfair competition, providing it did its legal duty in distinguishing its product from that of complainant.

"Where the deception of purchasers is not the natural result of the imitation by defendant of goods made by complainant, and there is no intention to so deceive purchasers, a case of unfair competition is not made out."

Much has been said by counsel and the Master as to whether the case of Baker vs. Baker, (115 Fed. Rep. 297) decided by the Circuit Court of Appeals for the Second Circuit, is authority in the case now being considered.

That court is one of the strongest in the country, and its decision in Baker vs. Baker has been approvingly considered by the Court of Appeals of this Circuit. That case was one on an accounting in an "unfair trade" case.

The Court at page 299, of the report, said:

"The evidence upon the accounting failed to disclose that complainant was entitled to any recovery of profits, or any except nominal damages, by reason of the defendant's conduct. It
827 failed to disclose that a single person had purchased goods marketed by the defendant, supposing them to be the product of the complainant, or that the complainant had lost a single customer by defendant's conduct."

In Howe Scale Co. v. Wyckoff et al., 198 U. S., 118, Chief Justice Fuller said:

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

In the present case the evidence shows that the defendant did not attempt to palm off its manufacture for the manufacture of complainant, but upon the contrary proclaimed in almost every conceivable way that it was the manufacturer of the goods offered for sale.

In the view the court takes of this case it does not deem it necessary to go into the question of what were and what were not proper allowances to the defendant for the expenses of manufacture.

A cursory view, however, of the Master's report in these particulars, shows that he was rigidly parsimonious in such allowances.

The exceptions of complainant to the Master's report will be overruled, and the exceptions of the defendant to the same report will be sustained.

A judgment for nominal damages [(1.00)] will be entered in favor of the complainant against the defendant.

It appearing from the record that prior to the beginning of the accounting defendant tendered to complainant the sum for which judgment is directed, the costs attending such accounting are adjudged against the complainant.

An allowance of two thousand dollars (in addition to the amounts

heretofore paid him) will be allowed the Master, and will be taxed as costs in the case.

Counsel may prepare a decree in conformity with this opinion and hand it to the Clerk for the consideration of the Court.

Endorsed: Filed Jan'y. 17", 1912. W. W. Nall, Clerk.

828 *(Clerk's Certificate.)*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, W. W. Nall, Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the foregoing consisting of volumes 1 and 2 attached together, constitutes a full, true and complete transcript of the record and proceedings, (save as restricted by the præcipe filed by Complainant and the designation of parts of record to be embodied in the transcript, filed by Defendant) in the case wherein The Wolf Brothers & Company is Complainant, and Hamilton, Brown Shoe Company, is Defendant, In Equity No. 5252, as fully as the same remain on file and of record in said case in my office, and that the original citation is heerto attached and herewith returned.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at office in the City of St. Louis, in said Division of said District, this 25th day of March, A. D. Nineteen hundred and twelve.

[Seal U. S. Dist. Court, Eastern Division, East. Jud. Dist. Mo.]

W. W. NALL,
Clerk of said Court.

Vol. 2, Filed Mar. 28, 1912. John D. Jordan, Clerk.

829 *(Appearance of Counsel for Appellant.)*

United States Circuit Court of Appeals, Eighth Circuit.

No. 3758.

THE WOLF BROTHERS AND COMPANY, Appellant,
vs.
HAMILTON-BROWN SHOE COMPANY.

The Clerk will enter our appearance as counsel for the Appellant.

LAWRENCE MAXWELL, JR.,
SIMEON M. JOHNSON,
PERCY WERNER.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 29, 1912.

(Motion of Appellant to Dispense with Reprinting of Record in Former Case No. 2811.)

Comes now the Appellant, by its counsel, and moves the Court to enter its order directing the Clerk, in printing the Transcript of the Record filed in the above cause on this appeal, to dispense with the re-printing of the old Record heretofore filed in this cause on the first appeal of said cause to this Court, upon the filing by Appellant of not less than three (3) printed copies of said old Record, and providing that the said old record may be referred to upon the hearing of this cause with the same force and effect as if the same was incorporated in the printed record on the second appeal.

By LAWRENCE MAXWELL, Jr.,
SIMEON M. JOHNSON,
PERCY WERNER,
Counsel for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 29, 1912.

830 *(Order Dispensing with Reprinting of Record, etc., in Former Case No. 2811.)*

December Term, 1911.

TUESDAY, April 2, 1912.

This cause came on to be heard upon the motion of appellant for an order dispensing with the reprinting of the record in the case on the former appeal between the same parties and docketed in this Court as case No. 2811, which printed record is embraced and included in the transcript of the record on the present appeal.

On consideration whereof, it is now here ordered that the motion of appellant be granted, and that the clerk of this Court be, and he is hereby, directed to omit the reprinting of the record in case No. 2811, from the printed record of the case on the present appeal, provided, however, that three copies of the printed record in case No. 2811, be furnished the clerk of this Court for the use of the Judges in the consideration of the case on the present appeal.

It is further ordered that the copies of the record in case No. 2811, furnished for the use of the Judges shall have the same force and effect as if said record had been reprinted as a part of the printed record on the present appeal.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.
PAUL BAKEWELL.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 24, 1912.

(*Order of Submission.*)

December Term, 1912.

TUESDAY, December 3, 1912.

This cause having been called for hearing in its regular or-
831 der, argument was commenced by Mr. Simeon M. Johnson for Appellant, continued by Mr. H. S. Priest and Mr. Paul Bakewell for Appellee and concluded by Mr. Lawrence Maxwell for Appellant.

Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

832 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 3758, May Term, A. D. 1913.

THE WOLF BROTHERS AND COMPANY, Appellant,
vs.
HAMILTON-BROWN SHOE COMPANY, Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

Mr. Simeon M. Johnson and Mr. Lawrence Maxwell (Mr. Percy Werner was with them on the brief), for appellant.

Mr. H. S. Priest and Mr. Paul Bakewell (Mr. Luke E. Hart was with them on the brief), for appellee.

Before Hook and Smith, Circuit Judges, and Van Valkenburgh, District Judge.

VAN VALKENBURGH, District Judge, delivered the opinion of the court.

Appellant, The Wolf Brothers and Company, complainant below, is a corporation engaged in the manufacture of women's shoes at Cincinnati, Ohio. Appellee is a corporation and a large manufacturer and jobber of shoes at St. Louis, Missouri. Appellant and its predecessors manufactured and sold a woman's shoe which it called "The American Girl". This name was registered as a trade-mark. Some years later the appellee adopted and registered as a trade-mark the term "American Lady", and manufactured, advertised and sold women's shoes under that name. January 29, 1906, appellant filed its bill charging the appellee with infringing its said trade-mark "The American Girl", and with unfair trade by the use of the name "American Lady", together with certain catch-phrases and numerals

theretofore adopted and used by appellant, and praying an injunction and accounting. Proofs were taken, and upon the hearing, the Circuit Court dismissed appellant's bill and the case was brought to this court on appeal. Upon consideration thereof this court held that the term "The American Girl" was not the subject of valid trade-mark, but that the record did disclose conduct on the
833 part of appellee amounting to unfair competition in trade.

Accordingly, the decree was reversed, with directions to the Circuit Court to enter a decree "enjoining the defendant from using the name 'American Lady' as applied to its shoes for women when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and, therefore, not of complainant's, and from using in connection with such name, as applied to its shoes for women, the numerals mentioned or the catch-phrase 'With the character of the woman', or any other phrase in simulation of the phrase 'A shoe as good as its name'"; also granting an accounting which was limited to the time since the commencement of the suit. The opinion of this Court is found in 165 Federal Reporter at page 413. The facts upon which it was based are stated therein and will not be unnecessarily repeated here.

Pursuant to the direction of this Court, the Circuit Court on November 15, 1909, entered the following decree:

"The defendant, Hamilton-Brown Shoe Company, its servants, agents, officers and employees, are perpetually enjoined from using the name 'The American Lady', as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and, therefore, not of the manufacture of the plaintiff, The Wolf Brothers & Company, and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408 or 397, or the catch-phrase 'With the character of the woman' or any other phrase in simulation of the phrase 'A shoe as good as its name.'

"The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded.

"This case is referred to H. H. Denison, Esq., as Master, upon the evidence already taken in this case and the exhibits in evidence in this case, and such further evidence as may be offered before the Master by the parties to this action, to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits, since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case and which were marked with the name, 'The American Lady' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company."

Extended proofs were taken before the Master. In his report he finds that during the period to which the accounting was limited appellee sold American Lady shoes, which, because of differences in marking, are divided into three classes:

Class 1. 974,016 pairs of shoes which bore no impression or dis-

tinguishing mark except the words "American Lady" stamped upon the sole with a metal die. The profits upon these were found to be $254,401.72.

834 Class 2. 961,607 pairs of shoes marked as follows: The words "Hamilton-Brown Shoe Company" in belt form, with the words "American Lady" in the center, stamped upon the sole of each shoe; and in the top-facing no mark, except, perhaps, in some cases, the name of a retail dealer in the facing of one shoe. The profits upon these to appellee were found to be $190,909.83.

Class 3. 593,872 pairs of shoes marked as follows: Upon the sole the same stamping as in Class 2, and in the top-facing of one shoe the name "American Lady" and the words "Hamilton-Brown Shoe Company" in belt form surrounding the word "makers". The profits upon these to appellee were found to be $132,740.77.

The Master recommended that judgment be entered in favor of appellant in the sum of the profits accruing from the first two classes, aggregating $445,311.55. For the profits accruing from the third class he held that appellant was not entitled to recover under the opinion of this Court, and the decree entered in accordance therewith. Both parties filed numerous exceptions. Upon hearing below the Court overruled complainant's exceptions, sustained defendant's exceptions, adjudged a recovery of one dollar nominal damages against defendant, and taxed the costs against complainant.

The contentions of appellant are: first, that a decree should have been rendered in its favor upon the first two classes of shoes sold, as recommended by the Master; second, that that decree should have included the profits upon the third class of American Lady shoes sold, which was denied by the Master; third, that the Master erred in allowing too large credits to the expense of producing and selling the American Lady shoes, whereby appellee's net profits were improperly diminished.

Defendant, appellee, contends: first, that four elements must be made manifest in appellant's case before it can be entitled to recover, a failure of proof in any one of which constituent grounds must result in a failure in judgment: (*a*) a design to defraud; (*b*) the adoption of means reasonably calculated to make the design effective; (*c*) that the design and means were effective; (*d*) reasonably certain injury to complainant—material damage; second, that a different rule in the assessment of damages prevails in cases of unfair competition from that obtaining in those involving strict trade-mark; that in the latter a property right is taken, and the infringer must respond for the profits upon all goods sold through an unauthorized use of the mark; that in the former it must be shown that actual damages have accrued from loss of profits diverted; third, that in this case the name "American Lady" as applied to the shoes sold was actually accompanied with other matter clearly indicating that such shoes were of defendant's own manufacture, and, therefore, not of complainant's; fourth, that the Master adopted an erroneous method of computing the items of expense for which appellee should have received credit in the manufacture and sale

835 of American Lady Shoes, whereby the net profits arrived at were unduly increased. These contentions will be considered in their order.

1. With respect to elements "*a*" and "*b*" this Court, in directing an accounting on the former appeal, found that there was a design to defraud and that the means adopted were reasonably calculated to make that design effective. It found that appellant was first in the field with the words "The American Girl" adopted as a trade-name to designate its shoes; that in connection with this name it used the catch-phrase: "A shoe as good as its name," and in its catalogue certain numerals to designate different styles of such shoes; that thereafter the appellee adopted the trade-name "American Lady" and the catch-phrases: "The shoe deserves its name," and "With the character of the woman"; also the identical numerals used by appellant; that later appellant adopted an additional numeral, 397, and directly thereafter appellee went back and adopted the same numeral. The Court further found that the words: "The American Girl," and "American Lady," are so similar as to cause confusion, and that such confusion had resulted; that all this was done by appellee with knowledge that it was following appellant, and that such acts were not consistent with innocence and good faith; further, that appellee acted with notice and knowledge of the infringement through correspondence; hence an injunction and accounting was granted as heretofore stated. This Court at that time had before it evidence showing that the name "American Lady" was adopted by the appellee at an assembly of its traveling salesmen and resulted from suggestions made by them. These salesmen came from the same territory in which appellant's shoes were most largely sold. The original suggestion came from a salesman who traveled in Texas; another Texas salesman and one from Arkansas were also present. It was disclosed in the testimony that the largest sale of The American Girl shoes was among the negroes and illiterate whites in the south; also that in this very territory actual confusion, which worked greatly to the disadvantage of appellant, existed among purchasers. The adjudication made was upon the merits, and should be re-opened, if at all, only upon convincing evidence that the original conclusion, which led to the injunction and to this accounting, was wrong. (DeLong Hook & Eye Co. v. Francis Hook & Eye & Fastener Co. (C. C.) 159 Fed. 292; In re Potts, 166 U. S. 263-267; Chicago Wooden Ware Co., et al. v. Miller Ladder Co. (C. C. A.) 133 Fed. 541; Fairbank Co., et al. v. Windsor, et al. (C. C. A.) 124 Fed. 200; Fourniquet, et al. v. Perkins, 16 Howard 82.) Nothing was adduced at the second hearing to alter the situation originally presented, and we adhere now to the conclusion reached then. That conclusion also involves, to a certain degree, elements "*c*" and "*d*"; namely, that the design and means were effective, and that reasonably certain injury and material damage resulted to appellant. It appears from the record that the appellant, through one of its salesmen, enjoyed an annual business of $75,000.00 from the sale
836 of The American Girl shoes in the State of Illinois. This salesman was hired by the appellee and appellant's business in that state was practically destroyed. When appellee entered the field with its rival trade-name appellant's business immediately fell

off. Actual confusion in the mind of the consuming public was shown and damage to appellant is legitimately to be presumed. The injury to its business was at least reasonably certain. And even though these deductions may not necessarily be drawn from the prior conclusion reached by this Court, nevertheless the same results are now sufficiently apparent from an examination of this record. In cases of unfair competition the fraudulent intent is often inferred from the facts sometimes against the sworn protestations of the infringer. (Fairbank Company v. Windsor, et al. (C. C. A.) 124 Fed. 200; Florence Mfg. Co. v. Dowd, et al. (C. C. A.) 189 Fed. 44.) And so this Court held on the former appeal (165 Fed. l. c. 416).

2 and 3. In strict trade-mark cases the infringer is held to account for profits accruing because of the unauthorized use of the property right; and unfair competition in trade may, under proper conditions, entitle the injured party to the same measure of relief. (Regis, et al. v. Jaynes, et al., 191 Mass. 245; Gulden v. Chance, et al. (C. C. A.) 182 Fed. 303-320; Merriam Co. v. Saalfield (C. C. A.) 198 Fed. 369; Reed Cushion Shoe Co. v. Frew, et al. (C. C.) 158 Fed. 552-556; Fairbank Co. v. Windsor, et al. (C. C.) 118 Fed. 96; Atlanta Milling Co. v. Rowland, et al. (C. C.) 27 Fed. 24; Lever v. Goodwin, L. R. 36 Ch. Div. 1.)

Following the analogy of the patent cases.

(Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604; Tilghman v. Proctor, 125 U. S. 136; Root v. Railway Company, 105 U. S. 189.)

However, appellee submits that this accounting must fail for the following reasons: First, because it claims that the cartons in which its American Lady shoes were sold displayed accompanying matter clearly indicating that such shoes were of its own manufacture, and, therefore, not of appellant's; second, because it conclusively appears that it did not deceive the retailers, to whom alone it made sales; third, because it denies any responsibility for the ultimate consumers, who buy at retail, and asserts that there is no direct proof that any such were deceived into buying appellee's shoes for those manufactured by appellant.

It was stipulated at the hearing that every pair of American Lady shoes issued by appellee to its retail dealers were sold and delivered in cartons, each of which cartons bore prominently on the lid thereof in white letters on a black background at the head of said lid the words "Hamilton-Brown Shoe Co.'s" and at the foot of said lid, equally prominent, the name "American Lady", making the lettering upon the lid read: "Hamilton-Brown Shoe Co.'s American Lady"; that on the front end of each carton
837 appeared the name "American Lady" and the belt trade-mark of the Hamilton-Brown Shoe Company, which consisted of a black strap, in the center of which was a red background, the words "Hamilton-Brown Shoe Co." appearing in white letters on the black strap, and the word "Makers" appearing in white letters on the red background. Appellee claims that this was matter accompanying the use of the words "American Lady" as applied to the

shoes sufficient to conform to the requirement made by this Court, and this was the opinion of the trial Court. With this we cannot agree. In the first place, it is abundantly shown in the testimony that it is a common pratice of shoe dealers, for their own purpose of advertisement, as well as for that of maintaining a uniform stock appearance in their stores, to remove shoes from the cartons in which they are purchased and place them in other cartons of uniform appearance and markings irrespective of the source from which they came. In the next place, it is not only disclosed by the testimony, but it is a matter of common knowledge, that the purchaser of shoes rarely, if ever, sees the carton in which they are encased upon the shelves—much less that in which they come from the manufacturer. The purchaser takes his seat at a point removed from the stock, and makes known his wishes as to the character of shoe and its size, with which he desires to be fitted; the salesman brings the shoe—often but one—taking it from the box, which he leaves upon the shelf, and the purchaser forms his opinion of the shoe from its appearance, and from the marks that appear upon the shoe itself. Therefore, the carton, in which the shoe is originally contained, or afterwards placed, has practically no influence upon the ultimate purchase. Furthermore, if the name "American Lady" be placed upon the shoe itself, as the evidence shows it was, the spirit as well as the letter of the Court's requirement would be that this name there placed should be accompanied by such matter as would clearly disclose the identity of the manufacturer. This defense also involves the claim that the name "Hamilton-Brown Shoe Company" stamped upon the shoe, either upon the sole with the name "American Lady," or in the top-facing, with the same distinctive name, constituted a sufficient disclosure of the identity of the manufacturer. This by no means follows. The practice of retailers, as well as jobbers, of placing their names upon articles which they have for sale, but do not manufacture, is well known; and in the present case the testimony discloses that the appellee is a jobber as well as a manufacturer of shoes, and that its name is stamped upon all the shoes it puts forth, whether of its own manufacture or that of another. It is the characteristic trade-name which strikes the attention of the wouldbe purchaser, and, as was shown in evidence, the name "The American Girl" was constantly confused in the minds of such purchasers with that of "American Lady."

These same cartons were before the Court on the last appeal. It must be presumed that the retail merchant receiving the shoes in these cartons knew what shoes he was buying, and from
838 whom. He would have known this in the absence of any carton. The appellee conceives that it has discharged its duty and obligation to the appellant, and to the public, if it has used means which would excuse it from the charge of having deceived its own customers. It says: "We are not concerned with what the retailer does; we are concerned with how the Hamilton-Brown Shoe Company sells the shoes." Such is not the law. If a manufacturer or wholesale dealer wilfully puts up goods in such a way

that the ultimate purchaser will be deceived into buying the goods of another, it is no defense that he does not deceive and has no intention of deceiving the retailer to whom he himself sells the goods. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser. (Scheuer v. Muller, et al. (C. C. A.) 74 Fed. 225; Denison Mfg. Co. v. Thomas Mfg. Co. (C. C.) 94 Fed. 651; National Biscuit Co. v. Baker, et al. (C. C.) 95 Fed. 135; Fairbank Co. v. Bell Mfg. Co. (C. C.) 77 Fed. 869; Revere Rubber Co. v. Consolidated Hoof Pad Co. (C. C.) 139 Fed. 151; Lever v. Goodwin, L. R. Ch. Div. 1; Gulden v. Chance, et al. (C. C. A.) 182 Fed. 303.)

In such cases the complainant will not be held to specific proof that ultimate purchasers were deceived and limited to loss of profits thus established. Loss will be presumed. In Merriam Co. v. Saalfield, 198 Fed. 369, the rule is thus stated by the Court of Appeals for the Sixth Circuit:

"Where the title was not qualified as the law and the decree required (if such cases appear), and it further appears, by direct proofs or by necessary inference, that it is impossible to determine whether this unlawful title use was the inducing cause of the sale —in other words, when it appears that such title was one of the causes, and it is impossible to apportion between that and other causes, the credit for the sale—then (and if we are to adopt the analogy of the patent cases) there must be a presumption that the sale results from the unlawful use of the name. The defendant has confused the marking and dress, which he had a right to use, with those which, as against complainant, he has no right to use. The latter part is a material, if not the maior, part of the whole. If the history of the sale cannot be more definitely ascertained and followed, and so it is impossible to say which part of the dress exercised the predominant influence, then under the principle of Westinghouse Co. v. Wagner Co., the defendant must respond."

We have here a case in which the appellee, with a design to appropriate appellant's trade, has devised a trade-name strikingly similar to that used by appellant. It did this deliberately and adopted many expedients, all of which were calculated to help along the deception and enable it to accomplish its purpose. It fortifies itself by certain formulas in dealing with its direct purchasers through which it expects to escape responsibility for the ultimate results of its acts. It invades the territory in which appellant is doing business and which covers all the states of the union
839 except two, and particularly the southern states in which appellant's trade is largest. It makes use of its own prestige, its great resources and advertising facilities with which to break down the trade of a smaller business competitor, and to confuse the public with which that competitor has already established a business reputation. Having accomplished its aim, which was to avail itself of the pioneer work of appellant, it is willing to submit to an injunction and to nominal damages, but insists as a condition to substantial recovery, that appellant accomplish the well nigh im-

possible task of establishing specifically the number of ultimate consumers who have been thus deceived in the purchase of shoes. Neither considerations of equity nor the decided cases sustain this contention. The property rights of complainant have been invaded in such manner that the rules long recognized in patent and strict trademark cases should be applied. Wrongs of this nature cannot be perpetrated and the Courts be helpless to extend substantial relief. The recovery in this case is large; but that is because the transactions involved were large. The principle is in nowise affected by this consideration. If the judgment seems harsh, it is no more so than defendant's own acts have made it. The Court cannot do otherwise than rule in accordance with those just principles which must govern and control its action. It should be steadfast in its purpose both to relieve against unlawful encroachment and to promote commercial honesty and fair dealing.

4. No special damages apart from profits are shown. The method of computation adopted by the Master was essentially fair and the profits found substantially accurate. The use of the word "Makers" in the third class of American Lady shoes while not placed upon the sole in such a position as to call especial attention to it, was, nevertheless, used upon the shoes themselves, and, therefore, this class was properly excluded by the Master. It follows that the Court below rightly overruled complainant's exceptions. It should likewise have overruled those of defendant. The decree must be reversed with directions that defendant's exceptions to the Master's report be overruled, that the report of the Master be confirmed, that a decree be entered against defendant for the amount recommended by him, and that the costs be taxed against defendant.

It is so Ordered.

Filed May 20, 1913.

HOOK, *Circuit Judge:*

For the most part I agree with the above opinion but am doubtful about the measure and amount of recovery. This is not a case of patent or trade mark but one of unfair competition, and though it has been said to be analogous to infringement of a trade mark it seems to me there may be distinctions which are important
840 in this litigation. The plaintiff offered no proof of damage but is held entitled to defendant's profits aggregating $445,311.55. It does not appear plaintiff was deprived of such a large amount of profits but simply that defendant made them. Nor does it appear that there was confusion or impossibility to segregate or distinguish between plaintiff's damage and defendant's gain because as stated plaintiff offered no proof of the former. From choice, not necessity, it stood on its right to defendant's profits. In this situation I am not clearly persuaded that defendant's profits, as such, are recoverable. But if they are, it then seems to me the recovery should have been more closely confined to the profits resulting from actual unfair competition as distinguished from that which is constructive or theoretical. It does not seem right that there should be a recovery

of the profits on all shoes insufficiently marked, without reference to the effect, extent, place or circumstance of the competition.

The Court has applied the rule which obtains in cases of patent and trade mark. There is a reason for the rule in those cases which is not applicable to unfair competition. Patents and trade marks are in themselves a sort of special property of which the owner is given a monopoly by statute. He has the exclusive right of use everywhere. An infringer carries off the property, as it were, and makes gains and profits from a use which belongs to the owner. Those gains and profits are recoverable in equity (not at law, Burdell v. Denig, 92 U. S. 716) according to the rule applied to a trustee who has wrongfully used trust property to his own advantage. Root v. Railway, 105 U. S. 189. In unfair competition the plaintiff has no such property right in his trade name, symbol or dress of goods. Anyone can use them by making it clear to the ordinary purchaser that the articles to which they are applied are his, not plaintiff's. A wrongful use of them is a tort injurious to plaintiff's business, but it is not an appropriation of a property right of which he has a monopoly. For a wrongful injury to business damages is the ordinary rule and compensation the ordinary measure of recovery. The books are full of instances in which the recovery is so limited. When more than compensation is demanded the reason must be found in statute or special circumstances and when the latter are relied on they should be closely examined especially when, as here, the doctrine is not fully settled in the law but is argued upon analogy. It is not enough to say unfair competition is analogous to infringement of a trade mark and profits are recoverable for the latter. Unfair competition is a subject of modern origin and its development which has been rapid should proceed along lines of principle. Upon what theory is a plaintiff entitled to more than an injunction and compensatory damages for injury sustained—a loss in his business? Disapprobation excited by defendant's conduct will not suffice. As was said in Livingston v. Woodworth, 15 How. 546, 559: "We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts." Nor will a sup-
841 posed impossibility of proving the damage. Proof of damage to a business may be difficult but it is not impossible. No higher degree of certainty is required than the nature of the case admits and the scope and extent of the inquiry are well settled. Nor can it be that defendant's profits are an element of plaintiff's damage upon the presumption that the sales of the former would otherwise have been made by the latter. There is no such presumption even in a case of patent. Seymour v. Morgan, 16 How. 480. Unfair competition may also be said to be analogous to a trespass upon the good will of a business. Indeed a trade name or symbol is an incident to the good will. Brown Chemical Co. v. Meyer, 139 U. S. 540, 548. A transfer of the business by sale or succession may embrace the good will; a vendor may also covenant not to engage in competition. The rights so acquired, like the right of the plaintiff here, may be protected in equity by injunction. Trego v. Hunt, 65 L. J. Ch. 1; Hedge v. Lowe, 47 Ia. 137; Pomeroy Eq. Juris. sec.

934. It is difficult to distinguish the principle of such cases from that of ordinary unfair competition yet I would be surprised had the courts awarded the injured party all the profits of the wrongful competitor up to the time of the injunction.

It is true there is some authority for the award of profits in unfair competition, but in most of the cases relied on it rests largely on unnecessary dicta or brief statements of an analogy to trade marks and patents. Regis v. Jaynes & Co., 191 Mass. 245, is frequently cited on this proposition, but it seems to have been a case of technical statutory trade mark (see 185 Mass. 485) and the mention of the rule in unfair competition a passing reference arguendo. In support of the reference the following cases were cited: Fairbank Co. v. Windsor, 118 Fed. 96, in which the Circuit Court relied mainly upon an analogy to the infringement of a trade mark, saying: "The remedy for the enforcement or protection of a trade mark right or against unfair competition involves the same mode of procedure and ends in the exercise of the restraining power of a court of equity, and the award of such damages as may have been sustained or the profits of the wrongdoer it is presumed would have accrued to the person whose rights were invaded." Walter Baker & Co. v. Slack, 130 Fed. 514, 65 C. C. A. 138, in which the rule was assumed rather than decided and the discussion was from a different angle; Williams v. Mitchell, 105 Fed. 168, 45 C. C. A. 265, in which the trial court denied complainants "a reference to determine the damages sustained them by reason of past unfair competition," and the Court of Appeals merely said: "The complainants are entitled, upon proper proof, to compensation to the extent of the invasion": and finally, Lever v. Goodwin, 36 Ch. Div. 1. This last case is frequently cited to sustain the doctrine, and it does, though rather by way of assumption since the matter for decision was defendant's contention that he sold only to dealers, not to final purchasers, and therefore there was
842 no evidence he had injured plaintiffs at all. Ten years later Justice Kekewich followed it as by obligation in Saxlehner v. Apollinaris Co., 66 L. J. Ch. 533, 1 Ch. 893, but took occasion to say:

"I venture to doubt whether the propriety of directing such an account in a case like the present has ever been fully considered. It seems to have been assumed that the right to use and protect what is styled a common law trade mark, to distinguish it from a registered trade mark, is a species of property carrying with it all the rights and remedies incidental to property, and that therefore the account of profits follows the injunction as a matter of course, as it does when a successful plaintiff asks it in a patent case * * *. If at liberty to express an opinion, I should wish to say that if there be no property in such a trade mark the right to an account of profits does not necessarily follow the injunction, and the consequences of directing an account here are so serious that I should be unwilling to do it unless compelled by authority."

Atlantic Milling Co. v. Rowland, 27 Fed. 24, was a case of trade mark. Reed Cushion Shoe Co. v. Frew, 158 Fed. 552, is also cited to sustain the rule but the Circuit Court said that it rests entirely

upon the "fraud by a defendant and the loss of business by acts," and no accounting was allowed because under the peculiar circumstances "it would be difficult to satisfactorily establish that the purchasers" would not have bought from defendant with full knowledge of the facts. In Gulden v. Chance, 182 Fed. 303, 105 C. C. A. 16, there was no discussion and but brief reference to the measure of recovery. The trial court had held with defendants on the question of unfair competition and in reversing it on that ground the Court of Appeals merely added: "The complainant is also entitled to recover all profits and damages lost and sustained by him by reason of all sales by the defendants," etc. Profits lost by a plaintiff on all defendant's sales may be a proper element in his compensation, but they do not necessarily equal all defendant's profits. In Florence Mfg. Co. v. Dowd, 189 Fed. 44, 110 C. C. A. 608, the question was that of difficulty in accounting, and defendant's liability for his gains and profits was assumed, not discussed. Perhaps the fullest discussion is found in Merriam Co. v. Saalfield, 198 Fed. 369, 117 C. C. A. 245. It was there held that plaintiff could recover defendant's profits on each sale where it was made to appear the purchaser was misled, and also, by analogy to Westinghouse Co. v. Wagner Co., 225 U. S. 604, where it was impossible to determine the influencing cause, that is, to apportion the credit for the sale. There are other cases upon the subject but for the most part less definite than the above. On the other hand Judge Putnam in Merriam Co. v. Ogilvie, 170 Fed. 167, said in speaking for the court:

"Under some circumstances, it has been held that the profits to be accounted for would be the entire profits of publication; but the Supreme Court has never had occasion to consider a rule so 843 harsh as this, and, following the analogy of the practice established in suits for infringements of patents for inventions, we are led to the conclusion that it would never go to that extent."

Again, the court said, doubtless having in mind the difficulty which beset Justice Kekewich in Saxlehner v. Apollinaris Co., supra:

"The cases where there has been no division of profits, but the whole profits have been allowed are probably trade mark cases, in which, the defendant having used a trade mark proper, the presumption was that the goods would not have been sold without that use * * *. The present case, however, does not fully take on that feature. The substantial offense of Ogilvie did not consist in availing himself of a Merriam Company's trade mark, because both this court and the Circuit Court have expressly found that there was no trade mark. It consisted in dressing up his publications unlawfully. Therefore there is no concrete thing which belongs to the Merriam Company, the value of which can be substantially determined in this connection."

But even if gains and profits are recoverable, the amount awarded here seems to me far beyond what can be justified upon sound reason or principle. I think it should have been more

closely confined to the extent of the interference with plaintiff's business, to the results of the actual unfair competition as distinguished from that which is inferred or theoretical. No rule in equity is good which, based on abstract considerations, ignores relevant conditions and inflicts a grievous punishment beyond the real extent of the wrong or the deserts of the complaining party. If it be conceded that a defendant who has used the trade name, symbol or dress of another should be held to have intended deception and to bear the burden of disproving it in each case of sale or, failing in it, as he must, to yield to plaintiff all the profits of the unfair competition, should the inquiry end with the amount of his sales and the gains therefrom? Should it not be broader and embrace the conditions of the trade, the markets, the relations of the parties to them and to each other, etc., so that the real effect of defendant's conduct may appear and plaintiff may not make an unmerited gain by recovering exaggerated damages in a court of equity? A, having applied a trade name to an article which he has sold only in Maine, might possibly have an injunction against B who, thinking it attractive, uses it on a like article in Nebraska, because the potential expansion of A's business might be affected; but we would hardly expect him to recover all B's gains and profits. That is an extreme instance but in actual affairs cases cover the entire range from such extremes to close hand to hand competition. Nor, if A had made a few sales in Nebraska and B's had run into the millions, would it appear equitable that the former should have all the gains and profits of the latter. In a patent case that rule of recovery would be clear but to apply it to unfair competition seems like using a yard stick to weigh sugar. Again, if both sell
844 largely in the same territory it might nevertheless clearly appear that defendant with a much larger capital and many times the outlay for enlarging his business acquired an enormous trade, much greater than plaintiff would ever have had under any circumstances. It must be borne in mind that plaintiff can be fully protected for the future by injunction which leaves him in the undisturbed enjoyment of his rights in the trade designations. What we are concerned with here is the past, whether plaintiff should be compensated or rewarded and if the latter whether extravagantly or temporately according to rules which can be generally applied to all cases of the kind. The award in this case does not proceed along the above lines.

The suit was begun January 29, 1906. Between December 11, 1908, and the close of the period of accounting defendant sold 961,607 pairs of shoes on the soles of which were stamped the words "Hamilton-Brown Shoe Company" in belt form with the words "American Lady" in the center. Each pair was in a carton having prominent labels showing the contents were Hamilton-Brown Shoe Co.'s Amerian Lady shoes and that that company was the maker. On neither cartons nor shoes was any phrase or arbitrary number in simulation of those of the plaintiff. As to these shoes the sole criticism is the absence of the word "maker" on the shoes and the similarity of the name "American Lady" to the plaintiff's "Ameri-

can Girl." There was nothing else to mislead the ultimate purchaser. On these shoes defendant made a profit of $190,909.83 and it is included in the award to the plaintiff. I agree with the court in what it says about the ignorance of the ultimate purchaser of the labels on the cartons and also that defendant should have more definitely indicated on the shoes themselves that it was the maker and therefore inferentially that plaintiff was not. But I think the omission was sufficiently cured by injunction and did not call for the punishment imposed. The markings which were made showed an honest but ineffectual attempt to observe plaintiff's rights, and in such a case there should be no recovery of profits, if indeed any pecuniary recovery at all. An injunction is not necessarily followed by an accounting. It frequently occurs that the former is granted and the latter refused, and sometimes for the lack of fraudulent intent.

Filed May 20, 1913.

SMITH, *Circuit Judge:*

I fully concur in most of the opinion by Judge Van Valkenburgh. I am of the opinion, however, that The Wolf Brothers and Company is entitled to a decree for one hundred and thirty-two thousand seven hundred and forty dollars and seventy-seven cents in excess of that awarded it on account of the shoes embraced in what is called Class Three. The interlocutory decree entered in the Circuit Court upon the mandate of this Court contains this provision:

845 "2. The defendant, Hamilton-Brown Shoe Company, its servants, agents, officers and employees, are perpetually enjoined from using the name "The American Lady," as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, The Wolf Brothers & Company * * *."

There has been no suggestion that this decree was too broad or exceeded the directions given by this Court. The parties do not agree, however, as to the construction of it.

Substantially the respondent says the Hamilton-Brown Shoe Co., was enjoined from using the name "The American Lady" as applied to its shoes for women unless the shoes were accompanied with the other matter described.

The complainant contends it was the words "The American Lady" which were required to be so accompanied.

Substantially the Court has adopted the contention of the complainant and I think that clearly where the words "The American Lady" were stamped on the sole of a shoe they were not accompanied with the explanatory words required if they appeared on the inside of one of the shoes.

I think the complainant's exceptions to the finding of the referee should have been sustained but fully concur that defendant's exceptions should have been overruled.

Filed May 20, 1913.

846 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1913.

Tuesday, May 20, 1913.

No. 3758.

THE WOLF BROTHERS AND COMPANY, Appellant,
vs.
HAMILTON BROWN SHOE COMPANY.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that The Wolf Brothers and Company have and recover against the Hamilton Brown Shoe Company the sum of — Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to overrule the exceptions of defendant to the Master's report, that the report of the Master be confirmed, that a decree be entered against defendant for the amount recommended by him, and that the costs be taxed against defendant.

May 20, 1913.

IN THE

United States Circuit Court of Appeals

EIGHTH CIRCUIT

THE WOLF BROTHERS & COMPANY,
Appellant,

v.

HAMILTON, BROWN SHOE COMPANY,
Appellee.

In Equity
No. 3,758

APPELLEE'S PETITION FOR REHEARING.

We respectfully ask the Court for a rehearing in this case. *We ask it solely upon the amount of recovery and the rule adopted in the prevailing opinion in ascertaining the amount of the recovery.*

PRELIMINARY STATEMENT.

Before stating the questions to be reargued, we beg to submit this brief statement of facts:

Plaintiff's original bill claimed a "trade mark" in the words "The American Girl" as applied to its manufactured shoes. This Court held the claim to be *not* well founded (165 Fed. 413). It, however, reversed the case and ordered an injunction and accounting, upon the theory of unfair competition in trade, saying (p. 415):

> "In this case, while complainant is not entitled to relief upon the ground that the words 'American Girl' or the numerals applied to its several styles of shoes are *valid trade marks*, yet it is entitled to protection from

their use by the defendant in *a manner* and *under circumstances* constituting unfair trade; the essence of the rule being that one person shall not *in the sale* of his goods so act as to lead the public to believe that they are the goods of another."

If defendant must not "so act as to lead the public to believe" that its goods are those of another, then unless it has so acted as to make the public so believe and act on that belief, there can be no title to recovery of damages or profits in this case. An injunction may go in apprehension that such belief may and likely will be created in the public mind and damage thereby be occasioned; but when damages or profits are asked, they may be awarded only upon *proof* that the public has been deceived into buying defendant's goods as and for complainant's.

An accounting was ordered from the date of the commencement of the suit, January 29, 1906. It extended from that date until March 10, 1910—a little over four years. Plaintiff began business in 1898. Defendant began using the words "American Lady" in 1900, and some correspondence as to its use took place between plaintiff and defendant in January, 1901. (See 165 Fed. 416.)

There is not a scintilla of proof in this record that, either before the date set by the Court for the accounting, or since, a single pair of "*American Lady*" shoes was palmed off on the public as and for "*The American Girl*" shoes.

Long prior to 1900 the defendant was one of the most prominent manufacturers of shoes in the United States, and had spent thousands upon thousands of dollars in advertising its business and different makes of shoes.

After this suit was brought (in 1906), the officers of plaintiff gave a value to their trade mark—they then supposed and insisted it was a true trade mark; this Court not then having decided to the contrary—of from $5,000 to $10,000 (O. R. 63, 105, 106).

On the accounting it was found by the Master that defendant had made and sold to the trade from January 29, 1906, to March 10, 1910, *two million, five hundred and twenty-nine thousand, four hundred and ninety-five pairs of shoes.* Of this number the Master allowed (and this Court has affirmed that allowance) the plaintiff to recover *the entire profit made* by defendant upon 1,935,623 pairs of shoes, because they did not have stamped on the shoes the word "Makers."

The Master refused to allow plaintiff anything upon 593,872 pairs of shoes because they bore upon them the impress "Maker." All defendant's American Lady shoes accounted for were shipped and sold in the same cartons. The plaintiff offered no proof of injury to its business—none that it had been diminished or injured by the defendant's use of the words "American Lady."

The amount awarded the complainant for the three years' profits of defendant's business is $445,311.55. There is neither proof of loss of profits nor damage to plaintiff resulting from the alleged unfair competition.

POINTS UPON WHICH REHEARING IS ASKED.

I.

This Court has awarded this recovery upon an analogy of the supposed rule in cases of strict trade-mark or patent rights. There are two objections to this:

(a) It is not the rule in strict trade-mark or patent rights to award all the profits of the infringer. Profits are *sometimes* allowed in patent cases—*first*, because the statute authorizes it, and *second*, when damages are an inadequate compensation to plaintiff; and in either case only to the extent to which the plaintiff can show, by certain and definite proof, that the plaintiff's patent—his property—has entered into the commercial value of the thing defendant has sold.

(b) There is no legal analogy of the rule in actions for infringement of true trade-marks or patents and actions for unfair competition in trade. The *former* rest upon the invasion of a property right; the *latter* upon *fraud and deceit* in business transactions, whereby one person palms off his goods as and for the goods of another.

II.

The True Rule in Cases of Unfair Competition is this:

The plaintiff can recover such damages only as it shows it has sustained, or such profits as defendant has made, by reason of such unfair competition.

It must show:

(a) That it has lost trade which it would have had but for defendant's wrongful acts; or

(b) That defendant sold its goods to the trade as and for the plaintiff's, with the belief at the time of the purchase on

the part of the trade that it was purchasing plaintiff's goods and not those of defendant.

The application of any other rule would impose a penalty, which the Court in this action has no jurisdiction to impose.

III.

This Court, by its opinion confirming the Master's report, has refused to allow the defendant as a part of the expense of manufacturing and selling its "American Lady" shoes, in diminution of its profits thereon, the amount of money expended by it in advertising which "had reference exclusively to the American Lady shoe" (R. 112), interest on that part of the capital which defendant had invested in its business, over and above borrowed moneys, and which "was devoted exclusively to the American Lady line of shoes" (R. 123), the pro rata of the amount of money expended by it in payment of taxes (R. 125), the pro rata of the amount of money expended by it in payment for insurance (R. 125), the pro rata of the amount of the depreciation of its real estate (R. 125), and the pro rata of the amount of the trade discount allowed to the Boston House on goods sold to it and referred to in the stipulation at page 532 of the record on this appeal (R. 109), the said items thus disallowed amounting to two-thirds of the amount of the recovery and made up as follows:

Advertising	$186,278.68
Interest on Capital	63,364.45
Taxes	10,974.99
Insurance	4,933.02
Depreciation of Real Estate	12,508.06
Discount to Boston House	10,271.69
Total	$288,330.89

The amount of the defendant's profits on American Lady shoes is the amount that is left after deducting every item which the manufacture and sale of those shoes cost the defendant. "The *whole* cost of the shoes belongs to the defendant" and the defendant's profits on them are not determined until every item of cost or expense entering into their manufacture and sale has been deducted.

IV.

This case is based solely on unfair competition in trade; no trademark right is here involved, as this Court held on

the former appeal (165 Fed. 415). There is no proof that a single pair of defendant's shoes was palmed off, to the deception of purchasers, as and for the shoes of the plaintiff; and there is no proof that plaintiff has suffered damage. Therefore, to give the plaintiff the profits made by defendant in the sale of defendant's shoes is without precedent in the reported decisions and violates the fundamental principles governing cases of unfair competition in trade, as repeatedly laid down by the United States Supreme Court, notably in the case of Howe Scale Co. v. Wyckoff, where the Supreme Court says, at p. 140 of 198 U. S.:

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant the action fails."

V.

In this case, based upon unfair competition in trade, where the defendant did nothing more, during the period of this inquiry, than use a geographical and descriptive name, and the plaintiff has suffered no *damages*, and there is no proof that defendant's shoes were palmed off, to the deception of purchasers, as and for the shoes of the plaintiff, the defendant has not made *any illegitimate* profits. For this Court, under the circumstances, to give to the plaintiff the profits made by defendant in the sale of its shoes is to impose a punishment on the defendant—to inflict a penalty upon the defendant—thereby converting this Court of Equity into an instrument for the punishment of simple torts, thus violating established principles governing courts of equity, which principles have been fixed by the Supreme Court of the United States. (Livingston v. Woodworth, 15 How. *559-560; Root v. Railway Co., 105 U. S. l. c. 194, 195; Westinghouse Co. v. Wagner Co , 225 U. S. 620.)

VI.

In failing to recognize the established principles governing cases of alleged unfair competition, of the character of the case at bar, and in finding the defendant liable to complainant for the *profits* estimated by the Master on the classes of defendant's shoes specified as Classes 1 and 2 in the prevail-

ing opinion of this Court, and in ordering that defendant pay to complainant all or any part of said *profits,* without proof that complainant had been *damaged* and without proof that in a single instance any of defendant's shoes in either of those Classes had been sold, to the deception of purchasers, as and for The American Girl shoes of complainant, this Court, as a court of equity, has converted itself into an instrument for the punishment of a simple tort and has inflicted a penalty on the defendant, without warrant either in the statute, or in the law as interpreted by the U. S. Supreme Court. In doing this it has not given to the complainant what complainant showed was *ex aequo et bono* the complainant's. In so doing and in thus inflicting a penalty on defendant, without warrant or authority in the statute or in the law governing the procedure (in cases such as the case at bar) in the Federal Courts of the United States, this Court has exceeded its power and jurisdiction and has undertaken to deprive defendant of its property without due process of law. Under such circumstances the order of this Court in its prevailing opinion, if carried into effect, will result in taking defendant's property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

VII.

This Court is in error in its prevailing opinion, in the last paragraph but one thereof, wherein it is stated:

> "The *property rights* of complainant have been invaded in such manner that the rules long recognized in patent and strict trade mark cases should be applied." (Italics ours.)

This statement in the prevailing opinion of this Court is in respect to defendant's American Lady shoes specified in Classes 1 and 2 of said opinion. The shoes in said Classes bore upon them the geographical and descriptive name "American Lady," and this Court has held in its former opinion in this case (165 Fed. 415) that the complainant has no trade mark in the geographical and descriptive name, "The American Girl," as applied to shoes. Therefore, no *property rights* of the complainant were taken by defendant in respect to the shoes in any of the classes named by this Court in its opinion.

VIII.

This Court is also in error with reference to certain facts hereinafter specified, as well as in massing together *all* of those things which defendant had done prior to the filing of the bill and using them as inducements for inflicting punishment on the defendant on this accounting. As a matter of fact, defendant had ceased doing *all* of those things when the bill was filed, and was not guilty of doing *all* of those things during the period of the accounting. The only thing that defendant did with respect to the shoes specified in the various classes named in the prevailing opinion of this Court was to use on the shoes in those classes the geographical and descriptive name "American Lady."

As to the numbers, defendant ceased using those numbers *before* the filing of the bill; and those numbers only appeared in catalogues issued by defendant years *before* the filing of the bill, on which catalogues plainly appeared the defendant's name; and those numbers were only a very few (five at most) of hundreds of distinct numbers which had been used by defendant to classify its shoes (see Old R. 459 to 463).

As to the use by defendant of the words "The shoe deserves its name," as appears from Old R. 434-5, defendant only used those words once, and then only in an advertisement in the Shoe & Leather Gazette (a publication addressed to the trade and not to the consumer), of October 29, 1903—nearly three years before the filing of the bill in this case. Moreover, that advertisement contained, in conspicuous letters, the name of defendant company; and the words "The shoe deserves its name" were not used, even in that single instance, by themselves, but in connection with the picture of Gracie Scott and in connection with the statement, based on a letter from Gracie Scott, which read as follows:

> "She wears the American Lady shoe and says the shoe deserves its name." (See Old R. 434-5).

One of the things complained of on the original hearing before the Court was that before the filing of the bill the defendant used on its cartons the end label reproduced at the foot of p. 233 of Old Record, on which end label the name of defendant did not happen to appear and upon which end label appeared the words "With the character of the woman." Assuming, as we must, since this Court has so found in its former opinion, that the words "With the character of

the woman" on defendant's end label for its cartons simulated complainant's catch phrase "A shoe as good as its name," the record shows that defendant never used that phrase "With the character of the woman" on its shoes, or on the cartons containing its shoes, after the filing of the bill; and since the filing of the bill the record shows that defendant used on all its cartons the lid label Exhibit A and the end label Exhibit B reproduced at Appeal R. 461.

This Court is in error in Clause 1 of its prevailing opinion where it says that it appears from the record that the plaintiff, through one of its salesmen, enjoyed an annual business of $75,000 on account of the sales of The American Girl shoes in the State of Illinois; that afterwards this salesman was hired by defendant, and that then plaintiff's business in that state was "*practically destroyed.*"

We do not find this borne out by the record. The deeply interested James J. Wolf, vice-president and general manager of the plaintiff company, without reference to the books of the company, makes the statement (Old R. 116) that the salesman Selig had sold annually approximately $50,000 worth of plaintiff's shoes; and at R. 117 he says that Selig was afterwards engaged in selling in that territory defendant's shoes; but Wolf does not state, and it does not appear in the record, that plaintiff's business in the State of Illinois, or elsewhere, was "*practically destroyed,*" nor that it fell off then, or at any other time.

This Court has erred in utilizing all the things that defendant did *before* the filing of the bill as inducements for inflicting this penalty on defendant on the accounting, with respect to the shoes classified in the prevailing opinion of this Court, all of which were sold by defendant *after* the filing of the bill.

IX.

This case is an important one—important because of the principles involved; important because of the great amount involved.

The judges who have written opinions in this case differ radically in their conception of the principles of law and equity applicable to it. Each cites authorities to support contrary views. Under these circumstances, if this Court does not see fit to grant a rehearing of this case, then, and in that event, we ask that, in pursuance of Sec. 239, Chapter 10, of the new Federal Judicial Code, enacted March 3, 1911, and

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which has been in effect since January 1, 1912, this Court certify the question to the Supreme Court in substantially the following form:

Whether on an accounting in a suit in equity, where complainant claims that defendant has been guilty of unfair competition in trade, due to the fact that defendant has merely used a geographical and descriptive name similar to a geographical and descriptive name in which the Court has found complainant has no trade mark, complainant may recover all the profits made by defendant on goods sold by defendant bearing such name, where it appears:

(a) That there is no proof that plaintiff has sustained damages by reason of defendant's goods, so marked, being palmed off on purchasers as and for the goods of the complainant;

(b) That it has not been shown that any of defendant's goods so marked were sold, to the deception of purchasers, as and for the goods of the complainant?

Respectfully submitted,

HAMILTON, BROWN SHOE COMPANY,
Petitioner.

By H. S. PRIEST,
PAUL BAKEWELL,
LUKE E. HART,
Its Solicitors.

St. Louis, July, 1913.

CERTIFCATE OF COUNSEL.

The undersigned, solicitors and counsel for Hamilton-Brown Shoe Company, Petitioner, certify that this petition is filed in good faith and not for purposes of delay; and that, in their opinion, it is well founded both in law and in fact.

H. S. PRIEST,
PAUE BAKEWELL,
LUKE E. HART.

1138

856 (*Order Denying Petition of Appellee for a Rehearing.*)

September Term, 1913.

Monday, September 22, 1913.

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for Appellee.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

September 22, 1913.

(*Motion of Appellee for Stay of Mandate.*)

Now comes Hamilton, Brown Shoe Company, appellee, by its solicitors and counsel, and moves this Court to stay the mandate in this case until the appellee, Hamilton, Brown Shoe Company, perfect an appeal to, or file a petition in, the Supreme Court of the United States for a writ of certiorari to this Court to send up the record and proceedings in this case to the Supreme Court of the United States for review, and, in case of the latter, until the Supreme Court of the United States act upon said petition.

The appellee, Hamilton, Brown Shoe Company, engages to perfect said appeal or petition the Supreme Court of the United States for a writ of certiorari with all reasonable haste consistent with the reproduction of the voluminous record in this case and otherwise complying with the rules of the Supreme Court of the United States in this behalf, and not later than at the October Term of said court for the year 1913, as soon as possible, after said court has convened for said October Term 1913 as appellee's counsel may prepare said petition and file in said court a reproduction of the necessary copies of the entire record in this case.

Appellee states that the necessary complete copies of the entire record in this case for the purposes of presenting said peti-
857 tion for certiorari to the Supreme Court of the United States are not extant, and that therefore it will be necessary to reproduce the necessary copies of said record to comply with the rules of the Supreme Court of the United States in that behalf.

PAUL BAKEWELL,
LUKE E. HART,
H. S. PRIEST,
Solicitors for Hamilton, Brown Shoe Co., Defendant-Appellee.

UNITED STATES OF AMERICA,
State of Missouri, City of St. Louis:

Paul Bakewell, being first duly sworn, on his oath states:

I am solicitor and of counsel for the above-named Hamilton, Brown Shoe Company, appellee; I am advised by my client that it is its intention, in the event the petition for rehearing in this case

is not granted, to perfect an appeal to the Supreme Court of the United States from the decision of this Court, or petition the Supreme Court of the United States for writ of certiorari in this case, in order that the Supreme Court of the United States may, if it see fit, review the opinions, decree and orders against the appellee heretofore ordered or rendered in this cause, and that to that end a complete transcript of the record and proceedings in this cause be sent to the Supreme Court of the United States; and I state that this motion is not made for purposes of delay but, on the contrary, in good faith.

PAUL BAKEWELL.

Sworn to and subscribed before me, this fourteenth day of July, 1913.

GEORGE BAKEWELL,
[SEAL.] *Notary Public.*

My term expires Feb. 3, 1917.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 22, 1913.

858 *(Order Staying Mandate.)*

September Term, 1913.

Monday, September 22, 1913.

This cause came on to be heard upon the motion of counsel for appellee for an order staying the mandate in this cause, pending an application to the Supreme Court of the United States for a writ of certiorari to review the decision of this Court.

On consideration whereof, and in pursuance of said motion, it is now here ordered by this Court, that the mandate in this cause be, and the same is hereby, stayed pending the presentation to and the disposition by the said Supreme Court of the said application, provided, that the said petition for a writ of certiorari shall be filed in and presented to the said Supreme Court within sixty days from and after this date.

September 22, 1913.

859 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and pro-

ceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein The Wolf Brothers and Company is Appellant and the Hamilton-Brown Shoe Company is Appellee, No. 3758, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourteenth day of October, A. D. 1913.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

860 Supreme Court of the United States, October Term, 1913.

No. 813.

HAMILTON, BROWN SHOE COMPANY, Petitioner,
vs.
THE WOLF BROTHERS & COMPANY, Respondent.

Stipulation.

It is hereby stipulated by and between the parties to the above entitled cause, that the certified copy of the record on file in the clerk's office together with the original physical exhibits may be taken as a return to the Writ of Certiorari issued herein on the twenty-sixth day of December, 1913.

St. Louis, Mo., March 17, 1914.

MORTON JOURDAN,
LUKE E. HART, &
H. S. PRIEST,
Solicitors for Petitioner, Hamilton, Brown Shoe Company.
LAWRENCE MAXWELL,
SIMEON M. JOHNSON,
PERCY WERNER,
Solicitors for Respondent, The Wolf Brothers & Company.

(Endorsed:) No. 3758. The Wolf Brothers and Co., Appellant, vs. Hamilton-Brown Shoe Co. Stipulation as to return to Writ of Certiorari from Supreme Court, U. S. Filed Mar. 27, 1914. John D. Jordan, Clerk.

861 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Wolf Brothers & Company is appellant, and Hamilton-Brown Shoe Company is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Eastern District of Missouri, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

862 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-sixth day of December, in the year of our Lord one thousand nine hundred and thirteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

863 [Endorsed:] File No. 23,964. Supreme Court of the United States, No. 813, October Term, 1913. Hamilton-Brown Shoe Company vs. The Wolf Brothers & Company. Writ of Certiorari. Filed Mar. 27, 1914. John D. Jordan, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The Wolf Brothers and Company, Appellant, vs. Hamilton-Brown Shoe Company, No. 3758, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificates thereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-eighth day of March, A. D. 1914.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

864 [Endorsed:] File No. 23,964. Supreme Court U. S., October Term, 1913. Term No. 813. Hamilton-Brown Shoe Company vs. The Wolf Brothers & Company. Writ of Certiorari and Return. Filed March 30, 1914.

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

No. 37.

Supreme Court of the United States

OCTOBER TERM, 1913.

In Equity.

HAMILTON, BROWN SHOE COMPANY, PETITIONER,

vs.

THE WOLF BROTHERS & COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MORTON JOURDAN,
Of Counsel.

H. S. PRIEST,
LUKE E. HART,
Solicitors and Counsel for Petitioner, Hamilton, Brown Shoe Company.

BUXTON & SKINNER STATIONERY CO., ST. LOUIS

On Accounting In Action For Unfair Competition In Trade.

I

Majority of Court (Circuit Judge Hook, contra), directed judgment against defendant for $445,311.55 profits found to have been made by defendant in its manufacture and sale of shoes, in analogy to the supposed rule in accounting for infringement in patent or strict trade-mark cases *and* without any proof that a single person had purchased goods marketed by the defendant, supposing them to be the product of complainant, or that complainant had lost a single customer by the defendant's conduct. This is contrary to ruling of this Court and the Courts of Appeal in other Circuits in the cases of Howe Scale Co. v. Wyckoff, 198 U. S. 140; Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 674; Goodyear v. Goodyear, 128 U. S. 598; Baker v. Baker, 115 Fed. 297; Merriam Co. v. Ogilvie, 170 Fed. 169, and other leading cases cited.

II

There can be no recovery of defendant's *profits* in an action based upon unfair competition. Plaintiff's recovery is limited to his injury and consequent damage. He can recover such damages only as he shows he has sustained by the loss of trade which he otherwise would have had but for defendant's sale of its goods as and for plaintiff's goods.

The complainant's right to recover profits in cases of patents and strict trade-marks rests upon the ground of complainant's *property* right in them and of the defendant's unlawful use thereof, according to the rule applied to a trustee who has wrongfully used trust property to his

own advantage. This rule has no application in a case which does not involve the use of *another's property* from which a definite profit is derived. If a wrongdoer makes no profit from the use of another's property, there can be no recovery of profits (Elizabeth v. Pavement Co., 97 U. S. 126). But cases of unfair trade do not involve the element of the use of another's property; they involve only fraud and deception, through and by means of which the wrongdoer induces others to buy his goods as and for the goods of another, to the damage of such other. (Dissenting opinion of Judge Hook, 206 Fed. 620.)

III

There is no anology between patent and trade-mark cases, and cases of unfair competition. But the majority opinion misconceives and misapplies even the rule applicable to patent cases. In patent cases the complainant is not entitled to recover *the entire profit* made by the defendant from the manufacture and sale of the article, but only such profits as it is shown the defendant made "by the use of the plaintiff's invention," i. e., the gains savings and advantages derived by the defendant *by reason of the infringement,* or, in other words, *the amount proved to have been contributed to the defendant's profits by the use of the infringing device.* Westinghouse Co. v. Wagner Co., 225 U. S. 620.

Supreme Court of the United States

OCTOBER TERM, 1913.

In Equity.

HAMILTON, BROWN SHOE COMPANY, PETITIONER,

vs.

THE WOLF BROTHERS & COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Hamilton, Brown Shoe Company, respectfully represents:

That The Wolf Brothers & Company, a corporation, engaged in the manufacture of shoes at Cincinnati, Ohio, instituted a suit in equity in the District Court for the Eastern District of Missouri against your petitioner, a corporation, engaged extensively in the manufacture of shoes at the City of St. Louis, Missouri, claiming that it was the owner of a trade-mark in the name "The American Girl," as applied to women's shoes manufactured by it and of a catch phrase consisting of the words "A shoe as good as its name," and certain

Small transcript is referred to as First Record and large transcript as Second Record.

style numbers used to designate the styles of its shoes in its catalogues. It charged your petitioner with infringement of its rights by using the words "American Lady," as applied to women's shoes, and also by the use of certain catch phrases and style numbers.

Upon trial on bill, answer and evidence, complainant's bill was dismissed. Complainant appealed from this decree to the Circuit Court of Appeals. The Circuit Court of Appeals, in an opinion by District Judge Munger, concurred in by Circuit Judge (now Mr. Justice) Vandeventer, (165 Fed. Rep. 413; 1 R, 506), reversed the decree of the Circuit Court, holding: That while the complainant was not entitled to a trade-mark in the words "The American Girl" for the reason that they were "descriptive merely" and "were not the subject of a valid trade-mark," yet it was "entitled to protection" from the use of the name "American Lady" by the petitioner "in a manner and under circumstances constituting unfair trade, *the essence of the rule being that one person shall not in the sale of his goods so act as to lead the public to believe that they are the goods of another.* * * * * That the words 'The American Girl' and 'American Lady' are so similar as to cause confusion," and, therefore, while the petitioner was entitled to use the name "American Lady" "or any similar term, they could do so only on condition that they accompanied it with such distinguishing marks or matter as would plainly indicate that it was not being used with its secondary signification; that is, as pointing to the complainant as the manufacturer of the shoes to which it was applied." That the complainant was entitled to an injunction and to "an accounting limited to the time since the commencement of this suit" (January 29, 1906).

The decree of the Circuit Court under the mandate of the Court of Appeals was entered November 15, 1909.

The accounting extended from January 29, 1906, to March 10, 1910.

Agreed statements of facts, in the form of two stipulations, were entered into by the parties on the accounting and are found at pages 452 and 535 of the second Record. By these agreed statements of facts it was shown that the petitioner is engaged in the manufacture and sale of shoes at St. Louis, Missouri, exclusively at wholesale; that all of the shoes sold by it under the name "American Lady" were manufactured in what is known as its "American Lady" factory; that every pair of "American Lady" shoes manufactured and sold by the petitioner during the period of the accounting was sold and delivered by it to its customers in a carton, upon the lid of which appeared prominently the words "Hamilton-Brown Shoe Co's. American Lady" and upon the end of which carton appeared the name "American Lady" in association with the name and word "Hamilton-Brown Shoe Company, Makers," on the belt trademark of defendant, duplicates of said lid and end labels being hereto attached and on following page:

(End label)

HAMILTON-BROWN MAKERS SHOE CO.

"KEEP THE QUALITY UP"

American Lady

[6]

(Lid label)

HAMILTON-BROWN SHOE Co's

Those stipulations also showed that during the period of the accounting 2,529,495 pairs of American Lady shoes were sold, divided according to their markings as follows:

(1) 593,872 pairs were marked on the sole of each shoe with defendant's belt trademark, with the name "Hamilton-Brown Shoe Co." on the belt and the name "American Lady" in the center of the belt, one shoe of each pair having a silk top facing which had woven thereon the name "American Lady," the defendant's belt trademark, with the name "Hamilton-Brown Shoe Co." thereon and the word "Makers" in the center of the belt, a duplicate of said sole mark, marked Exhibit "A," being found at page 21 of the second Record and a duplicate of said top facing being found at page 461 of the second Record.

(2) 961,607 pairs were marked on the sole of each shoe as in class (1) above, with defendant's belt trade mark, with the name "Hamilton-Brown Shoe Co." on the belt and the name "American Lady" in the center.

(3) 974,016 pairs were marked on the sole of each shoe with the name "American Lady."

All of these shoes were sold in cartons marked as described above.

There was no evidence that the plaintiff had suffered any damage—no evidence that it ever lost a single customer by reason of the defendant's conduct. This was admitted by the complainant in its brief before the Master (2R, 72); it was the finding of the Master (2R, 78); it was the finding of the Circuit Court (2R, 825; 192 Fed., 935); it was the finding of the Court of Appeals in its prevailing opinion (2R, 839; 206 Fed. 619), and also the finding of Judge Hook in his dissenting opinin (2R, 839; 206 Fed. 619).

The Master recommended that the complainant be given a judgment for the *entire profits* made by the defendant up-

on the shoes included within classes 2 and 3 above and which he estimated at $445,311.55. The profits as thus estimated by the Master included the *entire profit from the manufacture and sale* of those shoes, "including all profits from" dressing and treating the leather and from every other operation necessary to convert the raw leather into the finished shoe, and, to use the language of this Court in Dobson v. Hartford Carpet Co., 114 U. S. 444, "thus regarding the entire profits as due to the" name "American Lady."

The Circuit Court, in an able and well considered opinion (2R, 818-827; 192 Fed. 930), set aside the Master's report on exceptions filed by the defendant, and entered judgment in favor of the respondent for nominal damages only. In that opinion the Court said:

> "The record in this case is absolutely barren of evidence tending to show that any individual purchased a pair of shoes marked 'American Lady,' believing at the time of the purchase he was getting the 'American Girl.' There is no evidence in the record tending to prove that the defendant or any of its customers ever offered for sale any shoe marked 'American Lady' as and for the 'American Girl.' There is no evidence in the record tending to prove that a single pair of shoes marked 'American Lady' was ever taken from the carton in which they were enclosed before sale. There is no evidence in the record that the complainant's output was curtailed in the least by the sale of the 'American Lady,' nor is there any evidence that complainant lost a single customer by reason of anything done by the defendant or any of its customers. If the court correctly understood counsel for the complainant, no claim to the contrary of these facts was made."

From that judgment The Wolf Brothers & Company prosecuted an appeal to the Circuit Court of Appeals, where,

by a divided Court, the judgment was reversed and the lower Court ordered to enter a judgment against your petitioner for *$45,311.55*. It is for the purpose of having that action of the Court of Appeals reviewed by this Court that your petitioner now asks for a writ of certiorari.

Three Judges sat in the Court of Appeals. The opinion of the majority was expressed by District Judge Van Valkenburgh, in which it was held that the rule for the recovery of profits which obtains in cases of patents and strict trade-marks applies also by analogy to a case based upon unfair competition in trade, and that under that rule the complainant is entitled to recover on an accounting *the entire profits* made by the defendant in the manufacture and sale of the article accounted for, without it being made to appear that in a single instance the defendant's goods have been sold as and for the goods of the complainant and without it being made to appear what, if any, advantage accrued to the defendant "by reason of the infringement."

The contrary view of the law was expressed as follows by Circuit Judge Hook (206 Fed. 619-620; 2 R, 839-841);

> "This is not a case of patent or trade mark, but one of unfair competition, and, though it has been said to be analogous to infringement of a trade mark, it seems to me there may be distinctions which are important in this litigation. *The plaintiff offered no proof of damage, but is held entitled to defendant's profits aggregating $45,311.55. It does not appear plaintiff was deprived of such a large amount of profits, but simply that defendant made them. Nor does it appear that there was confusion or impossibility to segregate or distinguish between plaintiff's damage and defendant's gain, because, as stated, plaintiff offered no proof of the former. From choice, not necessity, it stood on its right to defendant's profits.* In this situation I

am not clearly persuaded that defendants' profits, as such, are recoverable. But, if they are, it then seems to me the recovery should have been more closely confined to the profits resulting from actual unfair competition, as distinguished from that which is constructive or theoretical. It does not seem right that there should be a recovery of the profits on *all* shoes insufficiently marked, without reference to the effect, extent, place or circumstance of the competition.

"*The Court (that is, the majority) has applied the rule which obtains in cases of patent and trade mark.* There is a reason for the rule in those cases, which is not applicable to unfair competition. Patents and trade marks are in themselves a sort of special property, of which the owner is given a monopoly by statute. He has the exclusive right of use everywhere. An infringer carries off the property, as it were, and makes gains and profits from a use which belongs to the owner. Those gains and profits are recoverable in equity (not at law, Burdell v. Denig, 92 U. S. 716) according to the rule applied to a trustee who has wrongfully used trust property to his own advantage. Root v. Railway, 105 U. S. 189. In unfair competition the plaintiff has no such property right in his trade name, symbol or dress of goods. Anyone can use them by making it clear to the ordinary purchaser that the articles to which they are applied are his, not plaintiff's. A wrongful use of them is a tort injurious to plaintiff's business, but it is not an appropriation of a property right of which he has a monopoly. For a wrongful injury to business damages is the ordinary rule, and compensation the ordinary measure of recovery. The books are full of instances in which the recovery is so limited. *When more than compenation is demanded, the reason must be found in statute or special circumstances, and when the latter are relied on they should be closely examined especially when, as here, the doctrine is not fully settled in the law, but is argued upon analogy.* It is not

enough to say unfair competition is analogous to infringement of a trade mark and profits are recoverable for the latter. Unfair competition is a subject of modern origin, and its development, which has been rapid, should proceed along lines of principle. Upon what theory is a plaintiff entitled to more than an injunction and compensatory damages for injury sustained—a loss in his business? Disapprobation excited by defendant's conduct will not suffice. As was said in Livingston v. Woodworth, 15 How. 546,559: 'We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts.' Nor will a supposed impossibility of proving the damage. Proof of damage to a business may be difficult, but it is not impossible. No higher degree of certainty is required than the nature of the case admits, and the scope and extent of the injury are well settled. Nor can it be that defendant's profits are an element of plaintiff's damage, upon the presumption that the sales of the former would otherwise have been made by the latter. There is no such presumption, even in a case of patent. Seymour v. McCormick, 16 How., 480. Unfair competition may also be said to be analogous to a trespass upon the good will of a business. Indeed, a trade name or symbol is an incident to the good will. Brown Chemical Co. v. Meyer, 139 U. S., 540, 548. A transfer of the business by sale or succession may embrace the good will; a vendor may also covenant not to engage in competition. The rights so acquired, like the right of the plaintiff here, may be protected in equity by injunction. Trego v. Hunt, 65 L. J. Ch. 1; Hedge v. Lowe, 47 Ia., 137; Pomeroy Eq. Juris. sec. 934. It is difficult to distinguish the principle of such cases from that of ordinary unfair competition, yet I would be surprised, had the courts awarded the injured party all the profits of the wrongful competitor up to the time of the injunction." (Italics ours)

We submit, then, the judgment of the Circuit Court of Appeals was erroneous in holding that the complainant, The Wolf Brothers & Company, is entitled to recover the profits made by your petitioner on the shoes manufactured and sold by it, in the absence of any proof of damages, or that any person had been deceived into buying petitioner's shoes as and for those of The Wolf Brothers & Co., and that such holding is contrary to the express rulings of this Court and the Courts of Appeal of other Circuits, and, if permitted to stand, will create confusion in the administration of the law in such cases.

I.

Under the decisions of this Court and other Courts of Appeal:

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer for the goods of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

Howe Scale Co. v. Wyckoff, 198 U. S. 140;
Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 461;
Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665;
Brown Chemical Co. v. Meyer, 139 U. S. 540;
Goodyear Co. v. Goodyear, 128 U. S., 598;
Baker v. Baker, 115 Fed. 299, 2d C. C. A.;
Rowley Co. v. Rowley, 193 Fed. 390, 393, 3d C. C. A.;
Rathbone, Sard & Co. v. Champion Co., 189 Fed. 26, 6th C. C. A.;
Merriam Co. v. Ogilvie, 170 Fed. 167, 1st C. C. A.;
Appollo Bros. v. Perkins, 207 Fed. 530, 533, 3d C. C. A.;
Rushmore v. Badger, 198 Fed. 379, 2d C. C. A.
Also see Dyer Quarry Co. v. Schuylkill Stone Co., 185 Fed. 557.

The rule is stated in various ways in the cases cited, the above statement of the rule being from the opinion of this Court in Howe Scale Co. v. Wyckoff, 198 U. S. at page 140. This statement of the rule is almost identical with the statement of the rule in the cases of Standard Paint Co. v. Trinidad Co., 220 U. S. 461, and Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665. In the Goodyear case, 128 U. S. 598, this Court stated the rule as follows:

> "Relief in such cases is granted only where the defendant by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacturer, to the injury of the plaintiff."

In applying this rule to the facts in the case of Baker v. Baker, 115 Fed. 297, the Circuit Court of Appeals for the Second Circuit said (p. 299):

> "The evidence upon the accounting failed to disclose that complainant was entitled to any recovery of profits, or any except nominal damages by reason of the defendant's conduct. It failed to disclose that a single person had purchased goods marketed by the defendant supposing them to be the product of the complainant, or that the complainant had lost a single customer by the defendant's conduct."

Those decisions of this Court, followed by numerous decisions of other Courts of Appeal, clearly establish the rule to be that—

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails," that "relief in such cases is granted only where the defendant represents to the public that the goods sold by him are those

> of a different manufacturer," and that where, as in this case, the evidence on the accounting "failed to disclose that a single person had purchased goods marketed by the defendant, supposing them to be the product of the complainant, or that the complainant had lost a single customer by defendant's conduct," it "failed to disclose that complainant was entitled to any recovery of profits, or any except nominal damages by reason of the defendant's conduct."

This is the law as clearly laid down by this Court and other Courts of Appeal in the cases cited, also by the Court of Appeals for the Eighth Circuit (Munger and Vandeventer, Judges) in this case on the first appeal, by Judge Hook in his dissenting opinion in this case, by the Circuit Court in this case and by Judge Bradford in the Dyer Quarry case.

II.

Under the decisions of this Court and other Courts of Appeal, the rule for the recovery of profits in cases brought for infringement of patents is that the plaintiff may recover such profits as it is shown that the defendant *made by the use of the plaintiff's invention, i. e.,* the gains, savings and advantages derived by the defendant *by reason of the infringement, or, in other words, the amount proved to have been contributed to the defendant's profits by the use of the infringing device.*

> Seymour v. McCormick, 16 Howard 480;
> Rubber Co. v. Goodyear, 9 Wallace 788;
> Elizabeth v. Pavement Co., 97 U. S. 126;
> Garretson v. Clark, 111 U. S. 120;
> Tilghman v. Proctor, 125 U. S. 136, 146;
> Dobson v. Hartford Carpet Co., 114 U. S. 444-446;
> Keystone Mfg. Co. v. Adams, 151 U. S. 139;
> Westinghouse Co. v. Wagner Co., 225 U. S. 604, 620.

In this case the Court of Appeals undertakes to give the plaintiff the entire profits made by the defendant from the manufacture and sale of its shoes, without it being made to appear that any of those profits were due or attributable in any manner to the use of the name "American Lady."

In the case of Dobson v. Hartford Carpet Co. 114 U. S. 444-446, the suit was for infringement of a design patent and the complainant sought, as did the complainant in this case, to recover *the entire profits* made by the defendant from the manufacture and sale of the article accounted for. This Court said of this contention:

> "This Court has, in a series of decisions, laid down rules as to what are to be regarded as 'profits to be accounted for by the defendant,' and what as 'actual damages,' in suits for the infringement of patents; and *no rule has been sanctioned which will allow*, in the case of a patent for a design for ornamental figures created in the weaving of a carpet, or imprinted on it, *the entire profit from the manufacture and sale of the carpet*, as profits or damages, including all the profits from the carding, spinning, dyeing and weaving, *thus regarding the entire profits as due to the figure or pattern, unless it is shown, by reliable evidence, that the entire profit is due to the figure or pattern.* It is a matter of common knowledge, that there is an infinite variety of patterns in carpets, and that, between two carpets, of equal cost to make, and equal merit as to durability of fabric and fastness of color, each with a pattern pleasing to the taste, one having a design free to be used, and the other a design protected by a patent, the latter may or may not command in the market a price larger than the former. If it does, then the increased price may be fairly attributed to the design; and there is a solid basis of evidence for profits or damages. But, short of this, under the rules established by this Court, there is no such basis. The same principle is applicable as in

patents for inventions. *The burden is upon the plaintiff, and, if he fails to give the necessary evidence, but resorts, instead, to inference and conjecture and speculation, he must fail for want of proof.* * * * Approval of the particular design or pattern may very well be one motive for purchasing the article containing it, but the article must have intrinsic merits of quality and structure, to obtain a purchaser, aside from the pattern or design; and *to attribute, in law, the entire profit to the pattern, to the exclusion of the other merits, unless it is shown, by evidence, as a fact, that the profit ought to be so attributed, not only violates the statutory rules of 'actual damages' and of 'profits to be accounted for,' but confounds all distinctions between cause and effect.*" (Italics ours).

On the principle of the cases cited, of which the Dobson v. Hartford Carpet Co. case is but an example, it would be necessary for the plaintiff to show as a condition to the recovery of the defendant's profits, that the profits were attributable in some definite measure to the fact that the shoes bore the name "American Lady," and the pecuniary value of such influence, for, as stated by this Court in that case, *to attribute the entire profit to the use of the name "American Lady," to the exclusion of the other merits*, unless it is shown that the profit ought to be so attributed, violates the statutory rules of "actual damages" and of "profits to be accounted for" and confounds all distinctions between cause and effect.

We submit, therefore, that the decision of the Court of Appeals is in conflict with the settled rule for the recovery of profits in patent cases as laid down by this Court.

We respectfully submit that numerous decisions of this Court settle the rules as to what are to be regarded as "profits to be accounted for by the defendant" in cases of

unfair competition, as set forth in this petition, and that the rule laid down in the majority opinion of the Court of Appeals in this case is in conflict with the rules as thus laid down by this Court. Certainly there is no warrant in any decision of this Court, in an unfair competition case, for the rule thus adopted by the Court of Appeals. However, if there should be any doubt as to the rules, we respectfully submit that that doubt should be resolved by this Court in favor of granting the writ, especially as in this case the decision of the Court of Appeals is a matter of great gravity and importance, affecting valuable rights of property, and, if allowed to stand it will establish a precedent in the Eighth Circuit which will necessarily affect interests of an incalculable value.

In this connection we beg to suggest that, even though the rule as to what are to be regarded as profits to be accounted for by the defendant in cases of unfair competition was not settled by the decisions of this Court, as we conceive it to be, there is a conflict between the decision of the majority of the Court of Appeals in the case at bar and the decisions of a number of other Courts of Appeal in which a rule directly contrary to the rule thus adopted by the Court of Appeals in the case at bar is laid down. We refer to the decisions of the Circuit Court of Appeals for the First Circuit in Merriam Co. v. Ogilvie, 170 Fed. 167; of the Circuit Court of Appeals for the Second Circuit in Baker v. Baker, 115 Fed. 297, 299, and in Rushmore v. Badger, 198 Fed. 379; of the Circuit Court of Appeals for the Third Circuit in J. F. Rowley Co. v. Rowley, 193 Fed. 390-393, and in Appollo Bros. v. Perkins, 207 Fed. 530, 533, and of the Circuit Court of Appeals for the Sixth Circuit in Rathbone, Sard & Co. v. Champion Steel Range Co., 189 Fed. 26.

We submit, therefore, that "*in the interest of uniformity of decision*" this Court should order this case certified up to it for a decision and settle the conflict between the rule as adopted by the Court of Appeals in the case at bar and the rule adopted by the other Courts of Appeal in the cases mentioned. That this should be done is made manifest, we believe, by the fact that in the case at bar the majority of the Court of Appeals was compelled to resort to the supposed analogy of the rule for the recovery of profits on accounting in patent cases in order to find support for its decision in this case, in decisions of this Court, instead of being able to find authority for its decision in decisions of this Court in this class of cases, thus evidencing a want of authority in decisions of this Court in like cases, and at least manifesting a want of authority in decisions of this Court in like cases for the rule adopted by the Court of Appeals in the case at bar.

Your petitioner believes that the decree of the Circuit Court of Appeals in the case at bar is erroneous and in conflict with the decisions of this Court and other Courts of Appeal, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in the said case therein entitled The Wolf Brothers & Company, Appellant, v. Hamilton, Brown Shoe Company, Appellee, In Equity

No. 3758, to the end that the said case may be certified and determined by this Court, as provided in Section 240 of the Act of Congress entitled "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary," approved March 3, 1911, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

H. S. PRIEST,
LUKE E. HART,
Solicitors and Counsel for Petitioner,
Hamilton, Brown Shoe Company.

MORTON JOURDAN,
Of Counsel.

State of Missouri,
City of St. Louis—ss.

Luke E. Hart, being duly sworn, says that he is Solicitor and of Counsel for the Petitioner, Hamilton, Brown Shoe Company; that he prepared the foregoing petition and that the allegations contained therein are true, as he verily believes.

LUKE E. HART.

Subscribed and sworn to before me this 1st day of December, A. D. 1913.

My Commission expires August 8, 1916.

(Seal)

ARTHUR H. MORRIS,
Notary Public.

No. 373.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
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Supreme Court of the United States

OCTOBER TERM, 1913.

In Equity.

HAMILTON, BROWN SHOE COMPANY,
Petitioner
vs.
THE WOLF BROTHERS & COMPANY,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MORTON JOURDAN,
Of Counsel.

H. S. PRIEST and
LUKE E. HART,
Solicitors and of Counsel for Petitioner, Hamilton, Brown Shoe Company.

BUXTON & SKINNER STATIONERY CO., ST. LOUIS

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On Accounting In Action For Unfair Competition In Trade.

I

Majority of Court (Circuit Judge Hook, contra), directed judgment against defendant for $445,311.55 profits found to have been made by defendant in its manufacture and sale of shoes, in analogy to the supposed rule in accounting for infringement in patent or strict trade-mark cases *and* without any proof that a single person had purchased goods marketed by the defendant, supposing them to be the product of complainant, or that complainant had lost a single customer by the defendant's conduct. This is contrary to ruling of this Court and the Courts of Appeal in other Circuits in the cases of Howe Scale Co. v. Wyckoff, 198 U. S. 140; Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 674; Goodyear v. Goodyear, 128 U. S. 598; Baker v. Baker, 115 Fed. 297; Merriam Co. v. Ogilvie, 170 Fed. 169, and other leading cases cited.

II

There can be no recovery of defendant's *profits* in an action based upon unfair competition. Plaintiff's recovery is limited to his injury and consequent damage. He can recover such damages only as he shows he has sustained by the loss of trade which he otherwise would have had but for defendant's sale of its goods as and for plaintiff's goods.

The complainant's right to recover profits in cases of patents and strict trade-marks rests upon the ground of complainant's *property* right in them and of the defendant's unlawful use thereof, according to the rule applied to a trustee who has wrongfully used trust property to his

own advantage. This rule has no application in a case which does not involve the use of *another's property* from which a definite profit is derived. If a wrongdoer makes no profit from the use of another's property, there can be no recovery of profits (Elizabeth v. Pavement Co., 97 U. S. 126). But cases of unfair trade do not involve the element of the use of another's property; they involve only fraud and deception, through and by means of which the wrongdoer induces others to buy his goods as and for the goods of another, to the damage of such other. (Dissenting opinion of Judge Hook, 206 Fed. 620.)

III

There is no anology between patent and trade-mark cases, and cases of unfair competition. But the majority opinion misconceives and misapplies even the rule applicable to patent cases. In patent cases the complainant is not entitled to recover *the entire profit* made by the defendant from the manufacture and sale of the article, but only such profits as it is shown the defendant made "by the use of the plaintiff's invention," i. e., the gains savings and advantages derived by the defendant *by reason of the infringement,* or, in other words, *the amount proved to have been contributed to the defendant's profits by the use of the infringing device.* Westinghouse Co. v. Wagner Co., 225 U. S. 620.

Supreme Court of the United States

OCTOBER TERM, 1913.

In Equity.

HAMILTON, BROWN SHOE COMPANY,
Petitioner
vs.
THE WOLF BROTHERS & COMPANY,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The Bill of Complaint in this case was filed January 29, 1906.

The Complainant (Respondent) is engaged in the manufacture of shoes at Cincinnati, Ohio. Its business was

Small transcript is referred to herein as First Record and large transcript as Second Record.

begun in May, 1898, when its owners purchased the entire business of the Dana-Lytle Shoe Company, "consisting of machinery, lasts, dies and patterns, good will and trade-mark known as 'The American Girl' for $3,000.00."

Up to the time of the filing of this suit the complainant's annual sales of "The American Girl" shoes amounted to $250,000.00 and during the year 1906 its sales amounted to $250,000.00.

During the eight years prior to the filing of this suit, January 29, 1906, the complainant expended $50,000.00 in advertising, or about $6,000 annually, and from January 29, 1906, to December 29, 1906, it expended $5,000.00. In their testimony the President and Vice President of the complainant Company placed a valuation on the name "The American Girl" as a trade-mark of from $5,000.00 to $10,000.00.

The Defendant (Petitioner) is engaged in the manufacture of shoes at St. Louis, Mo. Its business was established in 1872. It began to manufacture and sell American Lady shoes in 1900. In 1897 its total sales amounted to $5,000,000.00; in 1905 its total sales amounted to $9,500,000.00; in 1906 they amounted to more than $11,000,000.00, and its sales of American Lady shoes alone amounted to more than $1,100,000.00 in 1906.

In the five years between the adoption of the name American Lady and the filing of the bill of complaint the defendant expended $150,000.00 in advertising the American Lady shoe, or about $30,000.00 annually, and during the period of the accounting the defendant ex-

pended $331,000.00, or more than $80,000.00 annually, in advertising which "referred exclusively to the American Lady line of shoes."

On the first appeal the Court of Appeals held that:

> "The name 'The American Girl' applied to shoes, is not the subject of a valid trade mark;"

and that the limit of the complainant's right in this suit was a right to be protected from the use of the name "American Lady" by the petitioner

> "in a manner and under circumstances constituting unfair trade, the essence of the rule being that one person shall not in the sale of his goods so act as to lead the public to believe that they are the goods of another."

Therefore, "this is not a case of patent or trademark but one of unfair competition."

The Court of Appeals found "that the words 'The American Girl' and 'American Lady' are so similar as to cause confusion," and, therefore, while the petitioner was entitled to use the name "American Lady" "or any similar term, they could do so only on condition that they accompanied it with such distinguishing marks or matter as would plainly indicate that it was not being used with its secondary signification; that is, as pointing to the complainant as the manufacturer of the shoes to which it was applied." That the complainant was entitled to an injunction and to "an accounting limited to the time since the commencement of this suit." (January 29, 1906.)

The accounting covered the period between the date of the filing of the bill of complaint, January 29, 1906, and March 10, 1910.

Agreed statements of facts in the form of two stipulations were entered into by the parties on the accounting and are found at pages 452 and 535 of the second Record. By these agreed statements of facts it was shown that the petitioner is engaged in the manufacture and sale of shoes at St. Louis, Missouri, exclusively at wholesale; that all of the shoes sold by it under the name "American Lady" were manufactured in what is known as its "American Lady" factory; that every pair of "American Lady" shoes manufactured and sold by the petitioner during the period of the accounting was sold and delivered by it to its customers in a carton, upon the lid of which appeared prominently the words "Hamilton-Brown Shoe Co's. American Lady" and upon the end of which carton appeared the name "American Lady" in association with the name and word "Hamilton-Brown Shoe Company, Makers," on the belt trade-mark of defendant, duplicates of said lid and end labels being hereto attached.

(End label)

HAMILTON-BROWN
MAKERS
SHOE CO.
"KEEP THE QUALITY UP"

American Lady

[7]

(Lid label)

HAMILTON-BROWN
SHOE CO'S

Those stipulations also showed that during the period of the accounting 2,529,495 pairs of American Lady shoes were sold, divided according to their markings as follows:

(1) 593,872 pairs were marked on the sole of each shoe with defendant's belt trademark, with the name "Hamilton-Brown Shoe Co." on the belt and the name "American Lady" in the center of the belt, one shoe of each pair having a silk top facing which had woven thereon the name "American Lady," the defendant's belt trademark, with the name "Hamilton-Brown Shoe Co." thereon and the word "Makers" in the center of the belt, a duplicate of said sole mark, marked Exhibit "A," being found at page 21 of the second Record and a duplicate of said top facing being found at page 461 of the second Record.

(2) 961,607 pairs were marked on the sole of each shoe as in class (1) above, with defendant's belt trade mark, with the name "Hamilton-Brown Shoe Co." on the belt and the name "American Lady" in the center.

(3) 974,016 pairs were marked on the sole of each shoe with the name "American Lady."

All of these shoes were sold in cartons marked as described above.

There was no evidence that the plaintiff had suffered any damage—no evidence that it ever lost a single customer by reason of the defendant's conduct. This was admitted by the complainant in its brief before the Master (2R, 72); it was the finding of the Master (2R, 78); it was the finding of the Circuit Court (2R, 825; 192 Fed., 935); it was the finding of the Court of Appeals in its prevailing opinion (2R, 839; 206 Fed. 619), and also the finding of Judge Hook in his dissenting opinion (2R, 839; 206 Fed. 619).

The Master recommended that the complainant be given a judgment for the *entire profits* made by the defendant up-

on the shoes included within classes 2 and 3 above and which he estimated at $445,311.55. The profits as thus estimated by the Master included the *entire profit from the manufacture and sale* of those shoes, "including all profits from" dressing and treating the leather and from every other operation necessary to convert the raw leather into the finished shoe, and, to use the language of this Court in Dobson v. Hartford Carpet Co., 114 U. S. 444, "thus regarding the entire profits as due to the" name "American Lady."

The Circuit Court, in an able and well considered opinion (2R. 818-827; 192 Fed. 930), set aside the Master's report on exceptions filed by the defendant, and entered judgment in favor of the respondent for nominal damages only. In that opinion the Court said:

> "The record in this case is absolutely barren of evidence tending to show that any individual purchased a pair of shoes marked 'American Lady,' believing at the time of the purchase he was getting the 'American Girl.' There is no evidence in the record tending to prove that the defendant or any of its customers ever offered for sale any shoe marked 'American Lady' as and for the 'American Girl.' There is no evidence in the record tending to prove that a single pair of shoes marked 'American Lady' was ever taken from the carton in which they were enclosed before sale. There is no evidence in the record that the complainant's output was curtailed in the least by the sale of the 'American Lady,' nor is there any evidence that complainant lost a single customer by reason of anything done by the defendant or any of its customers. If the court correctly understood counsel for the complainant, no claim to the contrary of these facts was made."

From that judgment The Wolf Brothers & Company prosecuted an appeal to the Circuit Court of Appeals, where,

by a divided Court, the judgment was reversed and the lower Court ordered to enter a judgment against your petitioner for *$45,311.55.* It is for the purpose of having that action of the Court of Appeals reviewed by this Court that your petitioner now asks for a writ of certiorari.

Three Judges sat in the Court of Appeals. The opinion of the majority was expressed by District Judge Van Valkenburgh, in which it was held that the rule for the recovery of profits which obtains in cases of patents and strict trade-marks applies also by analogy to a case based upon unfair competition in trade, and that under that rule the complainant is entitled to recover on an accounting *the entire profits* made by the defendant in the manufacture and sale of the article accounted for, without it being made to appear that in a single instance the defendant's goods have been sold as and for the goods of the complainant and without it being made to appear what, if any, advantage accrued to the defendant "by reason of the infringement."

The contrary view of the law was expressed as follows by Circuit Judge Hook (206 Fed. 619-620; 2 R. 839-841);

> "This is not a case of patent or trade mark, but one of unfair competition, and, though it has been said to be analogous to infringement of a trade mark, it seems to me there may be distinctions which are important in this litigation. *The plaintiff offered no proof of damage, but is held entitled to defendant's profits aggregating $45,311.55. It does not appear plaintiff was deprived of such a large amount of profits, but simply that defendant made them. Nor does it appear that there was confusion or impossibility to segregate or distinguish between plaintiff's damage and defendant's gain, because, as stated, plaintiff offered no proof of the former. From choice, not necessity, it stood on its right to defendant's profits.* In this situation I

am not clearly persuaded that defendants' profits, as such, are recoverable. But, if they are, it then seems to me the recovery should have been more closely confined to the profits resulting from actual unfair competition, as distinguished from that which is constructive or theoretical. It does not seem right that there should be a recovery of the profits on *all* shoes insufficiently marked, without reference to the effect, extent, place or circumstance of the competition.

"*The Court (that is, the majority) has applied the rule which obtains in cases of patent and trade mark.* There is a reason for the rule in those cases, which is not applicable to unfair competition. Patents and trade marks are in themselves a sort of special property, of which the owner is given a monopoly by statute. He has the exclusive right of use everywhere. An infringer carries off the property, as it were, and makes gains and profits from a use which belongs to the owner. Those gains and profits are recoverable in equity (not at law, Burdell v. Denig, 92 U. S. 716) according to the rule applied to a trustee who has wrongfully used trust property to his own advantage. Root v. Railway, 105 U. S. 189. In unfair competition the plaintiff has no such property right in his trade name, symbol or dress of goods. Anyone can use them by making it clear to the ordinary purchaser that the articles to which they are applied are his, not plaintiff's. A wrongful use of them is a tort injurious to plaintiff's business, but it is not an appropriation of a property right of which he has a monopoly. For a wrongful injury to business damages is the ordinary rule, and compensation the ordinary measure of recovery. The books are full of instances in which the recovery is so limited. *When more than compenation is demanded, the reason must be found in statute or special circumstances, and when the latter are relied on they should be closely examined especially when, as here, the doctrine is not fully settled in the law, but is argued upon analogy.* It is not

enough to say unfair competition is analogous to infringement of a trade mark and profits are recoverable for the latter. Unfair competition is a subject of modern origin, and its development, which has been rapid, should proceed along lines of principle. Upon what theory is a plaintiff entitled to more than an injunction and compensatory damages for injury sustained—a loss in his business? Disapprobation excited by defendant's conduct will not suffice. As was said in Livingston v. Woodworth, 15 How. 546,559: 'We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts.' Nor will a supposed impossibility of proving the damage. Proof of damage to a business may be difficult, but it is not impossible. No higher degree of certainty is required than the nature of the case admits, and the scope and extent of the injury are well settled. Nor can it be that defendant's profits are an element of plaintiff's damage, upon the presumption that the sales of the former would otherwise have been made by the latter. There is no such presumption, even in a case of patent. Seymour v. McCormick, 16 How., 480. Unfair competition may also be said to be analogous to a trespass upon the good will of a business. Indeed, a trade name or symbol is an incident to the good will. Brown Chemical Co. v. Meyer, 139 U. S., 540, 548. A transfer of the business by sale or succession may embrace the good will; a vendor may also covenant not to engage in competition. The rights so acquired, like the right of the plaintiff here, may be protected in equity by injunction. Trego v. Hunt, 65 L. J. Ch. 1; Hedge v. Lowe, 47 Ia., 137; Pomeroy Eq. Juris. sec. 934. It is difficult to distinguish the principle of such cases from that of ordinary unfair competition, yet I would be surprised, had the courts awarded the injured party all the profits of the wrongful competitor up to the time of the injunction." (Italics ours)

The learned Circuit Judge in this opinion clearly states the differences in opinion as between the majority of the court and himself.

We contend that the majority opinion of the Court of Appeals is in error and that it is in conflict with the decisions of this Court and other Courts of Appeal.

I

UNFAIR COMPETITION "SINCE THE COMMENCEMENT OF THIS SUIT" WAS NOT SHOWN.

The Court of Appeals, on the first appeal, held that

> "The name 'The American Girl,' applied to shoes, is not the subject of a valid trade-mark,"

and that complainant's right consisted of a right to be protected from the use of the name "American Lady" by the defendant

> "in a manner and under circumstances constituting unfair trade, the essence of the rule being that one person shall not in the sale of his goods so act as to lead the public to believe that they are the goods of another."

It also held that the accounting which it ordered should be

> "limited to the time since the commencement of this suit."

From this it would seem to be obvious that the complainant is only entitled to an accounting of the shoes shown to have been sold by the defendant "since the commencement of this suit," and which were sold "in a manner and under circumstances constituting unfair trade." Had the Court of Appeals, in its opinion, stopped here, it would have been necessary to determine

what it meant by the term "unfair trade." To make its decision perfectly clear, however, the Court, in its opinion, stated:

> "The essence of the rule being that one person shall not in the sale of his goods so act as to lead the public to believe that they are the goods of another."

Therefore, it is manifest that under that decision of the Court of Appeals the complainant can only require the defendant to account for American Lady shoes which it is shown that it sold since the filing of the bill in a manner and under circumstances which led the purchaser to believe that its shoes were the shoes of the complainant. That is the rule as clearly adopted by the Court of Appeals (Munger and Vandeventer, Judges) on the first appeal, and that rule is in exact accord with the well settled rule adopted by this Court in a number of decisions.

In the case of Goodyear v. Goodyear, 128 U. S. 598, 604, the complainant claimed that the defendant had been guilty of unfair competition in using the descriptive name "Goodyear" applied to rubber goods. In that case this Court laid down the rule applicable to cases of unfair trade as follows:

> "Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are the goods of another."

And this Court held that under that rule that case could not be sustained for the reason that

> "There is no proof of any attempt of the defendant to represent the goods manufactured and sold by it as those manufactured and sold by the plaintiff."

In Brown Chemical Co. v. Meyer, 139 U. S. 540, 547, the complainant sought to prevent the defendant from using the words "Brown's Iron Bitters" on a patent medicine. In deciding that case this Court said:

> "If the words 'Iron Bitters' cannot be lawfully appropriated as a trade mark, it is difficult to see upon what theory a person making use of these or similar words can be enjoined. We understand it to be conceded that these words do not in themselves constitute a trade mark; *it follows then that another person has the right to use them, unless he uses them in such connection with other words or devices as to operate as a deception upon the public.*"

In Elgin National Watch Co. v. Illinois Watch Co., the complainant claimed the exclusive right to the use of the geographical name "Elgin" as applied to watches, and this Court there laid down the rule that in unfair competition (179 U. S. 674):

> "The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

In the case of Howe Scale Co. v. Wyckoff Co., 198 U. S. 118, 140, the complainant charged the defendant with unfair competition in trade by the use of the name "Remington," as applied to typewriters. This Court pointed out that the defendant had a right to use the name "Remington" as a part of its corporate name, and since there was no showing that the defendant's goods had been sold as and for the plaintiff's goods, the plaintiff was not entitled to recover. And this Court said:

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

Also in the case of Standard Paint Co. v. Trinidad Co., 220 U. S. 446, 461, the complainant charged the defendant with infringement of a trade-mark and unfair competition by the use of a word which this Court held did not constitute a valid trade-mark, and which, therefore, both parties had a right to use. This Court held that the defendant had not been guilty of unfair competition in trade, because, as it stated:

> "The essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another. Such a wrong is not established against the Asphalt Company."

The rule as thus laid down by this Court in the cases cited has been followed by a number of the Courts of Appeal, particularly the Courts of Appeal for the First, Second, Third and Sixth Circuits, and also by the Court of Appeals for the Eighth Circuit in the case of Trinidad Company v. Standard Paint Co., 163 Fed. 977, which was afterwards affirmed by this Court on appeal.

In the case of Baker v. Baker, 115 Fed. 297, 299, the Court of Appeals for the Second Circuit had before it a case in which the complainant charged the defendant with unfair competition in the use of the name "Baker," as applied to cocoa and chocolate, and the complainant sought to recover the profits made by the defendant in the sale of his goods. In disposing of this question in that case, the Court of Appeals said (115 Fed. 299):

> "The evidence upon the accounting failed to disclose that the complainant was entitled to any recovery of profits, or any except nominal damages, by reason of the defendant's conduct. It failed

to disclose that a single person had purchased goods marketed by the defendant, supposing them to be the product of the complainant, or that the complainant had lost a single customer by the defendant's conduct."

To the same effect is the decision of the Circuit Court of Appeals for the Second Circuit in the case of N. K. Fairbank Co. v. Windsor, 124 Fed. 200, reversing the decision of the Circuit Court in which it held that the mere use of the forbidden package, without more, constituted unfair competition.

In the case of Dr. A. Reed Cushion Shoe Co. v. Frew, 158 Fed. 552, the court issued an injunction prescribing the limits within which the defendant would be permitted to use his own name in his business, but it held that in that case

> "The palming off of a spurious Dr. Reed shoe for the genuine article is unfair dealing in trade,"

and it denied an accounting because (p. 557)

> "it would be difficult to satisfactorily establish that the purchasers of the cushion sole shoes of the defendant the E-Z Shoe Company and dealers would not have bought them had they known such shoes were not manufactured under the original Reed patents."

On appeal to the Circuit Court of Appeals for the Second Circuit the injunction was modified, the court saying (162 Fed. 891):

> "It is urged, however, that any use by the defendants of Dr. Reed's name will cause confusion, that purchasers may still be misled, and that unscrupulous dealers are furnished with a ready means for deceiving. But the defendants cannot be held responsible for the deception of others. The complainant chose to adopt as a trade-name the name of a living person, when innumerable dis-

> distinctive names were open to it. It is entitled to full protection against fraud and deceit, but is not in a position to complain of mere confusion,"

and it approved the decision of the lower Court denying an accounting.

In the case of Merriam Co. v. Ogilvie, 170 Fed. 167, the Circuit Court of Appeals for the First Circuit had before it a case in which the defendant was charged with unfair competition by the use of the name "Webster," as applied to dictionaries. The Court pointed out that both parties were entitled to use the name "Webster," as applied to dictionaries, and it held that the complainant was not entitled to an accounting of the profits made by the defendant, because of the impossibility of showing what proportion of those profits resulted from the illegitimate use of the word.

In the case of Rathbone, Sard & Co. v. Champion Co., 189 Fed. 26, the Circuit Court of Appeals for the Sixth Circuit had before it a case in which the defendant was charged with unfair competition in the use of certain distinguishing marks applied to stoves. In that case the Court of Appeals reviewed at length the decisions of this Court and other Courts of Appeal and quoted the rule as laid down by this Court in the Goodyear case and also in the Howe Scale Company case, and it held that in that case the complainant

> "failed to establish a case of unfair competition, for lack of proof that defendant has palmed off his goods upon the public as the goods of complainant."

In the case of J. F. Rowley Co. v. Rowley, 193 Fed. 390, the complainant charged the defendant with unfair competition in the use of the name "Rowley." The Circuit Court of Appeals for the Third Circuit granted an injunction against the defendant to restrain him from using the word "Rowley," except when

> "accompanied by explanatory words sufficient to clearly distinguish the goods manufactured by him from the goods of the complainant,"

and an accounting was ordered. On the accounting the Master found that the

> "complainant has not offered any proof upon this accounting to show that anyone purchased artificial legs from the respondent, supposing them to be the goods of the complainant, or that any sales were lost to complainant by reason of the alleged unfair competition of respondent."

He therefore found that the complainant was only entitled to recover nominal damages. The Circuit Court overruled the exceptions to the Master's report, and, on appeal, the Circuit Court of Appeals for the Third Circuit affirmed the decision of the Circuit Court and held that under the circumstances the complainant was not entitled to recover more than had been allowed by the Master—nominal damages.

To the same effect see the decision of the Circuit Court of Appeals for the Third Circuit in the case of Appollo Bros. v. Perkins, 207 Fed, 530, 533. In that case both parties used a name which was not the subject of a valid trademark. The first user charged the defendant with unfair competition by the use of the name. The Court of Appeals held that (page 533)

> "Inasmuch as no absolute ownership in or exclusive right to use such name as a trade-mark vests in any one, the rights obtained by the first user are not infringed *by the mere use of such mark*, by a competitor, even though such use is in association with competing goods. In such a case the second user becomes an infringer only when

> he makes an unfair use of such name. Not any competition, but only unfair competition, on the part of such user is actionable."

Citing the case of Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 674, in which this court held that in unfair competition

> "The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

The Court of Appeals then pointed out the distinction between trade-mark cases and cases of unfair competition, as follows (207 Fed. 533):

> "A technical trade-mark, registered or unregistered, is treated as property, and an infringement thereof carries with it the presumption of fraud; but where no such exclusive right to the use of such trade-mark exists, a technical trade-mark right is not established, and fraud—unfair competition—in the use of the mark must be proved."

In the case of Newcomer & Lewis v. Scriven Co., 168 Fed. 621, the Circuit Court of Appeals for the Sixth Circuit, in an opinion by Judge (now Mr. Justice) Lurton, held that as it was not shown

> "that any customer was misled into buying garments as made or sold by the Scriven Company which were made by others,"

the defendant was not guilty of unfair competition in trade.

In the case of Rushmore v. Badger Brass Mfg. Co., 198 Fed. 379, the Circuit Court of Appeals for the Second Circuit considered a case in which the complainant charged the defendant with unfair competi-

tion in trade. An injunction was granted, but on the question of an accounting the Court of Appeals held that:

> "To award another profits made on the sales of defendant's lamps, without proof of actual fraud on its part, would be inequitable. * * * * It seems to us unfair that the complainant should recover profits on the sale of lamps by the defendant to persons who never heard of Rushmore, and were well aware that the lamps they bought were made by the defendant, and who bought them because they were so made. A decree for profits and damages does not necessarily follow a decree for an injunction. * * * * We think the accounting should be limited to sales where it is shown by direct or presumptive evidence that the complainant would have sold the lamps but for the sale by the defendant."

In this very case, the Court of Appeals, on the first appeal (Munger and Vandeventer, Judges) adopted this same rule and held that:

> "The essence of the rule being that one person shall not, in the sale of his goods, so act as to lead the public to believe that they are the goods of another."

Therefore, it is well settled, we believe, by the decisions of this Court and a number of Courts of Appeal that, to use the language of this Court in the Howe Scale Company case,

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer for the goods of another, and if defendant so conducts its business as not to palm off its goods as those of the complainant, the action fails."

In this case there was no evidence that the plaintiff had suffered any damage—no evidence that it ever lost a single customer by reason of the defendant's conduct. This was admitted by the complainant in its brief before the Master (2R 72), it was the finding of the Master (2R 78), of the Circuit Court (2R 285; 192 Fed. 935), of the Court of Appeals in its prevailing opinion (2R 839; 206 Fed. 619) and of Judge Hook in his dissenting opinion (2R, 839; 206 Fed. 619).

Therefore, it follows, we respectfully submit, that inasmuch as

> "defendant so conducts its business as not to palm off its goods as those of complainant, the action fails,"

and that the decision of the Court of Appeals, giving complainant the defendant's profits to the amount of $445,311.55 is in conflict with the decisions of this Court and of other Courts of Appeal in the cases cited.

II.

THERE CAN BE NO RECOVERY OF DEFENDANT'S "PROFITS" IN AN ACTION BASED UPON UNFAIR COMPETITION.

In awarding the respondent the petitioner's profits to the amount of $445,311.55, the Court of Appeals, by its prevailing opinion, following what it termed "the analogy of the patent cases."

Every rule is founded upon a reason, and in the absence of the reason the rule has no application. In applying the rule for the recovery of profits in cases of patents and strict trade-marks to this case, based solely on unfair competition, the prevailing opinion of

the Court of Appeals ignores the reason for the rule in patent and strict trade-mark cases and which does not exist in a case of unfair competition. This was clearly pointed out in the dissenting opinion of Judge Hook, 206 Fed. 619, 620.

Under the decisions of this Court and other Courts of Appeal, the complainant recovers profits made by the defendant in the infringement of the complainant's patent or trade-mark by virtue of its property right in the patent or trade mark and in accordance with the rule which requires a trustee who has wrongfully used trust property to his own advantage to account to the *cestui que trust* for the gains and advantages thus derived from the use of the trust property.

> Suffolk Co. v. Hayden, 3 Wall. 315;
> Packet Co. v. Sickles, 19 Wall. 611;
> Root v. Railway Co., 105 U. S. 189, 214, 215;
> Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 548, 549;
> Westinghouse Co. v. Wagner Co., 225 U. S. 619

The reason for the rule as applied to patent and trade-mark cases is found in the fact that patents and trade-marks are property, of which the owner has a monopoly, and when an infringer makes profits from the use of plaintiff's patent or trade-mark, he carries off the plaintiff's property and converts it to his own use and benefit.

In applying "the analogy of the patent cases" in this case, the Court of Appeals gave as its reason that,

> "the property rights of the complainant have been invaded in such manner that the rule long recognized in patent and strict trade-mark cases should be applied."

It thus appears that the decision of the Court of Appeals is based upon the theory that "the property rights of the complainant have been invaded" and it is upon that theory that it adopts "the analogy of the patent cases."

On the first appeal, the Court of Appeals (Munger and Vandeventer, Judges) held that "the name 'The American Girl,' applied to shoes, is not the subject of a valid trade-mark;" that it "was not subject to exclusive appropriation by them." From this it follows, we submit, that "the property rights of complainant" have *not* been invaded, and, therefore, that "the analogy of the patent cases" is not properly applied to this case. How could the plaintiff have a property right in a name which "is not the subject of a valid trade-mark," which "was not subject to exclusive appropriation by them," and which others were entitled to use? The single element of the name not being subject to exclusive appropriation negatives any idea that the complainant could have a property right in it and shows conclusively that the mere use of this name does not involve the use of the plaintiff's property.

Unfair competition, therefore, does not involve the use of another's property, and an action based upon unfair competition in trade is not based upon the defendant's unfair use of plaintiff's property, but it is based upon the plaintiff's right to be protected against the sale of the defendant's goods as and for its goods, and in which

> "the essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

Howe Scale Co. v. Wyckoff, 198 U. S. 140.

It follows, therefore, that the only right of recovery which the plaintiff could have in a case of unfair competition, in the absence of any property right in the plaintiff, would be a right to compensation for any damage the plaintiff suffered by reason of the defendant's conduct, i. e., by reason of the sale of the defendant's goods as and for the goods of the complainant. If it is shown that the defendant's goods have been sold as and for the goods of the complainant, then the complainant's damage would be the profits which it would have made on sales made by the defendant. On the other hand, in a case of patent or trade-mark, where plaintiff's property has been taken, the plaintiff is entitled to recover not merely compensation for the injury done to it, but the profits derived by the defendant from the use of the plaintiff's property—its patent or trade-mark—and this regardless of whether or not the plaintiff suffered damage in the sense that it lost sales.

This distinction between patent and trade-mark cases and cases of unfair competition has been recognized by this Court and other Courts of Appeal in numerous cases.

This Court expressly held, in the case of Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 548, 549, that the jurisdiction to restrain the use of a trade-mark

> "rests upon the ground of the plaintiff *property* in it, and of the defendant's unlawful use thereof."

And it made a clear distinction between the rule applying to trade-mark and unfair competition cases, based upon the fact that in one case a property right is involved, while in the other case no property right is in-

volved and that no relief could be had in that case based upon principles of unfair competition in trade, for the reason that it did not appear that the defendant had used the marks in question

> "in such a way and under such circumstances as to amount to a false representation, which enabled it to sell its goods as those of the plaintiff." (page 551.)

So, in the case of Merriam Co. v. Ogilvie, 170 Fed. 169, in which the Court of Appeals for the First Circuit had reversed the decision of the Circuit Court and ordered an injunction, restraining the defendant from using the name in question in unfair competition, as was done by the Court of Appeals in this case, and in which, after an accounting had been had and the case again reached the Court of Appeals for the First Circuit, that Court expressly distinguished between "proper trade-mark cases" and cases of unfair competition in trade, and it held that since "there was no trade-mark," therefore, there was "no concrete thing" which belonged to the complainant and which had been appropriated by the defendant, and the complainant was, therefore, not entitled to recover any of the *profits* made by the defendant.

The distinction which we have been endeavoring to make between cases of patents and strict trade-marks and cases of unfair competition, and the rules of law applicable thereto, was clearly recognized and applied by the learned Judge who decided this case in the Circuit Court, 192 Fed. 932. In his opinion he refers to the rule governing this case, which he illustrated by quotations from the opinion of the Court of Appeals on the first appeal, the opinion of the Circuit Court

of Appeals for the Sixth Circuit in the case of Rathbone, Sard & Co. v. Champion Co., 189 Fed. 26, the opinion of this Court in the case of Howe Scale Co. v. Wyckoff, 198 U. S. 118, and the opinion of the Circuit Court of Appeals for the Second Circuit in the case of Baker v. Baker, 115 Fed. 299, which latter case he points out was cited with approval by the Circuit Court of Appeals for the Eighth Circuit (opinion by Adams, Judge) in the case of Walter Baker & Co. v. Gray, 192 Fed. 921. In that opinion, the learned District Judge quotes at length from the majority opinion of the Court of Appeals on the first appeal in this case:

> "for the purpose of showing that we are now considering questions of unfair trade and not that of infringement of a valid trade-mark."

After thus recognizing the distinction to be made between the two classes of cases, he said (192 Fed. 932):

> "This, therefore, being a question of unfair trade, we must look for the rule applicable thereto, with the view and for the purpose of determining whether in this particular case 'unfair trade' exists. * * * In the various authorities that have been referred to by counsel none state the rule as to unfair trade more clearly than the Court of Appeals in this case. The Court said:
>
> " 'The essence of the rule being that one person shall not in the sale of his goods so act as to lead the public to believe that they are the goods of another.'
>
> "Applying this rule to the evidence in this case, the complainant's demand for damages must fail,"

for the reason, among others, that

> "The record in this case is absolutely barren of evidence tending to show that any individual pur-

> chased a pair of shoes marked 'American Lady,' believing at the time of the purchase he was getting 'The American Girl.' * * * * There is no evidence in the record that the complainant's output was curtailed in the least by the sale of the 'American Lady,' nor is there any evidence that complainant lost a single customer by reason of anything done by the defendant or any of its customers."

III

THE RULE IN PATENT AND STRICT TRADE-MARK CASES.

Not only is there no analogy between patent and trade-mark cases and cases of unfair competition, but the majority opinion of the Court of Appeals misconceives and misapplies even the rule in patent cases. It undertakes to give the complainant all of the profits made by the defendant in the sale of its "American Lady" shoes, by reason of the supposed analogy between patent and trade-mark cases and cases of unfair competition in trade, without any evidence that the complainant has been damaged, without any evidence that plaintiff ever lost a single customer by reason of the defendant's conduct, without any evidence that a single pair of the defendant's shoes were sold "as and for" the complainant's shoes, without any evidence that any of the profits made by the defendant were due to the fact that the shoes bore the name "American Lady" and without any evidence that any of those profits were made in actual unfair competition, and, therefore, without any evidence that the defendant made any profits "*by reason of the infringement.*"

The rule in patent and strict trade-mark cases is that the complainant may recover such damages as it shows by the evidence it has sustained and such profits as the defendant has made "by reason of the infringement," i. e., by reason of the use of the complainant's property—its patent or trade-mark. All of the decisions recognize a clear distinction between damages and profits. Damages, as distinguished from profits, is the actual pecuniary injury—such as loss of trade—which the complainant can show he has suffered *"by reason of the defendant's infringement."* Profits, on the other hand, are those gains which it is shown the defendant has actually made *"by reason of the infringement."* (Walker on Patents, 4th Ed. Section 555 and 711.)

The complainant's damage is to be measured by the direct and immediate evil consequence to the plaintiff of the wrongful act of the defendant; while the profits recoverable in equity are the profits which the defendant made *"by reason of the infringement"* (Robinson on Patents, Sec. 1053 and 1136), i. e., *the amount proved to have been contributed to the defendant's profits by the use of the infringing device.* (Westinghouse Co. v. Wagner Co., 225 U. S. 604, 620.)

In determining these profits the complainant must show by direct and positive testimony, that the defendant's income has been augmented *"by reason of the infringement"* and the extent to which the defendant's income has been so augmented. The burden of proof is on the plaintiff.

The above is the rule in cases of patents and strict trade-marks, and the rule is based upon the complainant's right of property in the patent or trade-mark in question and the defendant's unlawful use thereof.

There is no proof of damages in this case. The Master so found and the opinions concede it; and it must also be conceded that there is no proof of any distinct and separate advantage that the defendant derived in the prosecution of its business, diassociated from the other incidents of its business, or that it derived any definite or specific profit from the use of the name "American Lady." In other words, it is not shown that the words "American Lady" contributed in any way or to any extent to the defendant's profit. In the prosecution of its business the defendant had a large capital. It thoroughly advertised its business. It had a large corps of energetic salesmen. It had great prestige as a manufacturer in the shoe trade. *Non constat*, but that it would have sold, so far as this record discloses, as many shoes of the same class under any other name as under the name "American Lady." *In other words, there is not one particle of proof in this case that the use of the name "American Lady" aided the defendant in making the profits which the Court of Appeals has awarded complainant by its majority opinion.*

In Dobson v. Hartford Carpet Co., 114 U. S., at pp. 114, 5, 6, this Court thus lays down the principles which are to govern in determining the recovery of profits and damages in a suit for infringemnt of a design patent:

> "This Court has, in a series of decisions, laid down rules as to what are to be regarded as 'profits to be accounted for by the defendant,' and what as 'actual damages,' in suits for the infringement of patents; and *no rule has been sanctioned which will allow*, in the case of a patent for a design for ornamental figures created in the weaving of a carpet, or imprinted on it, *the entire profit from the manufacture and sale* of the carpet, as profits or damages,

including all the profits from the carding, spinning, dyeing and weaving, *thus regarding the entire profits as due to the figure or pattern, unless it is shown, by reliable evidence, that the entire profit is due to the figure or pattern.* It is a matter of common knowledge, that there is an infinite variety of patterns in carpets, and that, between two carpets, of equal cost to make, and equal merit as to durability of fabric and fastness of color, each with a pattern pleasing to the taste, one having a design free to be used, and the other a design protected by a patent, the latter may or may not command in the market a price larger than the former. If it does, then the increased price may be fairly attributed to the design; and there is a solid basis of evidence for profits or damages. But, short of this, under the rules established by this Court, there is no such basis. The same principle is applicable as in patents for inventions. *The burden is upon the plaintiff, and, if he fails to give the necessary evidence, but resorts, instead, to inference and conjecture and speculation, he must fail for want of proof.* * * * Approval of the particular design or pattern may very well be one motive for purchasing the article containing it, but the article must have intrinsic merits of quality and structure, to obtain a purchaser, aside from the pattern or design; and *to attribute, in law, the entire profit to the pattern, to the exclusion of the other merits, unless it is shown, by evidence, as a fact, that the profit ought to be so attributed, not only violates the statutory rules of 'actual damages' and of 'profits to be accounted for,' but confounds all distinctions between cause and effect.*" (Italics ours.)

As stated by this Court in the case of Keystone Mfg. Co. v. Adams, 151 U. S. 139, the worth of the advantage gained must be shown by the plaintiff in the claim for profits, and, if there is no satisfactory proof of such worth, only nominal damages can be allowed. This Court in that case said:

"It is unnecessary, in this opinion, to review the numerous cases, some at law, other in equity, wherein this Court has considered various aspects of this question. It is sufficient to say that the conclusion reached may be briefly stated as follows: It is competent for a complainant, who has established the validity of his patent and proved infringement, to demand, in equity, an account of *the profits actually realized by the defendant from his use of the patented device;* that *the burden of proof is on the plaintiff;* that where the infringed device was a portion only of defendant's machine, which embraced inventions covered by patents other than that for the infringement of which the suit was brought, *in the absence of proof, to show how much of that profit was due to such other patents, and how much was a manufacturer's profit, the complainant is entitled to nominal damages only.* Seymour v. McCormick, 16 How. 480; Rubber Co. v. Goodyear, 9 Wall. 788; Mowry v. Whitney, 14 Wall. 620; Elizabeth v. Pavement Co., 97 U. S. 126.

"In the case last named it was said, 'It is unnecessary here to enter into the general question of profits recoverable in equity by a patentee. The subject, as a whole, is surrounded with many difficulties which the courts have not yet succeeded in overcoming. But one thing may be affirmed with reasonable confidence, that *if an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits;* the patentee, in such case, is left to his remedy for damages. It is also clear that a patentee is entitled to recover *the profits that have been actually realized from the use of his invention.*'

"In Garretson v. Clark, 111 U. S. 120, 121, this Court quoted with approval the statement of the rule made in the Court below by Mr. Justice Blatchford: 'The patentee must in every case give evi-

dence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative.'

"Tilghman v. Proctor, 125 U. S. 136, 146, is an important case, in which many of the earlier cases were reviewed, and it was there said: 'The infringer is liable for actual, not for posible, gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits *of the advantage which he derived from the use of that invention* over what he would have had in using other means open to the public and adequate to enable him to obtain an equally beneficial result. *If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits*, and the plaintiff's only remedy is by an action at law for damages.'

"In the light of these decisions there was error in the court below, not in any formal disregard of the rule restricting the plaintiff's recovery to the profits actually realized, but in permitting the plaintiff to prove, not the defendant's profits, but those realized by other companies. This was in effect showing what, in the opinion of a Master and the Court, 'he might reasonably have made, and not those which he did make.'

"The fallacy of this application of the rule is obvious, for nothing is more common than for the manufacturing concern to make profits where another, with equal advantages, operates at a loss.

"The learned judge seems to have thought that the course of the defendant, in not itself disclosing the condition of its business justified the Master in estimating its profits upon the basis of those of

other similar establishments. But, as we have seen, the burden of proof was upon the plaintiff. He relied, notwithstanding defendant's objections, on incompetent and irrelevant evidence, and the decree in his favor, in so far as it awards more than nominal damages, cannot be sustained."

Assuming then that the rule applicable to *patent cases* should be applied by analogy to the case at bar (as held by the Court of Appeals in its majority opinion), it would be necessary for the complainant to show, as pointed out by this Court in Dobson v. Carpet Co., *supra*, and Keystone Mfg. Co. v. Adams, *supra*, that the profits made by the defendant in the sale of its "American Lady" shoes were attributable in some definite measure to the fact that those shoes bore the name "American Lady," and the pecuniary value of such influence, before the plaintiff would have a right to recover any of those profits, for, as stated by this court in the Carpet case, "to attribute, in law, the entire profit to the pattern [name], to the exclusion of the other merits, unless it is shown, by evidence, as a fact, that it ought to be so attributed, not only violates the statutory rules of 'actual damages' and of 'profits to be accounted for,' but confounds all distinctions between cause and effect." Such fact could be established only by showing that at least some of the defendant's "American Lady" shoes were sold, *to the deception of customers, as and for "The American Girl" shoes of the complainant;* and there is no evidence in the record showing that *a single pair* of defendant's "American Lady" shoes were ever sold *as and for "The American Girl"* shoes of the complainant, to the deception of the customer. Such sales could not have been made without damage to the complainant. And that there was no proof that the

complainant was damaged was admitted by the complainant in its brief before the Master (2 R. 72); it was the finding of the Master (2 R., 78) and of the lower court, and it is the finding of the Court of Appeals in the prevailing and also in the dissenting opinion. Therefore, since there is no evidence in the record to show that any of the defendant's shoes bearing the name "American Lady" were sold, to the deception of the purchaser, *as and for "The American Girl" shoes of the complainant*, it follows as a matter of course that no profits were made by the defendant which were attributable to the *use by it of the name "American Lady."*

In the case of a patent or true trade mark, the owner has a property right in the invention or trade mark, and when an infringer makes, uses or sells a device embodying the invention or the trade mark, he makes, uses or sells that which belongs to the owner of the patent or trade mark, and any profit—that is, gains, savings or advantages—made by him from such transactions, which is attributable peculiarly to the invention or trade mark, belongs to such owner; and the defendant will be required to account to him for the profits, gains, savings or advantages thus made through the use of his property right in the invention or trade mark.

In a case brought upon the ground of *unfair competition in trade*, however, involving merely the use of a geographical and descriptive name (as in the case at bar), complainant has *no property right* in such name (165 Fed. 415). In such case, therefore, complainant does not have the same right of recovery as would the owner of letters patent or the owner of a true trade mark, because of the fact that *no property right* is in-

vaded by the mere use by the defendant of a similar geographical and descriptive name. In such a case the plaintiff's right to recovery hinges solely on the fact that, by reason of the use by the defendant of a similar geographical and descriptive name, the defendant has sold his goods, *to the deception of purchasers, as and for the goods of the plaintiff*. Unless it be shown that defendant has actually sold his goods, to the deception of purchasers, as and for the goods of the plaintiff, and unless it be also shown that such sales were made *by reason of the fact* that the defendant sold his goods under the particular name complained of, plaintiff can have no right of recovery for the use of a similar name by the defendant.

As pointed out by this Court in the case of Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. l. c. 140, the essence of the wrong in unfair competition *consists in the sale of the defendant's goods as and for the goods of the complainant*. This was the rule adopted by the Court of Appeals on the first appeal, where, at page 415 of 165 Fed., it said:

> " * * * the essence of the rule being that one person shall not in the sale of his shoes so act as to lead the public to believe that they are the goods of another."

Therefore, even though the defendant used the name "American Lady" on its shoes, and even though, as this Court holds in the prevailing opinion, the defendant did not accompany those words with other matter clearly indicating that its shoes were of its own manufacture and therefore not of complainant's, the latter could not be and was not injured, *unless* in the sale of its

shoes bearing the name "American Lady," the purchaser was deceived into buying the said shoes *as and for* "The American Girl" shoes of complainant; and, furthermore, the complainant would have no right of recovery *unless* such sales were *due to the fact* that defendant used the name "American Lady" on its shoes.

Not having a property right in the name "The American Girl" the complainant's sole right to complain of the use of the name "American Lady" by the defendant must be based upon the fact *that the use of that name by the defendant would result in the sale of defendant's shoes as and for the shoes of the complainant, to the deception of purchasers*, and it is to the extent, and only to the extent, that such purchasers were deceived by reason of such use of the name "American Lady" that the complainant would be injured or have a right of recovery; for only in such an event could the defendant have derived any profit, gains, savings or advantages, in its business, through the use of the name "American Lady."

To illustrate: *It is the deception of the purchasers in the purchase of the defendant's shoes under the belief that they are the shoes of the complainant that wrongs the complainant and gives it a right of action against the defendant.* Therefore, unless the use of the name "American Lady" by the defendant *has resulted* in the sale of its "American Lady" shoes as and for "The American Girl" shoes of the complainant, to the deception of purchasers, the complainant has not been injured and it has no right of recovery. If the defendant sold shoes to persons who knew that they were made by the defendant, or sold shoes to persons who had never heard of the complainant or its brand of shoes, there would clearly be no

right to recover either profits or damages. Rushmore v. Badger Brass Mfg. Co., 198 Fed. 379; Dissenting opinion of Judge Hook, 206 Fed. 622-3, 2R, 843-4; Walter Baker & Co. v. Gray, 192 Fed. 921, 926. On the other hand, the complainant might have a right of recovery against the defendant even though the defendant did not use the name "American Lady," *if* the complainant could show that, by reason of some device or subterfuge practiced by the defendant, its shoes had been sold as and for the shoes of the complainant, to the deception of customers.

Any conduct, whether in respect of branding, dress or color, on the part of the defendant, made with the design and efficient to cause a simulation of an earlier trader's goods, will call for just as great redress, as if there was a distinct imitation of the former's goods; for the principle is, that conduct tending to pass off one man's goods or business as that of another will constitute unfair competition; and nothing less than that will constitute unfair competition. This is the language of numerous cases ruled upon this subject—among others, Elgin Watch Co. v. Illinois Watch Co., 179 U. S. 674; Coates v. Merrick Thread Co., 149 U. S. 562, etc.

It is clearly recognized in the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Merriam Co. v. Saalfield, 198 Fed. 369, relied upon in the prevailing opinion of the Court of Appeals in the case at bar, where, at page 377, the Court said:

> "If books which offend only by bearing the title bear also the required qualification, there could, from their dress alone, be no inference that their sale was the result of unfair competition. Nevertheless, if it could be shown that such a book was in some other effective manner represented to be complainant's book, and was bought by reason of such misleading, such sale would be equally an invasion of complainant's right."

Undoubtedly this is true, and it goes to show that the complainant's right of recovery in cases of unfair competition is based upon the fact that the *customers have been deceived*, and is not due to the fact that the defendant used a particular name or a particular dress. It further shows that the limits within which the complainant will have a right of recovery in cases of unfair competition are not confined to those cases in which the defendant has used a particular name, but that complainant has a right of recovery in every case in which it is shown that the defendant's goods have been sold as and for the goods of the complainant, to the deception of purchasers. *The recovery depends upon the actual accomplishment of a fraud against the complainant's business.*

This also tends to illustrate, we believe, the fact that the Circuit Court of Appeals was in error in adopting the analogy of the patent cases in this case, for obviously it could not be said that the complainant's right of recovery in the instance last mentioned was based upon any principle applicable to cases of infringements of patents or strict trade marks, inasmuch as the sales could not possibly be said to be the result of, or in any manner attributable to, the use by the defendant of any device or dress which the defendant has no right to use.

In the case at bar, it was not shown that any part of the profits made by the defendant in the sale of its "American Lady" shoes, and for which the Court of Appeals, in its prevailing opinion, holds the defendant must account to the complainant, were in any way due to the fact that those shoes bore the name "American Lady" and *even under the principle of the patent cases* the defendant would, therefore, not be liable to account to the complainant for those profits.

The authority relied upon by the Circuit Court of Appeals in its prevailing opinion in the case at bar, is the case of Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604. The decision of this Court in that case does not support the rule adopted by the prevailing opinion in the case at bar, but does support the rule which we contend must be applied in this case, i. e., that, even though the complainant be entitled to recover profits made by defendant in the sale of its "American Lady" shoes, such recovery must be limited to the profits which are attributable to the use by the defendant of the name "American Lady" "in a manner and under circumstances constituting unfair trade." (165 Fed. l. c. 415). In the Westinghouse case, at page 620 of the 225 U. S., this Court said:

> "The rule, however, is not intended to penalize the infringer, nor to give the patentee profits to which he is clearly not entitled. So that where by general evidence, expert testimony or otherwise, it is shown that his patent is of relatively small value, it will often be possible to prove that at the utmost *it could not have contributed to more than a given amount of the profits.* Lupton v. White, 15 Vessey Jr. 432-440. In such cases, except possibly against one who had concealed or destroyed evidence or been guilty of gross wrong, *the plaintiff's recovery can not exceed the amount proved*, even though it be impossible otherwise more precisely to apportion the profits." (Italics ours.)

This is exactly the principle for which we contend in the case at bar, and it is in strict harmony with the decisions of this Court in Dobson v. Carpet Co., 114 U. S., 444 *et seq.* and Keystone Mfg. Co. v. Adams, 151 U. S. 139, cited above, and Elizabeth v. Pavement Co., 97 U. S. 126, quoted from in the opinion in the Keystone case.

It is there pointed out that, even in a patent case, in which the complainant's property right is involved, *it is only the profits which have been actually realized from the use of the complainant's invention* that the complainant has the right to recover, or, as stated by this Court in the Westinghouse v. Wagner case, *plaintiff's recovery can not exceed the amount proved to have been contributed to the defendant's profits by the use of the infringing device*, even though it be impossible to precisely apportion the profits.

In Seymour v. McCormick, 16 How. 480, this Court said:

> "It must be apparent to the most superficial observer of the immense variety of patents issued every day, that there cannot, in the nature of things, be any one rule of damages which will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted; that a man who invents or discovers a new composition of matter, or an entire new machine, may find his profit to consist in a close monopoly, the patentee being himself able to supply the whole demand, at his own price, in which cases 'The profit of the infringer may be the only criterion of the actual damage of the patentee,' that 'One who invents some improvement in the machinery of a mill could not claim that the profits of the whole mill should be the measure of damages for the use of his improvement; and where the profit of the patentee consisted neither in the exclusive use of the thing invented or discovered, nor in the monopoly of making it for others to use, it is evident that this rule could not apply. The case of Simpson's patent for a turn-out in a railroad may be cited as an example. It was to the interest of the patentee that all railroads should use his invention, provided they paid him the price of his license. He

> could not make his profit by selling it as a complete and separate machine. An infringer of such a patent could not beliable to damages to the amount of the profits of his railroad, nor could the actual damages of the patentee be measured by any known ratio of the profits of the road. * * * *It is only where, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss. Actual damages must be actually proved and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact.*"

The case of Mowry v. Whitney, 14 Wall. 620, was a bill in equity for an injunction and account. A decree was rendered in favor of the complainant for *all the profits* on the manufactured article, instead of upon the patented process of manufacture, with interest added. On appeal, the Supreme Court reversed the decree on that point, saying:

> "The question to be determined in this case is: What advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits. * * * That advantage is the measure of profits."

In Elizabeth v. Pavement Company, 97 U. S. 126, the Supreme Court points out in unmistakable language that even in the case for the infringement of a patent, the complainant is not entitled to recover profits realized by the defendant, unless those profits can be clearly traced to the wrongful use of the patended device. The Court said:

> "It is also clear that a patentee is entitled to recover the profits that have been actually realized

from the use of the invention, although from other causes the general business of the defendant, in which the invention is employed, may not have resulted in profits, as when it is shown that the use of his invention produces a different saving in the process of manufacture. * * * On the contrary, though the defendant's general business be ever so profitable, *if the use of the invention has not contributed to the profits, none can be recovered.*"

The Court then goes on to make this observation:

> "The same result would seem to follow where it is impossible to show the profitable effect of using the invention upon the business results of the party infringing. It may be added that where no profits are shown to have accrued, a court of equity cannot give a decree for profits by way of damages, or as a punishment for the infringement."

In the light of these authorities, how could the Court of Appeals in the case at bar, hold that the complainant is entitled to recover *all of the profits made by the defendant in the sale of shoes bearing the name "American Lady," regardless of whether or not such profits were attributable to the use of the name "American Lady" on those shoes?*

It must be apparent that the entire profits made by the defendant on its "American Lady" shoes during the period of the accounting were not attributable to any interference with the complainant's business or the use by the defendant of the name "American Lady" or to any inference that the defendant's shoes bearing that name were the product of complainant company.

Let us illustrate, in a homely way, the proposition of law involved in a strict trade mark or patent case. Let a set of harness stand for the trade mark or patent. A farmer takes the harness from his neighbor and with

it harnesses his own horse to farm machinery with which he tills his ground and makes a crop. The owner of the harness can not recover the full value of the crop; he can only recover the value of the use of the harness.

Therefore, the doctrine of the cases of Keystone Mfg. Co. v. Adams, 151 U. S. 139, and Elizabeth v. Pavement Co., 97 U. S. 126, and Westinghouse v. Wagner Mfg. Co., 225 U. S. 604, should be applied in this case, *if by analogy the rule that obtains in cases of patent and strict trade mark* is to be applied to cases of alleged unfair competition in trade, and the complainant should not be permitted to recover *all* of the profits made by the defendant on its "American Lady" shoes during the period of the accounting, but only such profits as it shows accrued *by reason of unfair competition—by palming off defendant's shoes as and for the shoes of complainant.*

We respectfully submit that the question presented by this petition is of great gravity and importance, affecting valuable rights of property; that the decision of the majority of the Court of Appeals is in conflict with the decisions of this Court and with the decisions of other Courts of Appeal. Therefore we respectfully ask that "*in the interest of uniformity of decision*" a writ of certiorari be granted as prayed for in the petition filed herewith.

Respectfully submitted,

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Solicitors and of Counsel for Petitioner, Hamilton, Brown Shoe Company.

MORTON JOURDAN,
Of Counsel.

December 1, 1913.

Office Supreme Court, U. S.
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JAMES D. MAHER
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. ~~813~~. 311 37

HAMILTON-BROWN SHOE COMPANY, PETITIONER,

vs.

THE WOLF BROTHERS AND COMPANY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT.

LAWRENCE MAXWELL,
PERCY WERNER,
SIMEON M. JOHNSON,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No.

HAMILTON-BROWN SHOE COMPANY, PETITIONER,

vs.

THE WOLF BROTHERS AND COMPANY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT.

The judgment is for a large amount, and the petitioner claims that it is erroneous, but it was rendered in a case, and in regard to questions as to which, under the Judiciary Act of 1891, the action of the Court of Appeals is final. This is the second petition for a writ of certiorari in this case. The first was filed by the Wolf Brothers & Company at a former term, and in response thereto Hamilton-Brown Shoe Company, now petitioner, said at pages 1, 3, and 4 of its brief filed in this court:

> "There is nothing whatever involved in this litigation beyond what is involved in an ordinary suit for the infringement of a trade-mark or for alleged unfair competition in trade. No question of either public interest or public policy is involved; merely matters of private interest. * * * The record of this case shows that there is nothing whatever of an unusual character connected with this litigation, but only those things which arise in every persistently defended case carried on in the Federal courts. No new, uncertain, or complex question of law, or even practice, is presented, and if this petition is granted it will open the door of access to the Supreme Court for all classes of litigation in this country where parties are dissatisfied with the decisions of the circuit courts of appeals.
>
> "With reference to the importance of the case, it should be noted that the matter involved between the parties hereto is a matter of private right, is important to THEM, because the money interests, especially of respondent, are large; but this court has repeatedly held that such showing does not warrant the issuance of the writ."

The writ was denied, 214 U. S., 514, and the account which the Court of Appeals had ordered has been taken. The errors assigned do not relate to the right of plaintiff to recover, but only to the measure and amount of the recovery.

Petitioner says that the amount awarded was not approved by all of the judges of the Court of Appeals, as if that were ground for a writ of certiorari. One of the judges thought that the award was too small, and another that it was too large. This court is invited by petitioner to examine 1,500 pages of record to settle that question. Circuit Judge Smith was of opinion "that Wolf Brothers & Co. is entitled to a decree for $132,740.77 in excess of that awarded." Circuit Judge Hook "agreed for the most part with the opinion," but was "doubtful about the measure and amount of recovery." The judgment was for the sum recommended by the master after a protracted hearing,

full argument and careful consideration. He was an experienced master, selected as the opinion of the district judge states by agreement of counsel and appointed at their request. The Court of Appeals found that "the method of computation adopted by the master was essentially fair, and the profits found substantially accurate" (206 Fed., 619).

The Court of Appeals limited the account to the period subsequent to the commencement of the suit, although it found that defendant had used plaintiff's trade name illegally for a considerable period prior thereto in disregard of repeated notices from plaintiff; so that the judgment is not for the full amount to which plaintiff is justly entitled, but for wilful and persistent disregard of its rights after the commencement of the suit and pending its final determination. With respect to a similar situation the Supreme Court of Massachusetts said of the defendants in Regis *vs.* Jaynes & Co., 191 Mass., 245:

> "They chose, after full notice and warnings, to persist in violating the plaintiff's rights. If the facts as they were afterwards proved could have been made manifest to the court when the bill was filed, an injunction must have issued then. It does not lie in the defendants' mouths to say that conduct on their part which afterwards was proved to have been wrongful, and as to which they had either full knowledge, or the means of obtaining full knowledge of the facts, was either lawful or innocent."

Even after the decision of the Court of Appeals, which was filed on November 17, 1908, defendant continued to mark its shoes in flagrant disregard of the decision. $149,075.53 of the sum awarded is on account of shoes so made and sold. It is also shown by the record that after the decision of the Court of Appeals was filed defendant expended more than $48,000 in advertising in violation of the terms of the injunction ordered to be entered.

The high-handed attitude of the defendant is illustrated

by the following statement of facts in the opinion of the Court of Appeals:

> "In January, 1901, Wolf Bros. & Co., on seeing one of defendant's advertisements of its shoes under the designation 'The American Lady' immediately wrote defendant, calling its attention to the fact that they regarded it as an infringement upon their trade name 'The American Girl.' To this letter defendant answered, in substance, that it did not regard its use of the words 'The American Lady,' with the picture of a lady, as an infringement. To this Wolf Bros. & Co. replied, suggesting that if defendant would further consider the matter they thought it would come to the conclusion that it did constitute an infringement, and expressing a desire that the matter be adjusted between themselves without legal proceedings. To this letter defendant made no reply. Defendant's treasurer, upon cross-examination, in answer to the inquiry as to whether the first of the above letters was answered by him merely as a matter of courtesy between one house and another, or because there was merit in the contention set up by complainant in the letters, said, 'My answer was prompted solely by a feeling of courtesy and politeness, as I never seriously regarded their claim. In fact, coming from a house relatively obscure, it seemed to me more a joke than a matter of any serious importance.' In a question relative to the second of said letters written by complainant to defendant he was asked if the same was answered; if not, why not? To which he answered, 'If I did not answer the letter it was because I did not think it of sufficient importance to waste the time necessary to do so. I do not remember that I did not reply to it but my impression is that I did not' " (1 R., 513).

In its opinion approving the report of the master and awarding judgment, the Court of Appeals said:

> "This court, in directing an accounting on the former appeal, found that there was a design to defraud and that the means adopted were reasonably calculated to make that design effective. It found

that appellant was first in the field with the words 'The American Girl,' adopted as a trade name to designate its shoes; that in connection with this name it used the catch phrase, 'A shoe as good as its name,' and in its catalogue certain numerals to designate different styles of such shoes; that thereafter the appellee adopted the trade name, 'American Lady,' and the catch phrases, 'The shoe deserves its name,' and 'With the character of the woman,' as also the identical numerals used by appellant; that later appellant adopted an additional numeral, 397, and directly thereafter appellee went back and adopted the same numeral. The court further found that the words, 'The American Girl' and 'American Lady,' are so similar as to cause confusion, and that such confusion had resulted; that all this was done by appellee with knowledge that it was following appellant, and that such acts were not consistent with innocence and good faith; further, that appellee acted with notice and knowledge of the infringement through correspondence; hence an injunction and accounting was granted as heretofore stated. This court at that time had before it evidence showing that the name 'American Lady' was adopted by the appellee at an assembly of its traveling salesmen and resulted from suggestions made by them. These salesmen came from the same territory in which appellant's shoes were most largely sold. The original suggestion came from a salesman who traveled in Texas, another Texas salesman and one from Arkansas were also present. It was disclosed in the testimony that the largest sale of The American Girl shoes was among the negroes and illititerate whites in the South; also that in this very territory actual confusion, which worked greatly to the disadvantage of appellant, existed among purchasers. The adjudication made was upon the merits, and should be reopened if at all, only upon convincing evidence that the original conclusion, which led to the injunction and to this accounting, was wrong (citing cases). Nothing was adduced at the second hearing to alter the situation originally presented, and we adhere now to the conclusion reached then" (206 Fed., 615).

The court said further:

> "We have here a case in which the appellee, with a design to appropriate appellant's trade, has devised a trade-name strikingly similar to that used by appellant. It did this deliberately, and adopted many expedients, all of which were calculated to help along the deception and enable it to accomplish its purpose. It fortified itself by certain formulas in dealing with its direct purchasers, through which it expects to escape responsibility for the ultimate results of its acts. It invades the territory in which appellant is doing business, and which covers all the States of the Union except two, and particularly the Southern States, in which appellant's trade is largest. It makes use of its own prestige, its great resources and advertising facilities, with which to break down the trade of a smaller business competitor, and to confuse the public with which that competitor has already established a business reputation. Having accomplished its aim, which was to avail itself of the pioneer work of appellant, it is willing to submit to an injunction and to nominal damages, but insists, as a condition to substantial recovery, that appellant accomplish the well nigh impossible task of establishing specifically the number of ultimate consumers who have been thus deceived in the purchase of shoes. Neither considerations of equity nor the decided cases sustain this contention. The property rights of complainant have been invaded in such manner that the rules long recognized in patent and strict trade-mark cases should be applied. Wrongs of this nature cannot be perpetrated, and the courts be helpless to extend substantial relief. The recovery in this case is large; but that is because the transactions involved were large. The principle is in no wise affected by this consideration. If the judgment seems harsh, it is no more so than defendant's own acts have made it. The court cannot do otherwise than rule in accordance with those just principles which must govern and control its action. It should be steadfast in its purpose both to relieve against unlawful encroachment and to promote commercial honesty and fair dealing" (206 Fed., 618).

Petitioner claims that "there can be no recovery of defendant's profits in an action based on unfair competition." That depends on the case. That such profits may be awarded by a court of equity in a proper case is well settled in England and in courts of last resort in this country. Some of the cases, and also cases in the Federal circuit courts and circuit courts of appeal, are cited in the opinion of the Court of Appeals.

A bill in equity will not lie to recover damages for the infringement of a patent or trade-mark, because it is a tort for which an adequate remedy is given at law. But where a court of equity takes jurisdiction to prevent a continuance of the wrong by injunction, the court,

> "in order to avoid multiplicity of suits and do complete justice, assumes jurisdiction to award compensation for the past injury, not, however, by assessing damages, which is the peculiar office of a jury, but requiring an account of profits, on the ground that if any had been made, it was equitable to require the wrongdoer to refund them, as it would be inequitable that he should make a profit out of his own wrong" (Root *vs.* Railway Company, 105 U. S., 189, 207).

At page 214 Mr. Justice Matthews refers to expressions in earlier opinions from which it might be inferred "that the infringer of a patent right is, by construction of law, a trustee of the profits derived from his wrong, for the patentee, and that a court of equity, in the exercise of its acknowledged jurisdiction over trusts and trustees, will require him to account as trustee, without reference to any other relief," and says:

> "But the inference sought to be drawn from the expressions referred to is not warranted. It is true that it is declared in those cases that, in suits in equity for relief against infringements of patents, the patentee, succeeding in establishing his right, is entitled to an account of the profits realized by the infringer,

> and that the rule for ascertaining the amount of such profits is that of treating the infringer as though he were a trustee for the patentee, in respect to profits. But it is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrongdoer by the fact of infringement, thus conferring jurisdiction upon a court of equity to administer the trust and to compel the trustee to account. * * * All that was meant in the opinions referred to was to declare according to what rule of computation and measurement the compensation of a complainant would be ascertained in a court of equity, which, having acquired jurisdiction upon some equitable grounds to grant relief, would retain the cause for the sake of administering an entire remedy and complete justice, rather than send him to a court of law for redress in a second action. The rule adopted was that which the court in fact applies in cases of trustees who have committed breaches of trust by an unlawful use of the trust property for their own advantage: that is, to require them to refund the amount of profit which they have actually realized. This rule was adopted, not for the purpose of acquiring jurisdiction, but, in cases where, having jurisdiction to grant equitable relief, the court was not permitted by the principles and practice in equity to award damages in the sense in which the law gives them, but a substitute for damages, at the election of the complainant, for the purpose of preventing multiplicity of suits."

In Tilghman *vs.* Proctor, 125 U. S., 136, 148, Mr. Justice Gray, referring to the foregoing decision, said:

> "The general rule has been sometimes said to be based upon the theory that the infringer is converted into a trustee for the owner of the patent, as regards the profits made by the use of his invention. But, as has been recently declared by this court, upon an elaborate review of the cases in this country and in England, it is more strictly accurate to say, that a court of equity, which has acquired, upon some equitable ground, jurisdiction of a suit for the infringe-

> ment of a patent, will not send the plaintiff to a court of law to recover damages, but will itself administer full relief, by awarding, as an equivalent or a substitute for legal damages, a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage. Root *vs.* Railway Co., 105 U. S., 189, 214, 215."

These cases answer petitioner's claim that profits are recoverable in patent and trade-mark cases on the theory that an infringer is accountable as trustee for profits derived from the use of plaintiff's "property," and refute the conclusion sought to be drawn by petitioner from such erroneous premise that "there is no analogy between patent and trade-mark cases and cases of unfair competition." All are torts for which an action at law for damages ordinarily affords an adequate remedy, but when a court of equity assumes jurisdiction to prevent a continuance of the wrong by injunction it retains the cause to award compensation for the past injury, not by assessing damages, but "by requiring an account of profits, on the ground that it is equitable to require the wrongdoer to refund them, as it would be inequitable to permit him to make a profit out of his own wrong."

What difference does it make in respect of the nature of the wrong, or the remedy and measure of recovery, by what device the defendant palms off his goods as those of the plaintiff. That is what the defendant did in this case, and in the Singer Sewing Machine case, 163 U. S., 169, and in the Hall's Safe case, 208 U. S., 554. The Court of Appeals found that the term "The American Girl" had by plaintiff's long-continued use of it "come to be recognized in the trade as meaning that such shoes were those of the complainant and its predecessors." When, therefore, the defendant stamped on shoes made by it the name "American Lady," without marks or matter to indicate that it was the manufacturer, it led the public to believe that the shoes were of

plaintiff's manufacture; it was equivalent to marking them with the name "The Wolf Brothers & Company."

The record does not support petitioner's statement that there was no evidence that the plaintiff had suffered any damage, or that it ever lost a single customer by reason of defendant's conduct, or that this was admitted in complainant's brief before the master, or that it was found by the master or by the Court of Appeals. Loss of customers is shown (1 R., 8, 10, 11). The master found that the plaintiff had suffered damage, but "that the amount of profits as established before him by the testimony and stipulation is amply sufficient to cover the damages which the plaintiff has suffered since the filing of the bill, as distinguished from the profits" (2 R., 78). The Court of Appeals, after finding "that reasonably certain injury and material damage resulted to plaintiff," specifying what it was (206 Fed., 615), said at page 619 that "no special damages apart from profits are shown. The method of computation adopted by the master was essentially fair and the profits found substantially accurate."

In resisting the former petition for a writ of certiorari Hamilton-Brown Shoe Company called the attention of the court to the cases in which it had held that this branch of its jurisdiction "should be exercised sparingly and with great caution." Since then the court has had frequent occasion to consider "the scope of the grant of power under the Judiciary Act of 1891 to review judgments of the circuit courts of appeal." In United States *vs.* Rimer, 220 U. S., 547, a writ of certiorari had been granted upon the assumption "that the decision below involved a principle concerning the collection of internal revenue taxes of far-reaching importance, and which, if thereafter applied in accordance with what it was urged was the rule established by the lower court, would overthrow practices prevailing as to the collection of internal revenue taxes, for a long period of time, founded

upon a well-settled administrative construction, and thus produce at least great confusion." When the case came on for argument it turned out that this was a misapprehension, and the court dismissed the writ, saying:

> "If we were to consider and decide the case we would but review the action of the court below in regard to a question as to which, under the Judiciary Act of 1891, the action of the court was final, and which, neither from its character or importance, was within the scope of the grant of power to review by certiorari. After giving the matter most careful consideration and because of the precedent as to future cases which must arise from the action we take in this, we have concluded that, under the conditions which we have stated, our duty is not to pass upon the merits of the case, but to dismiss the writ of certiorari."

We respectfully submit that this petition is an attempt to secure a review of a judgment of the Circuit Court of Appeals in a case, and in regard to questions, as to which, under the Judiciary Act of 1891, its action was final, and not within the scope of the grant of power to review by certiorari, on any of the grounds assigned in the petition, and that the petition should be denied.

LAWRENCE MAXWELL,
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Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 37

HAMILTON, BROWN SHOE COMPANY,
PETITIONER,

vs.

THE WOLF BROTHERS & COMPANY,
RESPONDENT.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

H. S. PRIEST AND
LUKE E. HART,
Solicitors and of Counsel for Petitioner,
Hamilton, Brown Shoe Company.

MORTON JOURDAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 813.

HAMILTON, BROWN SHOE COMPANY,
PETITIONER,

vs.

THE WOLF BROTHERS & COMPANY,
RESPONDENT.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

It is true that an application was made by The Wolf Brothers & Company for a writ of certiorari to review the decision of the Circuit Court of Appeals on the first appeal. That petition is found between pages 207 and 213 of the second record. As stated in that petition (top of page 210 of the second record) it presented only

> "the single question whether such a combination of words as 'The American Girl' can constitute a valid trade-mark for shoes."

Manifestly the question as to whether the words "The American Girl" constituted a valid trade-mark for shoes was of interest to the complainant alone, and in which

> "no question of either public interest or public policy is involved; merely matters of private interest."

But this petition presents entirely different questions. In the petition itself, and in our main brief filed in support of it, it is clearly pointed out that the decision of the majority of the Court of Appeals in this case, holding that the complainant is entitled to recover the defendant's profits to the amount of $445,311.55, in the absence of any proof that the complainant had been damaged, or that a single customer had purchased the defendant's shoes as and for the complainant's shoes, is in conflict with the decisions of this court and other courts of appeals. By its decision in this case the Court of Appeals has laid down a rule of decision in the eighth circuit which is in direct conflict with the rule of decision laid down by this court in Howe Scale Co. *vs.* Wyckoff, 198 U. S., 140; Goodyear *vs.* Goodyear, 128 U. S., 598, and Standard Paint Co. *vs.* Trinidad Co., 220 U. S., 461, and by the Circuit Courts of Appeals for the First, Second, Third, and Sixth Circuits, in Baker *vs.* Baker, 115 Fed., 297, 299; Rushmore *vs.* Badger, 198 Fed., 379; Merriam Co. *vs.* Ogilvie, 170 Fed., 167; Apollo Bros. *vs.* Perkins, 270 Fed., 530, 533; Newcomer & Lewis *vs.* Scriven Co., 168 Fed., 621, and other cases cited at page 12 of the petition and more particularly referred to in our main brief.

Undoubtedly, as stated in the respondent's brief, "The judgment is for a large amount." It is, we believe, without precedent. And, undoubtedly, also, this conflict between the rule as laid down in the eighth circuit by the decision of the Court of Appeals in this case and the rule laid down by this Court and by the Courts of Appeal for the First, Second, Third, and Sixth Circuits in the cases cited, involves a question of "public interest" and of "public policy." Does

not "public interest" and "public policy" require that the same rule of decision in this class of cases should be applied throughout the United States? **In this case there was no evidence that the plaintiff had suffered any damage—no evidence that it ever lost a single customer by reason of the defendant's conduct.** Can any one doubt then that if this case had been heard by the Circuit Court of Appeals for the Second Circuit the decision would have been in favor of the defendant, that court having laid down the rule that where the evidence "failed to disclose that a single person had purchased goods marketed by the defendant, supposing them to be the product of the complainant, or that the complainant had lost a single customer by the defendant's conduct," it "failed to disclose that the complainant was entitled to any recovery of profits, or any except nominal damages, by reason of the defendant's conduct?" And if under the circumstances of this case this defendant would be entitled to a decision in its favor in the First, Second, Third, and Sixth Circuits, why is it not likewise entitled to a decision in its favor in the Eighth Circuit? Is the winning or losing of a suit in the Federal Courts dependent upon the mere circumstance that it is brought in one circuit and not in another? Is not public policy outraged by this conflict of decision? Are we to have one rule of decision in the Eighth Circuit when a different rule of decision has been laid down by this Court and is in force in the First, Second, Third, and Sixth Circuits? Does not "public interest" and "public policy" require that there should be "uniformity of decision" throughout the several circuits and that there should not be one rule of decision in one circuit and a different rule of decision in the other circuits?

That this conflict of decision does exist is not denied by the respondent. In our main brief we were at pains to point out the conflict in the rule as laid down by the Circuit Court of Appeals for the Eighth Circuit in this case and the rule laid down by this Court and the Courts of Appeal for the First, Second, Third, and Sixth Circuits in the cases cited. Unable to explain this conflict or to harmonize the rule

adopted by the Court of Appeals in this case with the rule thus laid down by this Court and the Courts of Appeal for the First, Second, Third, and Sixth Circuits, the respondent makes no effort to do so.

Not only is the rule thus adopted by the Circuit Court of Appeals in the case at bar in conflict with the rule laid down by this Court and the Courts of Appeal for the First, Second, Third, and Sixth Circuits, but it is worthy of note that the rule thus adopted in this case does not have the sanction of all, or even a majority, of the Circuit Judges for the Eighth Circuit. The decision of the majority of the Court of Appeals in this case is the decision of a Circuit Judge (Judge Smith) and a District Judge (Judge Van Valkenburgh). As against that decision we have the decision of Circuit Judge Hook, and the decision of District Judge Dyer, who heard the case in the lower Court. Therefore, had District Judge Dyer sat with the Court of Appeals and District Judge Van Valkenburgh in the lower Court in this case, instead of District Julge Van Valkenburgh sitting with the Court of Appeals and District Judge Dyer in the lower Court, the result would have been just the reverse of the way in which it now stands.

Is not this an additional reason why the decision of the Circuit Court of Appeals in this case ought not to assert a rule as contrary to the rule laid down by this Court and the Courts of Appeal for the First, Second, Third, and Sixth Circuits?

Contrary to the statement at page 2 of the respondent's brief, the errors assigned *do* relate to the right of complainant to recover, and not merely to the measure and amount of recovery. In Howe Scale Co. *vs.* Wyckoff, 198 U. S., 140, referred to at page 12 of the petition, this court said that

> "if defendant so conducts its business as not to palm off its goods as those of complainant the action fails."

Therefore, in this case, the evidence having failed to show that a single person had ever purchased the defendant's shoes as those of complainant, "the action fails." (See top of page 12 of the petition and page 22 of our main brief.)

The case of Regis *vs.* Jaynes, 191 Mass., 245, cited at page 3 of respondent's brief, was a case of strict trade-mark, and not a case of unfair competition, and it therefore has no application to this case.

The statements in the paragraph at the bottom of page 3 of the respondent's brief are positively denied.

The statements quoted on pages 4, 5, and 6 of respondent's brief, if true, relate to matters and things that occurred long prior to the filing of the bill of complaint in this case, and therefore could have no relevancy on this accounting, which was expressly "limited to the time since the commencement of this suit."

As to the statement on page 10 of the respondent's brief, that the record does not support the petitioner's statement that there was no evidence that the plaintiff had suffered any damage, or that it ever lost a single customer by reason of defendant's conduct, we submit that the record does support that statement, and we quote from the master's report at page 78 of the second record as follows:

> "No testimony has been introduced before me in this case to establish damages as distinguished from profits. All the testimony throughout the hearing, as well as the stipulations of the parties, has been directed to the question of profits alone."

Therefore, since no testimony was introduced to establish damages as distinguished from profits, and all the testimony was "directed to the question of profits alone," we submit that it is quite true that there was no evidence that the plaintiff had suffered any damage, or that it ever lost a single customer by reason of defendant's conduct. That the com-

plainant did admit in its brief before the master that there was no such evidence, we refer to the master's report at page 72 of the second record, where the master quotes this admission as it appeared in the complainant's brief before him.

Loss of customers by the complainant is not shown, as stated on page 10 of respondent's brief. To support this statement, it refers to the testimony of a witness in the main case (not on the accounting), who testified, over objection, that a woman had told him that her sister had purchased a pair of defendant's shoes instead of complainant's shoes. That is the only instance it can cite, and we submit that it does not show by competent or credible evidence that this woman's sister purchased the defendant's shoes as and for the complainant's shoes. The most that it shows is that this woman told the witness that her sister had done so and so. Neither the woman or her sister were placed upon the witness stand or under oath, or submitted to cross-examination.

The master did not find that the plaintiff had suffered damage. As pointed out above, he expressly states that no testimony was introduced to establish damages, it having "been directed to the question of profits alone."

Between pages 14 and 16 of our petition and pages 28 and 44 of our main brief we pointed out the conflict between the decision of the Court of Appeals in this case and the decisions of this court relating to what are to be regarded as profits to be accounted for in cases of patents and strict trade-marks, citing, among others, the cases of Dobson *vs.* Hartford Carpet Co., 114 U. S., 444; Elizabeth *vs.* Pavement Co., 97 U. S., 126; Keystone Mfg. Co. *vs.* Adams, 151 U. S., 139; Westinghouse Co. *vs.* Wagner Co., 225 U. S., 620, and numerous other decisions of this Court.

Nowhere in the respondent's brief does it attempt to avoid the conflict between the decision of the Court of Appeals in

this case and the decisions of this court and other courts of appeals.

We respectfully submit that in view of the great injustice done the petitioner in this case and the far-reaching and disastrous effect that will necessarily result from the conflict between the rules laid down by the Court of Appeals in this case and the rules laid down by this court and the Courts of Appeal for the First, Second, Third, and Sixth Circuits in the cases cited, in the interest of justice and in the interest of uniformity of decision this court should grant the petition for a writ of certiorari.

Respectfully submitted,

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DECEMBER 15, 1913.